



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK /
ALBANY, NY 12234

TO: The Honorable the Members of the Board of Regents
FROM: Erin M. O'Grady-Parent
SUBJECT: 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
DATE: December 8, 2010
STRATEGIC GOAL: Goal 4
AUTHORIZATION(S):

Summary

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt by emergency action the amendment to Parts 275 and 276 of the Regulations of the Commissioner of Education to establish procedures for appeals to the Commissioner of Education under Education Law §§310 and 2853?

Reason for Consideration

To implement statutory requirements.

Proposed Handling

The proposed amendment will be presented to the Board of Regents at their December meeting for adoption as an emergency action. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

N/A

Background Information

The proposed amendment enacts technical amendments to Parts 275 and 276 of the Commissioner's Regulations to establish special procedures for appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§310 and 2853(3)(a-5). The statute requires that §310 appeals involving the following subjects must be handled on an expedited basis:

- determinations by the New York City School District to locate or co-locate a charter school within a public school building;
- implementation of and compliance with the building usage plan developed pursuant to Education Law §2853(a-3); and
- revision of a building usage plan that is appealed on the grounds that the revision fails to comply with Education Law §2853(3)(a-3)(2)(B), which requires the plan to provide for collaborative use of shared resources and spaces between the charter school and the non-charter schools which assures non-charter school students equitable access to the facilities in a similar manner and at reasonable times as provided to charter school students.

The proposed amendment modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations to accommodate the short time frames imposed by the statute and otherwise implement procedures in such expedited appeals consistent with statutory requirements.

A Notice of Proposed Rulemaking will be published in the State Register on December 29, 2010. A copy of the express terms is attached. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Recommendation

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

VOTED: that subdivision (b) of section 275.3, subdivisions (a) and (b) of section 275.8, the opening paragraph of subdivision (a) of section 275.9, subdivision (a) of section 275.11, subdivision (a) of section 275.13, subdivision (a) of section 275.14, and subdivision (a) of section 276.4 of the Regulations of the Commissioner of Education, be amended, and that subdivision (d) of section 276.1, subdivision (g) of section 276.2, subdivision (c) of section 276.5, subdivision (f) of section 276.8 and section 276.11 of the Regulations of the Commissioner of Education, be added, as submitted, effective December 21, 2010, as an emergency action upon a finding of the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that procedures are in place as soon as possible for expedited appeals relating to New York City charter school location/co-location appeals and building usage plans brought pursuant to Education Law §§310 and 2853(3)(a-5) so that the parties and their

attorneys are on notice of the procedures they must follow, and decisions in such appeals are handled expeditiously pursuant to statutory requirements.

Timetable for Implementation

If adopted at the November Regents meeting, the emergency rule will become effective on December 21, 2010. It is anticipated that the proposed amendment will be presented for permanent adoption at the March 2011 Regents meeting.

Attachment

PROPOSED AMENDMENT OF PARTS 275 AND 276 OF THE REGULATIONS OF
THE COMMISSIONER OF EDUCATION PURSUANT TO EDUCATION LAW
SECTIONS 101, 207, 305, 310, 311 AND 2853 AND CHAPTER 101 OF THE LAWS OF
2010, RELATING TO PROCEDURES IN EXPEDITED CHARTER SCHOOL CO-
LOCATION APPEALS
STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE
EMERGENCY ACTION

The proposed amendment is necessary to implement Chapter 101 of the Laws of 2010 by establishing procedures for expedited appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§310 and 2853(3)(a-5). The statute provides for expedited Education Law §310 appeals to the Commissioner of:

- (1) determinations by the New York City School District to locate or co-locate a charter school within a public school building;
- (2) implementation of and compliance with the building usage plan developed pursuant to Education Law §2853(a-3); and
- (3) revision of a building usage plan that is appealed on the grounds that the revision fails to meet the standards set forth in Education Law §2853(3)(a-3)(2)(B), which requires the building usage plan to include a proposal for the collaborative usage of shared resources and spaces between the charter school and the non-charter schools which assures equitable access to the facilities in a similar manner and at reasonable times to non-charter school students as provided to charter school students.

Pursuant to the statute, petitions in such appeals must be dismissed, adjudicated or disposed of by the Commissioner within ten days of the receipt of the New York City

School District's response. The proposed amendment merely modifies existing notice, service and filing requirements in Parts 275 and 276 of the Commissioner's Regulations to provide for such expedited appeals consistent with statutory requirements.

Because the Board of Regents meets at fixed intervals, the earliest the proposed amendment could be presented for adoption by regular (non-emergency) action, after publication of a Notice of Proposed Rule Making in the State Register and expiration of the 45-day public comment period prescribed in State Administrative Procedure Act (SAPA) section 202(1), would be at the March 7-8, 2011 Regents meeting. Since SAPA section 203(1) provides that an adopted rule cannot become effective until a Notice of Adoption is published in the State Register, the earliest date a rule adopted at the March 2011 Regents meeting can take effect is March 30, 2011. However, modified procedures for expedited New York City charter school co-location appeals need to be in place now, in order to ensure that decisions in such appeals can be timely rendered pursuant to statutory requirements.

