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TO: Members of the State Board of Education

FROM: Jack R. Smith, Ph.D. *JRS/CLH*

DATE: January 26, 2016

SUBJECT: Code of Maryland Regulations (COMAR) 13A.01.05 Appeals to the State Board of Education (AMEND)
PERMISSION TO PUBLISH

PURPOSE:

As a result of the Regulatory Review and Evaluation process and based, in part, on input from stakeholders, nine amendments to COMAR 13A.01.05, Appeals to the State Board are proposed. (See attached, proposed amendments highlighted in yellow).

REGULATION PROMULGATION PROCESS:

Under Maryland law, a state agency, such as the State Board, may propose a new or amended regulation whenever the circumstances arise to do so. In this case, the circumstances arose during the mandatory regulatory review an agency must conduct every 8 years under the Regulatory Review and Evaluation Act, Md. State Gov't Code Ann. §10-130, *et seq.* After the State Board votes to propose such a regulation, the proposed regulation is sent to the AELR Committee for a 15-day review period. If the AELR Committee does not hold up the proposed regulation for further review, it is published in the Maryland Register for a 30-day public comment period. At the end of the comment period, MSDE staff reviews and summarizes the public comments. Thereafter, MSDE staff will present a recommendation to the State Board of Education to either: (1) adopt the regulation in the form it was proposed; or (2) revise the regulation and adopt it as final because suggested revision is not a substantive change; or (3) revise the regulation and re-propose it because the suggested revision is a substantive change. At any time during this process, the AELR Committee may stop the promulgation process and hold a hearing. Thereafter, it may recommend to the Governor that the regulation not be adopted as a final regulation or the AELR Committee may release the regulation for final adoption.

HISTORICAL BACKGROUND:

During the Regulatory Review and Evaluation process, staff identified several technical "clean-up" amendments, several amendments to give the Board additional discretion. The stakeholders also suggested a change.

PROPOSED AMENDMENTS:

The following proposed amendments are technical “clean-up” amendments:

- .02(B)(3): delete the date, as it is no longer relevant.
- .05(C): delete the reference to the statute, as it is not necessary.
- .09(C): correct the position of the word “legal” in the sentence.
- .11(B): change Maryland Rule 7-301 to Maryland Rule 7-401 because the Rule numbers have changed.
- .11(D): as to the State Board’s status as a party to an appeal, delete the words “taken to the circuit court” to reflect the law that the State Board cannot be a party to an appeal taken at any level of the judicial process.

The following proposed amendments provide the State Board with additional discretion to control its docket:

- .04(B): amend the regulation to allow the State Board to shorten or extend time periods “on its own initiative.”
- .07(F)(5): decrease the amount of time for oral argument from 15 minutes to 10 minutes and allow the State Board to shorten or lengthen the time “at its sole discretion.”
- .09(B): add “If the Board cannot reach such concurrence, the local board’s decision shall stand” in order to reflect State Board practice.

Based on stakeholder input, to establish venue:

- .01(A): direct that an appeal must be filed in the circuit court in which the local board is located.

ACTION:

I request permission to publish amendments to COMAR 13A.01.05 with the following TENTATIVE timeline:

Maryland Register Issue Date	March 18, 2016
Hearing	N/A
30-Day Open Comment Period	March 18 – April 18, 2016
Adoption	May 24, 2016

Title 13A
STATE BOARD OF EDUCATION
Subtitle 01 STATE SCHOOL ADMINISTRATION
Chapter 05 Appeal to the State Board of Education
Authority: Education Article. §§2-205, 4-205, 6-202, 7-305, and 23-406:
State Government Article. §§10-122 and 10-201 et seq.; Annotated Code of Maryland

.01 Definitions

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined:

(1) "Appellant" means the individual or entity appealing a final decision of a local board.

(2) "Contested case" means a proceeding as defined in State Government Article, §10-202(d), Annotated Code of Maryland.

