



TO: The Honorable the Members of the Board of Regents

FROM: Sharon Cates-Williams *Sharon Cates-Williams*

SUBJECT: Proposed Amendment of Part 279 of the Regulations of the Commissioner of Education Relating to Procedures Concerning Appeals of Impartial Hearing Officer Determinations for Students with Disabilities to a State Review Officer

DATE: September 1, 2016

AUTHORIZATION(S):

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents amend Part 279 of the Regulations of the Commissioner of Education, to provide clarifications and updates to the procedures concerning appeals of impartial hearing officer determinations for students with disabilities to a State Review Officer?

Reason(s) for Consideration

Review of Policy.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at its September 2016 meeting. A copy of the proposed amendment is included as Attachment A.

Procedural History

The proposed amendments to Part 279 were initially discussed by the P-12 Education Committee at the January 2016 Regents meeting. In February 2016, comment was taken at public hearings, which were conducted in New York City, Albany, and Rochester, and a number of written public comments were received. An

assessment of the public comments was presented to the P-12 Education Committee at the June 2016 Regents meeting. Based on the comments received, the Board of Regents adopted several revisions to the proposed amendments at its June meeting to alleviate several of the concerns that were identified in the public comment process.

A Notice of Revised Rulemaking was published in the State Register on June 29, 2016. A copy of the proposed amendment is included as Attachment A. Supporting materials for the proposed regulation are available upon request from the Secretary to the Board of Regents.

Following the 30-day public comment period required for revised rule makings under the State Administrative Procedure Act, the Department received one comment. An assessment of the public comment is included as Attachment B.

Background

At its January meeting, the Board of Regents discussed the proposed amendment which updates citations and references, provides clarification and updates to the procedures concerning appeals of impartial hearing officer decisions to a State Review Officer, and expedites and otherwise facilitates the processing of petitions for review to State Review Officers. The proposed amendments also clarify the procedures for filing the record of the impartial hearing, serving the notice of intention to seek review, the time for a party to serve responsive pleadings in an appeal, the procedures for filing an appeal and responsive pleadings with the Office of State Review, and the format requirements for papers filed with the Office of State Review.

Based on comments received from the field, the Board of Regents adopted the following revisions to the proposed amendment at its June 2016 meeting:

- clarifying the scope of a State Review Officer's subject matter jurisdiction including the provision for a free appropriate public education to a student with a disability;
- withdrawing the proposed amendment that would have required parties to state any challenges to the impartiality of a State Review Officer in their respective pleadings;
- withdrawing the proposed amendment that would have permitted a school district to initiate an appeal by affixing the request for review to the door of a parent's residence and mailing a duplicate copy to the parent;
- revising the proposed time to answer a cross-appeal to be consistent with the time to answer the request for review;
- withdrawing a new proposal to require the filing of electronic copies of pleadings and memoranda; and
- withdrawing the proposal that the filing of a pleading would be complete upon receipt by the Office of State Review (which would diminish the amount of time

that a party has to transmit the pleading) and reverting to the previous standard that a filing is deemed complete upon the party's transmission of the document to the Office of State Review.

Following the 30-day public comment period required under the State Administrative Procedure Act, the Department received one comment. The Department does not believe any further revisions to regulation are needed.

Related Regents Items

- Proposed Amendment of Part 279 of the Regulations of the Commissioner of Education Relating to State Level Review of Impartial Hearing Officer Determinations for Students With Disabilities
(<http://www.regents.nysed.gov/common/regents/files/616p12d4.pdf>)
- Proposed Amendment of Part 279 of the Regulations of the Commissioner of Education Relating to State Level Review of Impartial Hearing Officer Determinations for Students With Disabilities
(<http://www.regents.nysed.gov/common/regents/files/116p12d3.pdf>)

Recommendation

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

VOTED: that Part 279 of the Regulations of the Commissioner of Education be amended, as submitted, effective January 1, 2017.