Emergency action to amend Parts 275 and 276 of the Commissioner's Regulations is necessary for the preservation of the general welfare in order to ensure that procedures are in place as soon as possible for expedited appeals relating to New York City charter school location/co-location and building usage plans brought pursuant to Education Law §§310 and 2853(3)(a-5) so that the parties and their attorneys are on notice of the procedures they must follow, and decisions in such appeals are handled expeditiously pursuant to statutory requirements.

It is anticipated that the proposed amendment will be presented for permanent adoption at the March 2011 meeting of the Board of Regents, after expiration of the 45-

day public comment period for proposed rule makings prescribed in the State Administrative Procedure Act.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 305, 310, 311 and 2853 and Chapter 101 of the Laws of 2010.

1. Subdivision (b) of section 275.3 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, as follows:

§ 275.3. Pleadings.

(b) Additional pleadings. The commissioner may permit or require the service and filing of additional pleadings upon good cause shown and upon such terms and conditions as the commissioner may specify. A party seeking to file an additional pleading shall submit an application to the Office of Counsel, at the address specified in section 275.9(a) of this Part, which shall state the reason(s) why such pleading is necessary and include a copy of the proposed pleading, together with proof of service of the application and the proposed pleading upon all parties in accordance with section 275.8(b) of this Part. The provisions of this subdivision shall not apply to a charter school location/co-location appeal pursuant to section 276.11 of this Part.

2. Subdivisions (a) and (b) of section 275.8 of the Regulations of the Commissioner of Education are amended, effective December 21, 2010, as follows:

(a) Petition. A copy of the petition, together with all of petitioner's affidavits, exhibits, and other supporting papers, except a memorandum of law (unless the appeal is a charter school location/co-location appeal pursuant to section 276.11 of this Title, in which case the memorandum of law shall be served with the petition) or an affidavit in support of a reply, shall be personally served upon each named respondent, or, if a named respondent cannot be found upon diligent search, by delivering and leaving the same at the respondent's residence with some person of suitable age and discretion,

between six o'clock in the morning and nine o'clock in the evening, or as otherwise directed by the commissioner. If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk, to any trustee or any member of the board of education of such school district, to the superintendent of schools, or to a person in the office of the superintendent who has been designated by the board of education to accept service. If a board of cooperative educational services is named as a party respondent, service upon such board shall be made personally by delivering a copy of the petition to the district superintendent, to a person in the office of the district superintendent who has been designated by the board to accept service, or to any member of the board of cooperative educational services. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

If the last day for service of the petition falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

(b) Subsequent pleadings and papers. All subsequent pleadings and papers shall be served upon the adverse party or, if the adverse party is represented by counsel, upon such party's attorney. When the same attorney appears for two or more parties, only one copy need be served upon such attorney. [Service] Except as provided in section 276.11 of this Title for charter school location/co-location appeals, service of all pleadings subsequent to the petition shall be made by United States mail, by private express delivery service or by personal service [. Service] ; service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of

the United States Postal Service. Service by private express delivery shall be complete upon delivery of the pleading or paper enclosed in a properly addressed wrapper to an employee or agent of such private express delivery service or by deposit of such pleading or paper, properly addressed and wrapped, in a depository of such private express delivery service. If the last day for service of any pleading or paper subsequent to the petition falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

3. The opening paragraph of subdivision (a) of section 275.9 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, 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, 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, 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 official character of the person upon whom service was made.

4. Subdivision (a) of section 275.11 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, as follows:

275.11 Notice with petition.

(a) Each petition must contain the following notice, 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:

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 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.

5. Subdivision (a) of section 275.13 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, as follows:

(a) [Each] Except in the case of a charter school location/co-location appeal pursuant to section 276.11 of this Title, each respondent upon whom a copy of the petition has been served shall, within 20 days from the time of such service , answer the same, either by concurring in a statement of facts with the petitioner or by service in the

manner set forth in section 275.8 (b) of this Part of an answer, together with all of respondent's affidavits, exhibits and other supporting papers. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20-day period. The time to answer in a charter school location/co-location appeal pursuant to section 276.11 of this Title shall be governed by Education Law section 2853(3)(a-5) and such section 276.11.

6. Subdivision (a) of section 275.14 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, as follows:

(a) The petitioner shall reply to each affirmative defense contained in an answer. The reply, together with any affidavits which shall be limited to support of such reply, shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8(b) of this Part ,except that a reply in a charter school location/co-location appeal pursuant to section 276.11 of this Title shall be served within the time prescribed by such section 276.11. If [the] an answer has been served by mail upon petitioner or petitioner's counsel, the date of mailing and the four days subsequent thereto shall be excluded in computing the 10-day period.

