





TO: The Honorable Members of the Board of Regents

FROM: Daniel Morton-Bentley 

SUBJECT: Proposed Amendment of Sections 3.23 and 3.26 of the Rules of the Board of Regents Relating to Fees for Certificates of Existence and Copies of Charter Actions and Consent to Incorporation

DATE: December 28, 2023

AUTHORIZATION(S): 

SUMMARY

Issue for Discussion

Should the Board of Regents adopt the proposed amendment of sections 3.23 and 3.26 of the Rules of the Board of Regents relating to fees for certificates of existence and copies of charter actions and consent to incorporation?

Reason for Consideration

Review of Policy.

Proposed Handling

The revised proposed amendment is presented to the Full Board for discussion 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 Full Board for discussion at the September 2023 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, the Department received comment on the proposed amendment. An Assessment of Public Comment (Attachment B) is attached. 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 January 24, 2024. Supporting materials are available upon request to the Secretary of the Board of Regents.

Background Information

Fees for Certificates of Existence & Copies of Charter Actions:

The Department proposes to amend section 3.23 of the Rules of the Board of Regents to require a \$10 fee for certificates of existence and for certified copies of charter actions taken by the Board of Regents. The number of requests for certificates of existence has consistently increased over time; in addition, education corporations often request multiple copies of such certificates. Similarly, the number of requests for certified copies of charter actions taken by the Board of Regents has also increased over time. These fees will help offset the cost of staff time and supplies in generating these requested certificates and certified copies. The Department believes that this cost is reasonable; by comparison, the New York State Department of State charges \$25 dollars for similar certification.

Consent to Incorporation:

The Department also proposes to amend section 3.26 of the Rules of the Board of Regents regarding consents to incorporation pursuant to Education Law §216. This provision has not been amended since it was enacted in 1971. The proposed rule updates such section to reflect that the Board of Regents may consent to the formation of companies and corporations under the Limited Liability Company Law in addition to the Business Corporation Law. The proposed amendment includes provisions for the formation of domestic business corporations, foreign business corporations, domestic limited liability corporations, and foreign limited liability corporations.

Revisions to the Proposed Rule:

Following publication of the proposed rule and the 60-day public comment period the Department proposes to revise the proposed rule in response to public comment as outlined in Attachment B. The proposed rule has been revised to remove references to the Not-for-Profit Corporation Law in section 3.26 of the Rules of the Board of Regents regarding consent of the Commissioner to incorporation.

Related Regents Items

September 2023: [Proposed Amendment of Sections 3.23 and 3.26 of the Rules of the Board of Regents Relating to Fees for Certificates of Existence and Copies of Charter Actions and Consent to Incorporation](https://www.regents.nysed.gov/sites/regents/files/923brd1.pdf)

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Recommendation

Not applicable.

Timetable for Implementation

It is anticipated that the proposed amendment will be presented for permanent adoption at the April 2024 Regents meeting, after publication of the proposed amendment

in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the April 2024 meeting, the proposed amendment will become effective on May 1, 2024.

AMENDMENT OF THE RULES OF THE BOARD OF REGENTS

Pursuant to Education Law sections 207 and 216.

1. Section 3.23 of the Rules of the Board of Regents is amended to read as follows:

Section 3.23. Application and fees

An educational institution desiring incorporation or admission to the university or registration by the department shall file application giving the information required in such form and manner as shall be prescribed by the commissioner. The fee for a provisional charter shall be \$100; for a Regents certificate of incorporation, \$100; for an order of consolidation, \$100; for an extension of a provisional charter, \$60; for an absolute charter, \$60; for an amendment of a charter, \$60; [and] for an order dissolving a Regents corporation, \$60; for a certificate of existence shall be \$10, and for certified copies of charter actions taken by the Board of Regents shall be \$10. The fee, which shall accompany the filing of a request for the commissioner's consent to the filing with the Secretary of State of a certificate of incorporation, a certificate of amendment of a certificate of incorporation, an application for authority to do business in New York, a certificate of dissolution of a corporation, or a certificate of merger of a corporation, or for a waiver of the need to secure such consents, shall be \$20 for business corporations and \$10 for not-for-profit corporations.