Timetable for Implementation

If the Board of Regents adopts the proposed amendment at the September meeting, the proposed amendment will take effect on January 1, 2017.

Attachments

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 101, 207, 301, 311, 4403, 4404 and 4410

Part 279 of the Regulations of the Commissioner of Education is amended,
effective January 1, 2017, as follows:

PART 279

PRACTICE ON REVIEW OF HEARINGS FOR STUDENTS WITH DISABILITIES

§ 279.1 Scope of Part.

(a) Review by a State Review Officer[of the State Education Department] of a determination made by an impartial hearing officer concerning the identification, evaluation, [program or]educational placement, provision of a free appropriate public education, or manifestation determination of a student with a disability pursuant to the provisions of article 89 of the Education Law and Part 200 of this Title may be obtained by either the parent or person in parental relationship of such student or the board of education or trustees of a school district (the parties). The provisions of [Parts 275 and 276 of this Title] this Part shall govern the practice on such reviews[, except as provided in this Part. As applied to such reviews, references to the term commissioner in Parts 275 and 276 shall be deemed to mean a State Review Officer of the State Education Department, unless the context otherwise requires].

(b) As used in this Part, State Review Officer means an employee of the State Education Department designated by the commissioner to conduct impartial State-level review pursuant to Education Law, section 4404(2) of the determination of an impartial hearing officer in a hearing related to the identification, evaluation, [program or] educational placement, provision of a free appropriate public education, or manifestation determination of a student with a disability.

(c) Impartiality. The commissioner shall establish written procedures to ensure the impartiality of State Review Officers, which shall include, but need not be limited to, the following:

(1) State Review Officers shall not be designated to conduct State-level review with respect to a hearing to which the State Education Department, or any educational program operated by the State Education Department, is a party.

(2) State Review Officers shall not have jurisdiction to review the actions of any officer or employee of the State Education Department.

(3) State Review Officers shall be independent of, and shall not report to, the [Office]office of the State Education Department responsible for the general supervision of educational programs for students with disabilities.

(4) A State Review Officer shall have no personal, economic or professional interest in the hearing which he or she is assigned to review. A State Review Officer shall, on his or her own initiative or on application of any party, recuse himself or herself[or himself] and transfer the appeal to another State Review Officer in the event that:

(i) such officer has in any way been substantially involved in the development of any State or local policy or procedure challenged by the hearing;

(ii) such officer has at any time been employed by a party to the hearing or by the attorney, law firm or other representative appearing on behalf of a party; [and]or

(iii) such officer has at any time been personally involved in any aspect of the identification, evaluation, [program]or educational placement of the student with a disability about whom the hearing is concerned, or of other similarly situated children in the school district which is a party to the hearing.

(5) A State Review Officer shall not be an individual previously employed by the State Education Department in a position requiring routine personal involvement in decisions made by local school districts regarding any aspect of the provision of free appropriate public education to students with disabilities.

(d) Any party to the State-level review process may challenge the impartiality of a State Review Officer on any of the grounds set forth in subdivision (c) of this section.

(e) The Office of State Review means the office within the State Education Department which assists State Review Officers in rendering their decisions.

§ 279.2 Notice of intention to seek review and notice of intention to cross-appeal.

(a) [The parent or person in parental relationship of a student with a disability]A party, as described in subdivision (c) of this section, who intends to seek review by a State Review Officer[of the State Education Department] of the decision of an impartial hearing officer shall personally serve upon the [school district]opposing party, in the manner prescribed for the service of a [petition]request for review pursuant to section [275.8(a)]279.4 of this [Title]Part, a notice of intention to seek review in the following form:

Notice:

