

# Facilities Access Guide New York City Charter Schools

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This Guide is current as of August 2017. To download it and see any future revisions, visit [www.nyccharterschools.org/NewLaw](http://www.nyccharterschools.org/NewLaw).

This Guide does not constitute legal advice and is offered as an informational resource only. All charter schools should consult legal counsel to understand the law’s implications for their own circumstances.

Links to relevant statutes can be found at: <http://www.nyccharterschools.org/resources/charter-schools-act-1998-new-york-state-amended>.

Questions? Contact Corey Callahan, [ccallahan@nyccharterschools.org](mailto:ccallahan@nyccharterschools.org)

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In March 2014, state law was changed to grant a subset of NYC charter schools a statutory right to facilities assistance. Education Law §2853(3)). As this Guide explains below, Charter schools that are new, or adding grade levels, can go through a legally defined process (referred to as “Facilities Access Process” in this Guide) that results in a charter school either receiving co-located space in a school district building; private building space provide at no cost; or funding to cover rental expenses (up to 30%<sup>1</sup> of the per pupil, an estimated \$4,350 in 2017-18 school year). An amendment to the Facilities Access Process passed in March 2016 made permanent the funding mechanism for rental assistance and preserves that rental assistance will remain the lesser of 30% of the per pupil funding amount or actual total rental costs.

## **FACILITIES ACCESS PROCESS**

The Facilities Access Law provides:

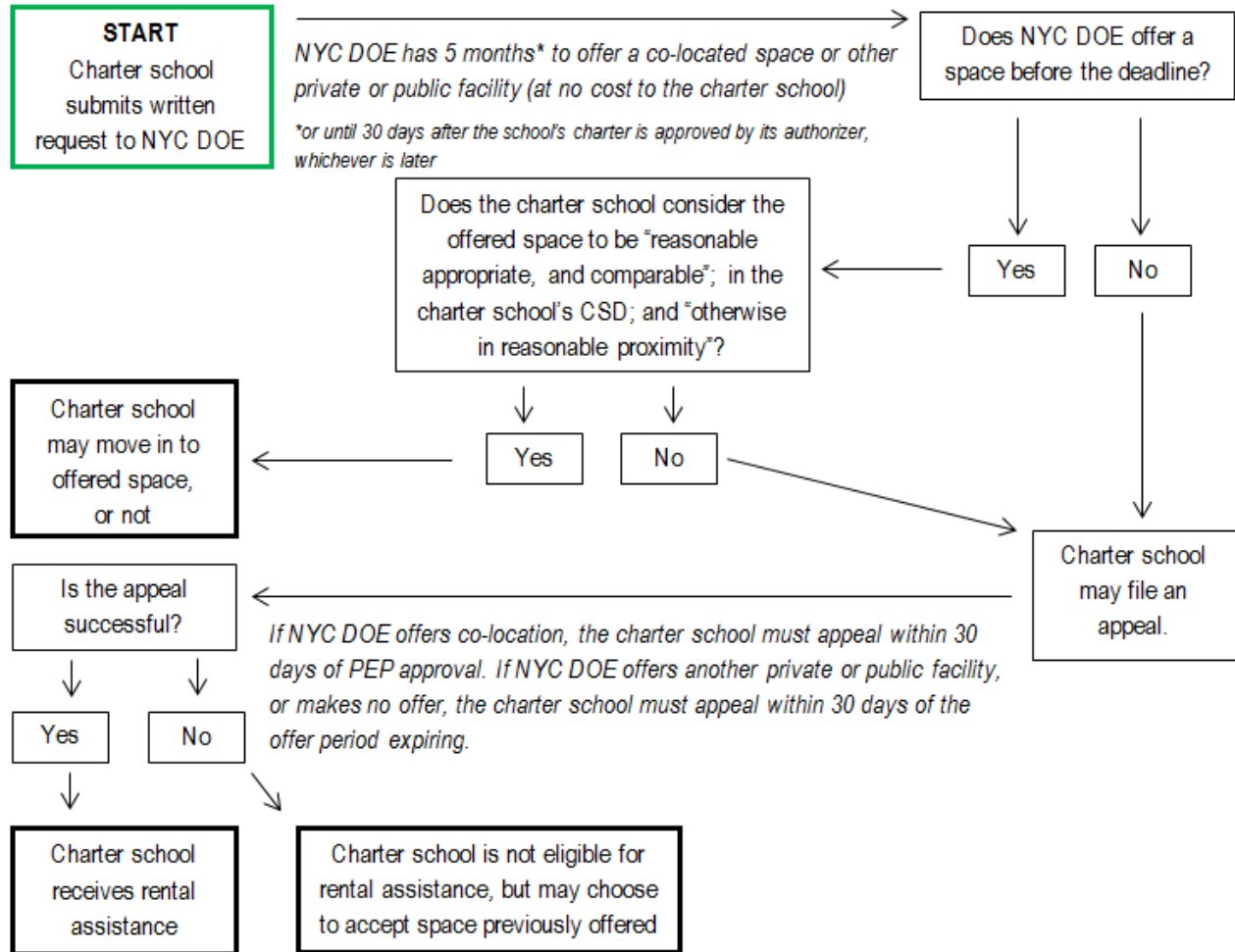
- Eligible new charter schools and schools expanding grade levels the right to request co-location from NYC DOE.
- In response, NYC DOE can either:
  - Make an offer of co-located space; or
  - Make an offer of space in another facility (public or private) at no cost to the charter school; or
  - Refuse to make an offer.
- Where NYC DOE makes an offer of co-located space or other space, the charter school can accept that offer if it finds the offer to be “reasonable, appropriate, and comparable.”<sup>2</sup>
- Where the charter school does not find that offer to be “reasonable, appropriate, and comparable,” the charter school can appeal that offer using one of three forums.
- If the charter school wins the appeal, it will be eligible for rental assistance that in 2017-18 will be a maximum of \$4,350per pupil. If it loses the appeal, it must either accept the offer or forego the space and locate in another space at its own expense.
- Where NYC DOE does not make an offer of space, the school can also appeal for rental assistance.