(3) "Days" means calendar days unless otherwise indicated.

(4) "Department" means the State Department of Education.

(5) "File" means the delivery of papers to the administrative office of the State Board on or before the papers are due, or depositing the papers in the United States mail before the date the papers are due.

(6) "Local board" means the board of education of a county including the Baltimore City Board of School Commissioners, and where applicable, a board of trustees of a public library system.

(7) "Local superintendent" means the superintendent of a local school system and includes the chief executive officers for the Baltimore City Public School System and the Prince George's County Public School System.

(8) "Party" means either an appellant, respondent, or any person or entity allowed to intervene or participate as a party.

(9) "Respondent" means the local board or other individual or entity which issued the decision that is on appeal.

(10) "State Board" means the State Board of Education.

.02 Appeal Contents

A. Contents. The request for an appeal shall:

(1) Specify the party or parties taking the appeal;

(2) Designate the decision or order for which review is requested;

(3) Contain a statement of the facts necessary to an understanding of the appeal;

(4) Contain the issues or charges for which the appeal is being taken;

(5) Contain reasons in support of the appeal;

(6) Contain a statement of the relief sought;

(7) Include any supporting documents, exhibits, and affidavits; and

(8) Include, if possible, a copy of the order and opinion from which the appeal is sought.

B. Deadlines.

(1) Appeals.

(a) An appeal shall be taken within 30 calendar days of the decision of the local board or other individual or entity which issued the decision on appeal.

(b) The 30 days shall run from the later of the date of the order or the opinion reflecting the decision.

(2) The day of the decision of the local board may not be included in computing any period of time prescribed by these regulations.

(3) **[For appeals taken on or after April 1, 2011, a]**An appeal shall be deemed to have been transmitted within the 30-day period of time permitted under §B(1) of this regulation if, before the expiration of the time, it has been:

(a) Delivered to the State Board; or

(b) Deposited in the United States mail, as registered or certified mail or Express Mail, or deposited with a delivery service such as Fed Ex, UPS, or DHL, that provides verifiable tracking of the item from the point of origin.

(4) The last day of the period of time prescribed by this chapter shall be included, unless it is a Saturday, Sunday, or a State legal holiday, in which event the period ends on the next day which is not a Saturday, Sunday, or State legal holiday.

(5) Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after service upon the party of a notice or other paper and service is made by mail, 3 days shall be added to the prescribed period.

C. Acknowledgment. The State Board shall promptly acknowledge receipt of the appeal in writing and send a copy of an appeal involving a local school system to the local superintendent.

D. Petition for Declaratory Ruling.

(1) A party may file a petition for declaratory ruling by the State Board on the interpretation of a public school law or regulation of the State Board that is material to an existing case or controversy.

(2) The procedures in this chapter apply to the review of a petition for declaratory ruling.

.03 Response to Appeals.

A. Time for Response. Within 20 days after a copy of the appeal has been sent, the respondent shall file an answer or motion, whichever is appropriate.

B. Answer.

(1) An answer shall be in short and plain terms and shall contain responses to the statements in the request for appeal.

(2) Unless a basis exists for filing a motion to dismiss, an answer shall be filed for an appeal from a certificated employee suspension or dismissal, and from a school consolidation, school redistricting, or school closing appeal.

C. Motion to Dismiss.

(1) A motion to dismiss shall specifically state the facts and reasons upon which the motion is based that may include, but are not limited to, the following:

(a) The county board has not made a final decision;

(b) The appeal has become moot;

(c) The appellant lacks standing to bring the appeal;

(d) The State Board has no jurisdiction over the appeal; or

(e) The appeal has not been filed within the time prescribed by Regulation .02B of this chapter.

(2) The State Board may, on its own motion, or on motion filed by any party, dismiss an appeal for one or more of the reasons listed in §C(1) of this regulation.

D. Motion for Summary Affirmance.

(1) A motion for summary affirmance may be filed if there are no genuine issues of material fact and the respondent is entitled to affirmance as a matter of law.

