




**TO:** The Honorable Members of the Board of Regents

**FROM:** Daniel Morton-Bentley 

**SUBJECT:** Proposed Amendment of Sections 275.2, 275.7, 275.9, 275.11, 276.9, 277.1, and 277.2 of the Regulations of the Commissioner of Education Relating to Appeals to the Commissioner of Education under Education Law §§ 306 and 310

**DATE:** December 28, 2023

**AUTHORIZATION(S):**



### SUMMARY

#### **Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed amendment of sections 275.2, 275.7, 275.9, 275.11, 276.9, 277.1, and 277.2 of the Regulations of the Commissioner of Education relating to appeals to the Commissioner of Education under Education Law §§ 306 and 310?

#### **Reason for Consideration**

Review of Policy.

#### **Proposed Handling**

The proposed amendment is presented to the Full Board for adoption as a permanent rule at the January 2024 Regents meeting. A copy of the proposed rule (Attachment A) is attached.

#### **Procedural History**

The proposed amendment was presented to the P-12 Committee for discussion at the September 2023 Regents meeting. A Notice of Proposed Rule Making was published in the State Register on September 27, 2023, for a 60-day public comment period. Following publication in the State Register, the Department received no comments on the proposed amendment. Therefore, an Assessment of Public Comment is not required and no changes to the proposed amendment are needed.

A Notice of Adoption will be published in the State Register on January 24, 2024. 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 to ensure that the process serves as “an expeditious and simple method by which the many questions bound to arise in the administration of the school system” can be resolved.<sup>1</sup>

### Class Appeals/Protective Orders

The practice regulations of the Commissioner contemplate a class appeal (8 NYCRR 275.2), whereby an individual brings an appeal on behalf of others who are similarly situated. Subdivision (b) of this section currently allows for the issuance of “protective orders” in connection with class appeals.<sup>2</sup> This appears to have been derived from the context of class action litigation.<sup>3</sup> However, it is not well suited to appeals to the Commissioner. Therefore, to promote clarity and simplicity, the Department proposes elimination of this provision, which has only caused confusion.

### Oaths/Notarization

Section 275.7 of the Commissioner’s regulations pertains to oaths administered by notaries public, more commonly known as notarization.<sup>4</sup> The Department recommends simplifying and clarifying this language. The Department will continue to allow attorneys to submit an affirmation in lieu of a notarized affidavit.

### Filing Fee

The Department first imposed a filing fee of \$20 in connection with Education Law § 310 appeals in the 1980s. Most petitioners in these appeals are the parents of school-age children. Therefore, the Department recommends eliminating the filing fee provision in section 275.9(c) of the Commissioner’s regulations, and a reference to such fee in section 277.1 of the Commissioner’s regulations. The Department anticipates imposing fees in connection with consents and certificates of incorporation to make up for any reduction in revenue.

### Notice of Petition

Appeals to the Commissioner have long required a separate document called a “Notice of Petition.” This requirement is modeled after practice in New York State Supreme

---

<sup>1</sup> *Application of M.K.*, 62 Ed Dept Rep, Decision No. 18,236.

<sup>2</sup> The Commissioner has previously clarified that this section only pertains to class appeals (*Application and Appeal of Moss*, 58 Ed Dept Rep, Decision No. 17,602; *Appeal of Kalnitz*, 53 *id.*, Decision No. 16,600).

<sup>3</sup> See *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F3d 748 (7th Cir 2000).

<sup>4</sup> See Executive Law § 135 [“Every notary public duly qualified is hereby authorized and empowered within and throughout the State to administer oaths and affirmations ...”].

Court.<sup>5</sup> Historically, the Commissioner dismissed appeals that did not include a Notice of Petition, characterizing them as “fatally defective.”<sup>6</sup> However, more recent decisions of the Commissioner have explained that the purpose of this document is “to ensure that respondents are apprised of their obligation to answer the allegations in the petition within 20 days of service thereof.”<sup>7</sup> As such, the Commissioner has opined that “the ordinary remedy” for failing to include this notice “should be to excuse a late answer, not to dismiss the appeal in its entirety.”<sup>8</sup>

The Department recommends amending section 275.11 of the Commissioner’s regulations to conform to these recent decisions of the Commissioner. Specifically, the Department proposes a requirement that the notice language be included with the petition—but not as a separate document. The Department further proposes clarifying that appeals will not be dismissed for failure to include this language. Parents frequently neglect to service a Notice of Petition on school districts, which requires correspondence and assistance from State Education Department staff. Moreover, the failure to include such a document is a technical omission, as corporate entities (including school districts) must appear through attorneys who are familiar with—or understand how to familiarize themselves with—the practice regulations governing appeals to the Commissioner.

This amendment would not pertain to removal applications under Education Law § 306, which must include personal service of the specialized notice required by 8 NYCRR 277.1(b).

#### Dismissal of Appeal

Many appeals to the Commissioner concern issues that fall outside the Commissioner’s jurisdiction, including challenges to the Open Meetings Law and complaints against the State Education Department.<sup>9</sup> This is apparent based on the allegations contained in a petition and cannot be cured by a later submission. Therefore, to save school district and Departmental resources, the Department proposes amending section 276.9 of the Commissioner’s regulation to authorize the Commissioner to dismiss appeals for lack of jurisdiction at any stage of the proceedings.