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<sup>1</sup> A legislative amendment in April 2017 increased the maximum amount of rental assistance from 20% of the per pupil to 30% of the per pupil.

<sup>2</sup> Education Law Section 2853 (3)(e)(1).

**Facilities Access Process for Eligible NYC Charter Schools**



**Which Schools Are Eligible?**

NYC charter schools are eligible for the Facility Access Process if they commenced instruction or added grade levels in the 2014-15 school year or thereafter. As to schools expanding grade levels, schools are eligible regardless of when they obtained authority to provide the grade(s) to which they are expanding or whether they had already begun to provide instruction in some of the grades previously authorized, *so long as they have not provided that grade or grades prior to the 2014-15 school year*. Thus a charter school that had previously received authority to provide grades K-5 but was only providing currently grades K-3 prior to the 2014-15 school year would be eligible under the Facilities Access Law—though only for grades 4 and 5.

The following chart may be helpful in sorting out whether your school is eligible.

<b>CHARTER SCHOOLS and PROSPECTIVE CHARTER SCHOOLS...</b>	without grade level expansion on or after SY 2014-15	with grade level expansion on or after SY 2014-15
operating in private space before SY 2014-15	<b>Not Eligible</b>	<b>Eligible</b> to accommodate planned grade level expansion
operating in NYC DOE space before SY 2014-15	<b>Not Eligible</b>	<b>Eligible if</b> approved co-location plans do not accommodate planned grade level expansion, e.g., school is K-8 but Educational Impact Statement only covers grades K-5.
authorized but commencing instruction on or after SY 2014-15	<b>N/A</b>	<b>Eligible if</b> any approved co-location plans do not accommodate planned grade level expansion OR offer of co-located space was accepted prior to July 1, 2014 and does not accommodate school.
not yet authorized	<b>N/A</b>	<b>Eligible</b>

**Starting the Process: The Duty to Request Co-Location/Timing**

To begin the Facilities Access Process, an eligible charter school must submit a written request for co-location to NYC DOE. This is true even if the school, in fact, would prefer to seek private space and receive rental assistance. This request begins the Facilities Access Process and starts the clock ticking on the time period NYC DOE has to respond to the request.

In order to ensure that new schools have as much time as possible before they open to determine whether they will be co-located or will be required to find space on their own, the law permits prospective charter schools (charter applicants) to request space prior to charter approval (though, as explained below, NYC DOE is given additional time to respond to a request when it comes from a charter applicant).