7. Subdivision (d) of section 276.1 of the Regulations of the Commissioner of Education is added, effective December 21, 2010, as follows:

(d) The provisions of this section shall not apply to a charter school location/co-location appeal pursuant to section 276.11 of this Part.

8. Subdivision (g) of section 276.2 of the Regulations of the Commissioner of Education is added, effective December 21, 2010, as follows

(g) The provisions of this section shall not apply to a charter school location/co-location appeal pursuant to section 276.11 of this Part.

9. Subdivision (a) of section 276.4 of the Regulations of the Commissioner of Education is amended, effective December 21, 2010, 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. 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 of law 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. [Reply] 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.

10. Subdivision (c) of section 276.5 of the Regulations of the Commissioner of Education is added, effective December 21, 2010, as follows:

(c) The provisions of this section shall not apply to a charter school location/co-location appeal pursuant to section 276.11 of this Part.

11. Subdivision (f) of section 276.8 of the Regulations of the Commissioner of Education is added, effective December 21, 2010, as follows:

(f) The provisions of this section shall not apply to a charter school location/co-location appeal pursuant to section 276.11 of this Part.

12. Section 276.11 of the Regulations of the Commissioner of Education is added, effective December 21, 2010, as follows:

§ 276.11. Procedures in a charter school location/co-location appeals pursuant to Education Law §2853(3).

(a) Definitions. As used in this section:

(1) "Board of education" means the Panel for Educational Policy of the City School District of the City of New York.

(2) "Day" means business day.

(b) Applicability. (1) The procedures set forth in this section shall apply to appeals pursuant to Education Law §2853(3)(a-5) from:

(i) final determinations of the board of education to locate or co-locate a charter school within a public school building;

(ii) the implementation of, and compliance with, the building usage plan developed pursuant to Education Law §2853(3)(a-3); and/or

(iii) revisions of such a building usage plan, relating to a proposal for the collaborative usage of shared resources and spaces between the charter school and the non-charter schools, on the grounds that such revision fails to meet the equitable access standard set forth in Education Law §2853(3)(a-3)(2)(B).

(2) Except as provided in this section, the procedures set forth in Part 275 of this Title and in this Part shall govern the practice in such appeals.

(3) The initiation of an appeal shall not, in and of itself, effect a stay of any proceedings on the part of respondent and a stay order shall not be available in an appeal pursuant to this section.

(c) Petition and Notice of Petition. (1) The petition shall be served in the manner prescribed in subdivision (a) of section 275.8 of this Title, together with all of petitioner's affidavits, exhibits and supporting papers and petitioner's memorandum of law. The petition may not include any claims challenging actions other than those set forth in paragraph (1) of subdivision (b) of this section.

(2) The petition must contain the following notice:

Notice of Petition in Charter School Location/Co-location Appeal pursuant to Education Law §2853(3):

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 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 10 business days after the service of the appeal, and that a copy of such answer must, within one business day after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234.

(3) An appeal commenced by service of a petition that fails to contain the Notice of Petition required by paragraph (2) of this subdivision shall be deemed to be a non-expedited appeal pursuant to Education Law §310, Part 275 of this Title and this Part, and the provisions of this section shall not apply to such appeal.

(d) Filing and fee. The original of any pleading or paper served under this section, together with the affidavit of verification and an affidavit proving the service of a copy thereof, shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234, by personal delivery, express mail delivery, or equivalent means reasonably calculated to assure receipt of such pleading or paper within one business day of such service. The affidavit of service shall be in substantially the form set forth in section 275.9 of this Title. The fee for filing of the petition shall be as provided in section 275.9(c) of this Title

(e) Subsequent pleadings and supporting papers.

(1) An answer shall be served within 10 days of service of the petition and a reply to each affirmative defense raised in the answer shall be served within two days of service of the answer; provided that the commissioner, in his/her sole discretion, may excuse a failure to serve an answer or reply within the time prescribed herein for good cause beyond the control of the requesting party. The reasons for such failure shall be set forth in the answer or reply.

(2) Service of all subsequent pleadings and supporting papers shall be made by personal delivery or next day delivery by express mail or a private express delivery service, in accordance with the provisions of section 275.8(b) of this Title; provided that, upon consent of the receiving party, service of subsequent pleadings and supporting papers may be made by electronic mail (e-mail) communication.

(f) Memoranda of law. The petitioner's memorandum of law shall be served and filed with the petition, and respondent's memorandum of law shall be served and filed with the answer. The petitioner may serve and file a reply memorandum of law with the reply.

(g) Additional pleadings, affidavits, exhibits and other supporting papers. The commissioner may require the service and filing of pleadings, affidavits, exhibits and other supporting papers, in addition to those served in accordance with sections 275.8, 275.13, 275.14 of this Title and with this section, upon such terms and conditions as the commissioner may specify.

(h) Dismissal of claims. Any claims included in the petition in a charter school location/co-location appeal in violation of paragraph (1) of subdivision (c) of this section shall be dismissed by the Commissioner without prejudice to commencing a non-

within 10 days after receipt of the decision dismissing such claims.