2. Section 3.26 of the Rules of the Board of Regents is amended to read as follows:

Section 3.26. Consent to incorporation. Education Law, § 216

The commissioner, pursuant to Education Law section 216, may consent to the formation of a corporation or company under the Business Corporation Law, and

Limited Liability Company Law and to the amendment of the certificate of incorporation, application for authority, or articles of organization of [a corporation] an entity so formed, whose purposes include the operation of a school or schools offering instruction in any of the grades 1 through 12, including instruction for the handicapped, or offering instruction at the kindergarten or prekindergarten level, if the proposed certificate of incorporation, application for authority, or articles of organization or amendment thereof specifically states that:

(a) Domestic business corporation.

(1) The corporation and any school or educational program which it may conduct shall be subject to and comply with all of the statutory provisions, rules of the Regents and regulations of the commissioner which would be applicable to a corporation created by the Regents pursuant to section 216 of the Education Law for the same purpose or purposes.

[[b)] (2) Within 30 days after receipt by the corporation of an order of the Board of Regents directing such action, the holders of a majority of all the outstanding shares of the corporation entitled to vote upon an amendment of the certificate of incorporation will cause to be filed with the Secretary of State a certificate of amendment to the certificate of incorporation deleting therefrom all provisions authorizing the corporation to operate such a school or schools, and changing the corporate name, if necessary, to delete therefrom any word or words which indicate that the corporation operates such a school or schools. Such an order of the Board of Regents shall be made only upon the same grounds and after the same procedures as are applicable to the revocation of a charter granted by the Regents pursuant to section 216 of the Education Law for the purpose of authorizing the corporation thereby created to operate a school or schools.

(b) Foreign business corporation.

(1) The corporation and any school or educational program which it may conduct shall be subject to and comply with all of the statutory provisions, Rules of the Regents and Regulations of the Commissioner which would be applicable to a corporation created by the Regents pursuant to section 216 of the Education Law for the same purpose or purposes.

(2) Within 30 days after receipt by the corporation of an order by the Board of Regents directing such action, the corporation shall cause to be filed with the New York Secretary of State either a certificate of surrender of authority, or a certificate of amendment of the application for authority deleting therefrom all provisions authorizing the corporation to operate such a school or educational program, and changing the corporate name, if necessary, to delete therefrom any word or words which indicate that the corporation operates such a school or educational program. Such an order of the Board of Regents shall be made only upon the same grounds and after the same procedures as are applicable to the revocation of a charter granted by the Regents pursuant to section 216 of the Education Law for the purpose of authorizing the corporation thereby created to operate a school or educational program.

(c) Domestic limited liability company.

(1) The company and any school or educational programs which it may conduct shall be subject to and comply with all of the statutory provisions, Rules of the Regents and Regulations of the Commissioner which would be applicable to a corporation created by the Regents pursuant to Section 216 of the Education Law for the same purpose or purposes.

(2) Within 30 days after receipt by the company of an order by the Board of Regents directing such action, the company shall file with the Secretary of State a certificate of amendment to the articles of organization deleting therefrom all provisions

authorizing the company to operate such a school or educational program, and changing the company name, if necessary, to delete therefrom any word or words which indicate that the company operates such a school or educational program. Such an order of the Board of Regents shall be made only upon the same grounds and after the same procedures as are applicable to the revocation of a charter granted by the Regents pursuant to section 216 of the Education Law for the purpose of authorizing the corporation thereby created to operate a school or educational program.

(d) Foreign limited liability company.

(1) The company and any school or educational programs which it may conduct shall be subject to and comply with all of the statutory provisions, Rules of the Regents and Regulations of the Commissioner which would be applicable to a corporation created by the Regents pursuant to Section 216 of the Education Law for the same purpose or purposes.

(2) Within 30 days after receipt by the company of an order by the Board of Regents directing such action, the company shall file with the New York Secretary of State either a certificate of surrender of authority, or a certificate of amendment of the application for authority deleting therefrom all provisions authorizing the company to operate such a school or educational program, and changing the company name, if necessary, to delete therefrom any word or words which indicate that the company operates such a school or educational program. Such an order of the Board of Regents shall be made only upon the same grounds and after the same procedures as are applicable to the revocation of a charter granted by the Regents pursuant to section 216 of the Education Law for the purpose of authorizing the corporation thereby created to operate a school or educational program.