In June 2017, DOE announced that it would shorten the amount of time it takes to deny a request for public space for any charter school that indicates a preference for rental assistance when requesting spaced under the Facilities Access Process. Schools that indicate such a preference and are eligible for rental assistance under the statute will receive a denial within five business

days. In addition, the DOE will submit a joint letter with the charter, within 10 business days, to the State Education Commissioner requesting a decision in favor of facilities reimbursement.<sup>3</sup>

***Q: How does a charter school submit a request for co-location?***

**A:** A charter school should submit a request in writing to the Office of the Chancellor and request a *return receipt*. In order for NYC DOE to be able to act on the request, we recommend that a charter school provide the following information in its request:

- a. the name of the school and whether it is currently authorized;
- b. if not authorized, the date on which the application was submitted and to which authorizer;
- c. the date it is intending to open or, if expanding grade levels, the date on which such expansion will begin;
- d. the number of students in each grade that the school is authorized/projected to serve;
- e. the Community School District (“CSD”) in which the school wishes to operate and any other information pertinent to the school’s request, e.g., “we would like our middle school expansion to be near our elementary school which is located at X address;” and
- f. the contact information for the person at the school that will be handling the Facility Access Process.
- g. Optional: Schools that are only seeking rental assistance should indicate a preference for rental assistance in the letter.

We have provided a template for you to use in Appendix A to this Guide.

Regardless of NYC DOE’s response, a written request from an eligible school triggers the period in which NYC DOE has to respond regardless of whether it is “accepting” requests or has yet to put a process in place in order to respond to such requests.

***Q: When can a charter school submit a written request for co-location?***

**A:** A charter school may submit a written request for co-location at any time. In general, the Charter Center recommends that such requests be submitted as early as possible in order for schools to find out whether they will be offered a co-located space (or other space paid for by NYC DOE) or rental assistance. For new and expanding charter schools with a strong preference for co-located space, however, applying too far in advance of NYC DOE’s own planning timelines may reduce the chances of receiving an offer of co-location. Such schools should contact NYC DOE to discuss timing *before* submitting a written request.

***Q: How does the timing of a charter school’s written request for co-location work with the existing EIS/BUP/PEP<sup>4</sup> process for co-locations?***

**A:** The Facilities Access Process does not replace the EIS/BUP/PEP process but runs parallel to it. This means that in order for NYC DOE to make a valid offer of co-located space in response to a charter school’s written request for co-location, NYC DOE must issue an EIS

<sup>3</sup> We will continue to update this Guide as new details about this streamlined process are announced.

<sup>4</sup> Educational Impact Statement/Building Utilization Plan/Panel for Educational Policy.

and BUP, hold a hearing at the school, and seek PEP approval of the EIS/BUP within the time period governing the EIS/BUP/PEP process—but also within the time period governing the Facilities Access Process (and meet any other notice requirements that are triggered where a co-location of a charter school is involved).

It is important to emphasize that NYC DOE will not be deemed to have made an offer of co-located space (and cannot co-locate a school) unless and until the proposed co-location goes through the EIS/BUP notice and hearing process for co-locations and is approved by the PEP in accordance with state law. The timing of this is explained in more detail below.

### **NYC DOE’s Response: Timing/The Choice to Provide an Offer of Space (or Not)**

NYC DOE must respond to a request for co-location *within the later of* five months after a charter school’s written request for co-location OR (if applicable to the situation) 30 days after the charter school’s charter is approved by its charter entity.<sup>5</sup> Thus, for a previously authorized school that makes a request, the response period is a maximum of five months; for a school not yet authorized, the response period is at least five months and may be longer depending upon when the school’s charter is approved by its charter entity. This same rule applies to expanding grades. For convenience, this Guide refers to the period during which NYC DOE has the right to make an offer as the “Offer Period” and the date on which the Offer Period ends as the “Offer Deadline.”

As stated above, in June 2017, DOE announced that it would shorten the amount of time it takes to deny a request for public space for any charter school that indicates a preference for rental assistance when requesting space under the Facilities Access Process. Schools that indicate such a preference and are eligible for rental assistance under the statute will receive a denial within five business days. Since this expedited timeline is not contemplated in the statute, this Guide will still refer to the Offer Period and Offer Deadline using the statutory timeframes above (five months or thirty days following authorization).

In response to a written request for co-location, NYC DOE may determine how it chooses to respond. NYC DOE may choose to offer the requesting charter school a co-located space in a public school, a space in a privately owned or publicly owned facility at no cost to the charter school, or outright deny the request. NYC DOE may also choose not to offer any space through a failure to respond by the Offer Deadline. A failure to respond in any fashion should be construed as a failure to make an offer and would guarantee a school’s ability to successfully appeal for rental assistance (see discussion in this Section, below).

***Q: My school, which is currently serving grades K-5, has submitted an application to our authorizer to revise our charter by expanding the grades we offer to K-8 starting in the 2018-19 school year. Assuming that we submit a written request to NYC DOE for co-location for grades 6-8 on August 1, 2017 and that our approval will not come through until January 26, 2018, when will the Offer Deadline be?***

***A:*** Because NYC DOE has the later of five months or 30 days after you are approved to provide the expanded grades (grades 6-8 in this example), the latest the Offer Deadline would be

<sup>5</sup> The term “charter entity” is defined in the Charter Schools Act as a charter school’s authorizer. Education Law Section 2851(3).