(2) A memorandum in support of or in opposition to a motion for summary affirmance shall contain the following:

- (a) A statement of the issues is presented for review;
- (b) A statement of facts;
- (c) An argument which includes reference to relevant legal principles and State Board decisions, if any;
- (d) A short conclusion stating the relief sought; and
- (e) Any supporting documents, exhibits, and affidavits.

E. Record.

(1) The local board shall transmit the record of the local proceedings with the local board's response.

(2) Transcript.

(a) The stenographic record of an evidentiary hearing before the local board or its designee shall be transcribed, and the cost of transcription shall initially be paid by the appellant.

(b) An appellant who prevails in appeal before the State Board shall be reimbursed the cost of the transcription by the local board.

(c) The transcript shall be filed promptly.

(3) Parties may agree by written stipulation to omit from the record and transcript those parts unnecessary for the determination of the issues presented to the State Board.

(4) Waiver of Transcription Costs.

(a) An individual appellant who by reason of indigence is unable to pay the cost of transcription may file a request for waiver of the costs.

(b) The request of waiver shall be accompanied by an affidavit verifying the facts set forth in the request and the appellant's inability to pay.

(c) The State Superintendent shall review the requests for waiver of costs and the accompanying affidavit and may require the appellant to supplement or explain any of the matters set forth in the papers.

(d) If the State Superintendent is satisfied that the appellant is unable by reason of indigence to pay the cost of transcription, the State Superintendent may waive the payment of cost, and the cost shall be paid by the local board.

(e) A waiver of transcription costs shall only be applicable to an individual appellant and not to a group or other entity.

.04 General Procedures.

A. Amendment of Appeal or Other Pleading.

(1) The State Board upon its own initiative or upon application of a party may order a party to make a more definite statement of the appeal.

(2) A party may amend an appeal or other pleading upon leave of the State Board or by written consent of the other party.

B. Requests to Shorten or Extend Time Requirements.

(1) Upon the written request of a party *or on its own initiative*, the State Board for good cause shown may shorten or extend the time limitations set forth in this chapter.

(2) The time period for filing an appeal from the decision of the local board or for filing an application for reconsideration of a State Board decision may not be extended.

C. Additional Evidence. If an appellant asks to present additional evidence on the issues in an appeal, and it is shown to the satisfaction of the State Board that the additional evidence is material and that there were good reasons for the failure to offer the evidence in the proceedings before the local board, the State Board may:

(1) Remand the appeal to the local board for the limited purpose of receiving the additional evidence upon conditions the State Board considers proper; or

(2) Receive the additional evidence.

D. Representation of Parties.

(1) A party may be accompanied, represented, and advised by counsel at all stages of appeal.

(2) An individual, or counsel if a party is represented by counsel, shall be responsible for the:

(a) Filing of pleadings, motions, or other papers;

(b) Submission of evidence, examination, and cross-examination of witnesses;

(c) Filing of objections, exceptions, and other motions; and

(d) Oral argument, if applicable.

E. Motions, Memoranda, and Other Pleadings.

(1) Motions, memoranda, and other pleadings shall be filed with the State Board with a written certification that copies were furnished to all other parties.

(2) Except as provided in §E(3) of this regulation, responses to any motion or other pleading, other than the request for appeal, shall be filed within in 15 days of the filing, and any reply to the response shall be filed within 10 days after the response is filed.

(3) The State Board or its designee may modify the time schedule for the filing of motions and other pleadings upon timely notice to all parties.

(4) A motion to dismiss or a motion for summary affirmance may be decided by the State Board upon consideration of the memoranda and documents filed in the record without oral argument.

F. Counsel. The State Board may request the Office of the Attorney General to participate or provide legal advice in any appeal as counsel for the State Board.

G. Library Employee Dismissals. An appeal from dismissal of a library employee under Education Article, §23-406, Annotated Code of Maryland, shall be reviewed in accordance with applicable procedures set forth in this chapter.