ASSESSMENT OF PUBLIC COMMENT

Since publication of the Notice of Proposed Rule Making in the State Register on September 27, 2023, the Department received the following comment on the proposed rule:

1. COMMENT: A coalition representing independent and religious schools requested that the proposed amendment to section 3.23 be decoupled from the amendment to section 3.26 stating that the amendments are unrelated and should be considered separately. They also state that since it was acknowledged at the September Regents' meeting that the State Administrative Procedure Act permits the Board of Regents to establish such fees without the rule making process, they proposed that the amendment to section 3.23 be withdrawn.

Regarding the amendments to section 3.26 of the Rules of the Board of Regents the coalition states that the amendment goes beyond updating such section, stating that it "instead transforms relationship between independent and religious schools and the state and arrogates to the department authority that it does not have and was not provided by the Legislature." The coalition states that on the surface it would appear that the proposed amendment would not apply to schools organized under the Religious Corporation Law, however it applies to any "domestic not for profit corporation" and a school incorporated under the Religious Corporation Law is a domestic not for profit corporation. Therefore, the coalition states that the amendment imposes upon religious and independent schools all statutes, rules, and regulations that would be applicable to for-profit corporation and other educational institutions formed under Education Law §216 and would give the Department authority to order the closure of any religious and independent school that it finds not in compliance. The coalition also states that this

provision violates the establishment and free exercise clause of the 1st Amendment to the United States Constitution, and it appears contrary to Albany Supreme Court's decision on the Part 130 substantial equivalence regulations.

DEPARTMENT RESPONSE: The Department disagrees with the commenters position that the amendments to section 3.23 should be withdrawn, as that section currently sets forth fees relating to incorporation.

The Department also disagrees with the commenter's assertion that the proposed amendment to section 3.26 violates the law or the Constitution of the United States. Education Law §216 provides that "[n]o school...shall be incorporated under the...not-for-profit corporation law, or any other general law without the consent of the commissioner." Therefore, the Department clearly has the statutory authority to require that schools incorporated under the Not-for-Profit Corporation Law obtain the consent of the Commissioner. The intent of the proposed amendment was not to require religious school that are affiliated with an incorporated religious institution to seek the Commissioner's consent to incorporate. Such religious institutions incorporate by filing with the county or the New York State Department of State. The proposed rule was not intended to change this process.

Nevertheless, the proposed rule has been revised to remove references to the Not-for-Profit Corporation Law.

2. COMMENT: A Christian non-profit organization submitted a comment on the proposed rule. The organization states that while there is no requirement in New York law that a school be incorporated, there are significant benefits that the Department has conditioned on incorporation or other recognition by the Department. They note that the Department has appropriately recognized that constitutional and statutory considerations merit different treatment for religious schools, however the proposed rule

would subject religious not-for-profit schools to a “significant body of regulations previously inapplicable to these schools” as the proposed rule “requires religious schools to concede that they are subject to ‘all of the...rules of the Regents,’ including rules to which they would otherwise not be subject.” An example the commenter provides is 8 NYCRR 3.31 which grants the Regents the power to remove trustees of the subject corporations and requires religious nonprofits to agree to cease educational activities within 30 days of the request by the Regents.

The organization proceeds to comment that the proposed rule is unconstitutional because it violates the Free Exercise and Establishment Clauses of the First Amendment, imposes unconstitutional conditions on religious schools, and is an unconstitutional prior restraint on speech. The organization also states that the proposed rule is improper as it exceeds the statutory authority of the rulemaking and is an improper delegation of legislative authority.

DEPARTMENT RESPONSE: Regarding the commenters statement that the proposed rule violates any law or the United States Constitution, the Department disagrees with these assertions. As stated above, Education Law §216 provides that “[n]o school...shall be incorporated under the...not-for-profit corporation law, or any other general law without the consent of the commissioner.” Further, the intent of the proposed amendment was not to require religious school that are affiliated with a religious institution incorporated under the Religious Corporation Law to seek the Commissioner’s consent to incorporate. However, as stated above, the proposed rule has been revised to remove references to the Not-for Profit Corporation Law.