February 25, 2018. Even though your school sent the written request in August 2017, since the grade expansion was not approved until January 26, 2018, NYC DOE would have 30 days after approval has occurred.

### **The Next Step: Evaluating an Offer of Space and Whether to Appeal or Accept the Offer**

If NYC DOE makes an offer of co-located or other space, the charter school must decide whether to accept it or file an appeal within the timeline required (see discussion in this Section, below). Any offered space must be in the charter school's CSD and "otherwise in reasonable proximity," and must be "reasonable, appropriate and comparable."<sup>6</sup> Recently, the Commissioner determined that space allocated to a charter school was not comparable when the space "does not meet the requirements of the Footprint, DOE's standard for the usage of space in DOE's buildings."<sup>7</sup>

Thus, for instance, if there are examples in which a district K-8 school in your CSD is split-sited, then an offer to put your K-3 in one site and your 4-8 in another may well be viewed as comparable and appropriate. However, if no K-8 district schools in your CSD are split-sited by elementary and middle school grades, such an offer might not pass the comparability test. There have been limited cases interpreting more precisely defining these terms and the Charter Center will update this guide as case law develops.

### **Accepting the Offer or Appealing the Offer/Lack of an Offer**

If NYC DOE makes an offer of co-located or other space and the charter school deems it acceptable, then the charter school can accept the offer (within the timeline set forth below). If, however, the charter school does not view the offer as acceptable, it can appeal the offer of space (again, within the timeline and process set forth below).<sup>8</sup> The charter school also can appeal if NYC DOE fails to make an offer. If NYC DOE issues an EIS but the proposed co-location does not make it through the statutory EIS/BUP/PEP process by the Offer Deadline, the charter school can appeal on the ground that NYC DOE has failed to make an offer. In fact, once a charter school starts the facilities access process by submitting a written request for co-located space, the charter school must appeal within the statutory time frames to protect their right to appeal. The Charter Center strongly recommends filing your appeal even if the EIS/BUP/PEP process is underway, because there are no guarantees that you will receive co-located space until you receive official PEP approval.

### **Deadlines for Accepting an Offer or Filing an Appeal**

A charter school is subject to strict deadlines for deciding whether to appeal NYC DOE's offer or failure to offer a co-location site. Appealing too soon would result in the appeal being dismissed as premature, though the school likely could bring the appeal later at the appropriate time. However,

<sup>6</sup> Education Law Section 2853 (3)(e)(1).

<sup>7</sup> Appeal of Boys Preparatory Charter School of New York, 55 Ed Dept Rep, Decision No. 16,889, available at <http://www.counsel.nysed.gov/Decisions/volume55/d16889>. Affirmed on Appeal, *see New York City Department of Education v. Boys Preparatory Charter School of New York*, No.904187/16 (Sup. Ct. Albany 2017).

missing the deadline to appeal carries severe consequences. If NYC DOE has failed to make an offer of space, a charter school that fails to appeal in the time permitted would receive neither space nor rental assistance. If NYC DOE offers a space that is plainly inadequate, a charter school that fails to appeal would have to choose between accepting the space “as is” and finding a private facility with no rental assistance.

To that end, schools must pay careful attention to timing once they begin the facilities access process, which begins by sending a written request to DOE for co-located space. Schools need to carefully track the Offer Period, which is the later of (a) five months or (b) thirty days following approval from the charter entity.<sup>9</sup> Once the Offer Period expires, schools MUST file an appeal in one of the three forums provided within 30 days. Please contact the Charter Center directly if you have any questions on timing.

### **The Appeal Process and Choice of Forum**

A charter school that chooses to appeal NYC DOE’s offer or failure to offer a co-location site may choose one of three forums for appeal:

- A. binding arbitration; *or*
- B. an expedited appeal to the State Education Commissioner; *or*
- C. a lawsuit in state court – specifically, a special proceeding pursuant to Article 78.

As a matter of practice, most schools have chosen to bring an expedited appeal to the State Education Commissioner, which is a simplified process that takes a matter of weeks from beginning to end. A decision by the Commissioner could then be appealed (either by the school or NYC DOE) to New York State Supreme Court via an Article 78 proceeding.

Binding arbitration can take a minimum of 4 to 5 months, but has the advantage of certainty, as there is no question that the decision of the arbitrator is final and cannot be appealed to state court. No school, to the Charter Center’s knowledge, has utilized this appeal process.