.05 Standard of Review

A. General. Decisions of a local board involving a local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable, or illegal.

B. A decision may be arbitrary or unreasonable if it is one or more of the following:

(1) It is contrary to sound educational policy; or

(2) A reasoning mind could not have reasonably reached the conclusion the local board or local superintendent reached.

C. A decision may be illegal if it is one or more of the following:

- (1) Unconstitutional;
- (2) Exceeds the statutory authority or jurisdiction of the local board;
- (3) Misconstrues the law;
- (4) Results from an unlawful procedure;
- (5) Is an abuse of discretionary powers; or
- (6) Is affected by any other error of law.

D. The appellant shall have the burden of proof by a preponderance of the evidence.

E. State School Laws and Regulations. The State Board shall exercise its independent judgment on the record before it in the explanation and interpretation of the public school laws and State Board regulations.

F. Certificated Employee Suspension or Dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland.

(1) The standard of review for certificated employee suspension and dismissal actions shall be de novo as defined in §F(2) of this regulation.

(2) The State Board shall exercise its independent judgment on the record before it in determining whether to sustain the suspension or dismissal of a certificated employee.

(3) The local board has the burden of proof by a preponderance of the evidence.

(4) The State Board, in its discretion, may modify a penalty.

G. Student Suspension and Expulsion.

(1) The decision of a local board in a student suspension and expulsion matter shall be final. [pursuant to Education Article §7-305(c), Annotated Code of Maryland].

(2) The State Board may not review the merits of a student suspension or expulsion, but shall accept an appeal if there are specific factual and legal allegations of one or more of the following:

- (a) The local board has not followed State or local law, policies, or procedures;
- (b) The local board has violated the due process rights of the student; or
- (c) The local board has acted in an unconstitutional manner.

(3) The State Board may reverse or modify a student suspension and expulsion if the allegations set forth in §G(2) of this regulation are proven true or if the decision of a local board is otherwise illegal as defined in §C of this regulation.

(4) The appellant shall have the burden of proof by a preponderance of the evidence.

H. Library Personnel Dismissal. An employment dismissal decision of a board of library trustees shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the board of library trustees unless the decision is arbitrary, unreasonable, or illegal.

.06 Review on the Record.

A. In an appeal of a local board decision on a controversy or dispute regarding a policy or regulation of the local board and the proper administration of a local public school system, the State Board shall review the appeal on the record made before the local board.

B. An appeal on the record may be decided by the State Board without a hearing or oral argument.

C. Upon review of the record, the State Board may transfer the case to the Office of Administrative Hearings for the scheduling of a hearing before an administrative law judge.

.07 Hearing Procedures.

A. The State Board shall transfer an appeal to the Office of Administrative Hearings for review by an administrative law judge under the following circumstances:

(1) An appeal of a school consolidation, school redistricting, or school closing pursuant to COMAR 13A.02.09;

(2) An appeal of a certificated employee suspension or dismissal pursuant to Education Article, §6-202, Annotated Code of Maryland; or

(3) An appeal upon review in which the State Board finds that there exists a genuine dispute of material fact.

B. Transcripts.

(1) Except as provided in §B(2) of this regulation, in an appeal of a suspension or dismissal of a certificated employee, the entire record of the proceedings before the local board shall be prepared and transcribed at the expense of the local board and shall be made a part of the record of the proceedings.

(2) Both parties may agree by way of written stipulation to omit from the record and transcript portions not relevant for consideration by the State Board.

C. Additional Testimony.

(1) Additional testimony or documentary evidence may be introduced by either party but evidence that is unduly repetitious of that already contained in the record may be excluded by an administrative law judge.

(2) Notwithstanding §C(1) of this regulation, the administrative law judge may permit repetitious testimony if credibility is an issue.

D. Except as otherwise provided in this chapter, hearing procedures shall be in accordance with the Administrative Procedure Act, State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland, and COMAR 28.02.

