

AMENDMENT OF PARTS 275 AND 276 OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

The Commissioner of Education has amended Parts 275 and 276 of the Commissioner's Regulations, relating to appeals to the Commissioner pursuant to Education Law §§310 and 2853(3)(a-5) concerning New York City charter school location/co-location and building usage plans.

The 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.

The text of the amendment follows.

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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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 March 30, 2011, 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, if any. 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. Memoranda of law, consisting of the parties' arguments of law, may be submitted by any party to an appeal. The petitioner shall serve and file any memorandum of law with the petition, and respondent shall serve and file any memorandum of law with the answer. The petitioner shall serve and file any 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-expedited appeal pursuant to Education Law §310, Part 275 of this Title and this Part within 10 days after receipt of the decision dismissing such claims.