Filing an Article 78 lawsuit directly with the New York State Supreme Court may be the most costly, time-consuming and complex of the three routes but provides a petitioner with an avenue to proceed directly to court, only a couple of schools have utilized this option.

In deciding which route to take, a school will want to consult with its legal counsel and consider the various factors of time, expense and certainty (as well as any other factors) that each forum may require.

### **Unsuccessful Appeals**

If an appeal fails, the charter school can accept the space offered, pay for private space without rental assistance, or file an appeal to the New York State Supreme Court via an Article 78 proceeding. Although the new law does not allow NYC DOE to withdraw its offer, and does not set forth a time frame within which the charter school must make its decision following an

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<sup>9</sup> Education Law Section 2853(3)(e)(1).



unsuccessful appeal, a “reasonableness” standard is assumed. Therefore, a charter school should not delay and, to be safe, should accept the offer within 30 days. Similarly, if the school chooses to appeal the Commissioner’s decision, it must do so within four months of the Commissioner’s decision. *See* Civil Practice Law and Rules Section 217.

**Successful Appeals: Rental Assistance**

If the appeal is successful, NYC DOE is responsible for providing rental assistance to the charter school.

The amount of rental assistance for all eligible school will be the amount of the “actual rental cost” of the charter school’s lease or 30% of per pupil funding, whichever is lower. As explained earlier, rental assistance is only provided for new and expanding grades—*not* for other grades a charter school is currently serving—but this does not stop a school from housing eligible and ineligible grades together in the same facility and under the same lease.

Importantly, rental assistance funds must be applied to lease costs and are not applicable to the cost of construction of a new building. Therefore a school receiving rental assistance should think carefully how to structure their lease arrangements to capture any costs associated with actual occupancy of the space. While the Charter Center believes that the language in the statute “actual rental costs” makes clear that many pass-through costs with renting space in New York City are covered under the facilities access law, there is open litigation on this issue with respect to whether renovations when done in exchange of lower base rent are part of “actual rental cost.” Some of the other costs that could be considered part of actual rental cost include lease payments, maintenance, costs of capital improvements, costs of occupancy, security, insurance and real property taxes.

The table below shows the amount of rental assistance available to eligible charter schools under the Facilities Access Law for the 2017-18 school year as compared to the 2016-17 school year.

<b>Year</b>	<b>Per Pupil Funding</b>	<b>Rental Assistance for Eligible Schools (30% of Per Pupil Funding)</b>
2016-17	\$14,027	\$2,805.40 <sup>10</sup>
2017-18	\$14,527	\$4,350

<sup>10</sup> A legislative amendment in April 2017 increased the maximum amount of rental assistance from 20% of the per pupil to 30% of the per pupil.

**APPENDIX A: CO-LOCATION REQUEST TEMPLATE**

[DATE]

*RETURN RECEIPT REQUESTED*

Office of the Chancellor  
Tweed Courthouse  
52 Chambers Street  
New York, NY 10007

**RE: Written Request for Co-Location in a Public School Building Pursuant to Section 2853(3)(e) of the Education Law**

Dear Sir/Madam:

\_\_\_\_\_ Charter School hereby submits its written request for co-location in a public school building pursuant to Section 2853(3)(e) of the Education Law, as of the date set forth above.

[\_\_\_\_\_ Charter School is currently authorized by [name of authorizer] for the 20\_\_-20\_\_ school years to provide Grades \_\_-\_\_. \_\_\_\_\_ Charter School is located at [address] in Community School District \_\_, and is currently providing Grades \_\_-\_\_. \_\_\_\_\_ Charter School intends to expand to Grades \_\_-\_\_ starting in the 20\_\_-\_\_ school year, and will serve [#] students in Grade \_\_, [#] students in Grade \_\_, and [#] students in Grade \_\_, for a total of [#] students. \_\_\_\_\_ Charter School specifically requests that its co-location for newly provided Grades \_\_-\_\_ be located in close proximity to our current school.]

OR

[\_\_\_\_\_ Charter School submitted its application to [name of authorizer] on \_\_\_\_\_, 20\_\_ to provide Grades \_\_-\_\_. \_\_\_\_\_ Charter School will be located in Community School District \_\_ and intends to begin serving students starting in the 20\_\_-\_\_ school year, and will serve [#] students in Grade \_\_, [#] students in Grade \_\_, and [#] students in Grade \_\_, for a total of [#] students.]

Please contact the following individual for further information or assistance:

Name  
Address  
Email  
Telephone

Thank you.

\_\_\_\_\_ Charter School  
By: \_\_\_\_\_  
[Name]  
[Title]