E. The administrative law judge shall submit in writing to the State Board a proposed decision containing findings of fact, conclusions of law, and recommendations, and distribute a copy of the written proposed decision to the parties.

F. Exceptions.

(1) A party objecting to the administrative law judge's proposed decision may file exceptions with the State Board within 15 days of the receipt of the findings.

(2) A party may respond to the exceptions within 15 days of receipt of the exceptions.

(3) As appropriate, each party shall append to the party's exceptions or response to exceptions filings copies of the pages of the transcript that support the argument set forth in the party's exceptions or response to exceptions.

(4) If exceptions are filed, all parties shall have the opportunity for oral argument before the State Board before a final decision is rendered.

(5) Oral argument before the State Board shall be limited to **[15] 10** minutes per side. *The State Board at its sole discretion may shorten or lengthen the time period for oral argument.*

.08 Hearing Record and Transcript.

A. The administrative law judge shall prepare an official record which shall include:

(1) Motions and pleadings;

(2) Documentary evidence;

(3) Exhibits;

- (4) Memoranda or materials filed in the proceedings; and
- (5) Items required in a contested case as set forth in the Administrative Procedure Act.

B. The proceedings before the administrative law judge shall be transcribed at the expense of the parties.

C. Cost of an expedited transcript shall be paid by the party requesting the expedited transcript.

.09 Final Decision.

A. The State Board shall make a final decision in all appeals.

B. A decision may not be rendered without the concurrence of a majority of the voting members then serving on the State Board. *If the Board cannot reach such concurrence, the local board's decision shall stand.*

C. The final decision shall be in writing and contain a factual background, *legal* analysis, and [legal] conclusion.

D. A copy of the decision shall be promptly delivered or mailed to each party or the party's attorney of record, local board presidents, local superintendents of schools, designated representatives of the State teachers associations, and the associations of local boards of education.

E. Copies.

(1) Copies of the opinions of the State Board and an index to the opinions shall be kept electronically at the Department and shall be available for inspection at any reasonable time.

(2) The Department may charge any reasonable fee for making or supervising the making of a copy, printout, or other reproduction of an opinion or an index.

.10 Reconsideration

A. A party aggrieved by the decision rendered in appeal may file a request for reconsideration within 30 days after the decision has been rendered.

B. The party requesting the reconsideration shall serve copies of the request on all other parties.

C. A response to a request for reconsideration may be filed within 15 days of the date of service.

D. A decision on the request shall be made in the discretion of the State Board except that a decision may not be disturbed unless there is sufficient indication in the request that:

(1) The decision resulted from a mistake or error of law; or

(2) New facts material to the issues have been discovered or have occurred subsequent to the decision.

E. The State Board may refuse to consider the facts that the party could have produced while the appeal was pending.

F. The filing of a request for reconsideration does not stay the enforcement of the original decision.

G. The State Board may, in its discretion, abrogate, change, or modify the original decision.

.11 Appeal to Circuit Court.

A. Any party may appeal a decision to the circuit court of the jurisdiction [where the appellant resides] *in which the local board is located* within 30 days of the date of the decision of the State Board.

B. The appeal is governed by Maryland Rules of Procedure 7-201 et seq. [and] *or 7-[301] 401, where appropriate.*

C. The State Board shall prepare and transmit the record in accordance with the time line set forth in the Maryland Rules of Procedure.

Italics = new language
[] = deleted language

D. Because the State Board has reviewed and rendered a decision made in the first instance by a local school system official or a local board, the State Board may not participate as a party in an appeal. [taken to the circuit court.]

Administrative History

Effective Date: July 19, 2004 (31:14 Md. R. 1079)

Regulation .02B amended effective May 28, 2012 (39:10 Md. R. 660)

Regulation .07F amended effective November 26, 2012 (39:23 Md. R. 1532)

Regulation .08 amended effective November 26, 2012 (39:23 Md. R. 1532)