#### Removal Applications

Finally, the Department recommends technical amendments to 8 NYCRR 277.2 to clarify that the Commissioner may seek removal of a school officer by service of an order to show cause.

---

<sup>5</sup> CPLR 403 (a).

<sup>6</sup> *E.g.*, *Appeal of C.S.L.*, 58 Ed Dept Rep, Decision No. 17,619; *Appeal of Hauk*, 44 *id.* 36, Decision No. 15,090; *Appeal of Khalid*, 40 *id.* 621, Decision No. 14,570).

<sup>7</sup> *Appeal of J.F.*, 62 Ed Dept Rep, Decision No. 18,239; *Appeal of V.G.*, *id.*, Decision No. 18,185.

<sup>8</sup> *Appeal of J.F.*, 62 Ed Dept Rep, Decision No. 18,239.

<sup>9</sup> *E.g.*, *Appeal of Egan*, 62 Ed Dept Rep, Decision No. 18,213 (dismissed for lack of jurisdiction over Open Meetings Law and Freedom of Information Law) and *Appeal of Chak*, 62 *id.*, Decision No. 18,226 (dismissed for lack of jurisdiction over actions of State Education Department staff).

## **Related Regents Items**

September 2023: [Proposed Amendment of Sections 275.2, 275.7, 275.9, 275.11, 276.9, and 277.2 of the Regulations of the Commissioner of Education Relating to Appeals to the Commissioner of Education under Education Law §310](https://www.regents.nysed.gov/sites/regents/files/923p12d1revised.pdf)  
(<https://www.regents.nysed.gov/sites/regents/files/923p12d1revised.pdf>)

## **Recommendation**

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

VOTED: That sections 275.2, 275.7, 275.9, 275.11, 276.9, 277.1, and 277.2 of the Regulations of the Commissioner of Education be amended, as submitted, effective January 24, 2024.

## **Timetable for Implementation**

If adopted at the January 2024 meeting, the proposed amendment will become effective as a permanent rule on January 24, 2024.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 101, 207, 305, 306, 310, and 311 of the Education Law.

1. Section 275.2 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 275.2. Class appeals

[(a)] When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

[(b) *Protective orders.* The commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.]

2. Subdivision (a) of section 275.7 of the Regulations of the Commissioner of Education is amended to read as follows:

275.7 Oaths Before Notary Publics

(a) [All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him/her to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit] The verification required by subdivision (a) of section 275.5 of this part shall be notarized by any person so authorized within the State

of New York. An attorney affirmation sworn to under the penalty of perjury need not be notarized.

3. Subdivision (c) of section 275.9 of the Regulations of the Commissioner of Education is REPEALED.

4. The title of section 275.9 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 275.9. Filing [and fee]

5. Section 275.11 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 275.11. Notice [with] of petition

(a) Each petition must contain the following [notice] language, except that in the case of a charter school location/co-location appeal pursuant to section 276.11 of this Title, the petition must contain the notice prescribed in such section 276.11 of this Title:

Notice:

You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to appeals before the Commissioner of Education, copies of which are available at [www.counsel.nysed.gov](http://www.counsel.nysed.gov) or from the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234.

If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the commissioner.

Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if the petitioner be represented by counsel, upon the

counsel, within 20 days after the service of the appeal, 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, NY 12234.

A petition shall not be dismissed for failure to include such language, but the lack thereof may excuse the submission of a late answer.

(b) ...

(c) ...

6. Section 276.9 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 276.9. Dismissal of appeal

The commissioner may, in his/her discretion, and at any stage of the proceedings, dismiss an appeal if it appears to the commissioner's satisfaction that the appeal is untimely, pursuant to section 275.16 of this Title; that the petition does not set forth a clear and concise statement of the petitioner's claim[.]; that the commissioner lacks jurisdiction over the subject matter of the appeal; or that the appeal has become moot. The provisions of this section shall not apply to appeals before a State review officer of the State Education Department brought pursuant to section 4404 of the Education Law.

7. Section 277.1 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 277.1. Initiation and conduct of proceeding

The provisions of this section shall apply to a proceeding for the removal of a school officer pursuant to section 306 of the Education Law, and shall not apply to an appeal brought to challenge the results of a school district election. An application seeking the removal of a school officer must be made in accordance with Parts 275 and

276 of this Chapter, as far as possible, [including the payment of the required filing fee,] except:

(a) the petition must distinctly state the willful violation of law, neglect of duty, or willful disobedience of a decision, order or regulation of the commissioner charged against the officer and the facts by which it is established; such facts must be set forth with such certainty as to time, place and all other pertinent details, as to furnish the officer with precise information as to what he or she is expected to meet; if the charge is willful disobedience of a decision or order of the commissioner, a copy thereof must be attached to the petition.

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

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.

\_\_\_\_\_

*(Signature)*

\_\_\_\_\_

P.O. Address

(c) ...

8. Section 277.2 of the Regulations of the Commissioner of Education is amended to read as follows:

Section 277.2. Initiation by commissioner

Such proceeding may be instituted by the commissioner [upon his own motion] by the service of an order to show cause [and thereafter]. Thereafter, the procedure as outlined in Parts 275 and 276 of this Chapter shall be followed so far as applicable.