The undersigned intends to seek review of the determination of the impartial hearing officer concerning the identification, evaluation,[program or] educational placement, provision of a free appropriate public education, or manifestation determination of (name of student with a disability). [Upon receipt of this notice, you are required to have prepared a written transcript of the proceedings before the impartial hearing officer in this matter. A copy of any interim and the final decision of the impartial hearing officer, a bound copy of the written transcript, including a word index for the written transcript, as well as an electronic transcript, and a true copy of the

original exhibits accepted into evidence at the hearing and an index to the exhibits must be filed by the Board of Education, together with certification of the completed record, with the Office of State Review of the New York State Education Department within 10 days after service of this notice.]The school district is required to prepare and submit a certified copy of the hearing record to the Office of State Review in accordance with section 279.9 of the Regulations of the Commissioner of Education. If you wish to seek review of this determination as well, you must send to the party listed below a notice of intention to cross-appeal in accordance with Part 279 of the Regulations of the Commissioner of Education, within 30 days after the date of the decision of the impartial hearing officer. You may find this form on the website of the Office of State Review (www.sro.nysed.gov).

(b) The notice of intention to seek review shall be [personally] served upon the [school district not less than 10 days before service of a copy of the petition for review upon such school district, and within]opposing party no later than 25 days [from the date of the decision sought to be reviewed. The petition for review shall be personally served upon the school district within 35 days from]after the date of the decision of the impartial hearing officer sought to be reviewed.[If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period.

(c) A notice of intention to seek review shall not be required when the board of education initiates an appeal from an impartial hearing officer's decision. A copy of the board's notice of petition, petition, memorandum of law and any additional documentary evidence shall be personally served upon the parent within 35 days from the date of the impartial hearing officer's decision. If the decision has been served by mail upon the

board, the date of mailing and the four days subsequent thereto shall be excluded in computing the 35-day period.]

(c) The party initially requesting the review shall be denominated as petitioner, and any adverse party as respondent.

(d) A respondent who wishes to cross-appeal to seek review by a State Review Officer of the decision of an impartial hearing officer shall personally serve upon the opposing party, in the manner prescribed for the service of a request for review pursuant to section 279.4 of this Part, a notice of intention to cross-appeal within 30 days after the decision of the impartial hearing officer. The notice of intention to cross-appeal shall be in the following form:

Notice:

The undersigned intends to seek review of the determination of the impartial hearing officer concerning the identification, evaluation, educational placement, provision of a free appropriate public education, or manifestation determination of (name of student with a disability).

(e) Every notice of intention to seek review or notice of intention to cross-appeal shall be accompanied by a case information statement, which shall identify those issues the party wishes to be reviewed by a State Review Officer, and may be made on a form prescribed by the Office of State Review. Matters appearing in the case information statement shall not preclude the parties from raising additional issues in their pleadings for review.

(f) A State Review Officer may, in his or her discretion and pursuant to this Part, review the determination of an impartial hearing officer notwithstanding a party's failure to timely serve a notice of intention to seek review.

§ 279.3 Notice [with petition]of request for review.

Each [petition]request for review must contain the following notice:

Notice:

You are hereby required to appear in this review and [to]may answer the allegations contained in this [petition]request for review. Your answer must conform with the provisions of the regulations of the Commissioner of Education relating to reviews of this nature, copies of which are available at www.sro.nysed.gov or from the Office of State Review of the New York State Education Department, 80 Wolf Road, Suite 203, Albany, NY 12205.

Please take notice that such regulations [require]provide that an answer to the [petition must]request for review may be served upon the petitioner, or if the petitioner is represented by counsel, upon such counsel, within [10]5 business days after the service of the [petition]request for review, and [that] a copy of such answer must, within two days after such service, be filed with the Office of State Review of the New York State Education Department, 80 Wolf Road, Suite 203, Albany, NY 12205. Extensions of time to serve an answer may be granted upon a request that complies with the provisions of section 279.10(e) of the Regulations of the Commissioner.

The decision of the State Review Officer shall be based solely on the record before the State Review Officer and shall be final, unless an aggrieved party seeks judicial review.

§ 279.4 Initiation of review.

(a) [Petition]Request for review. [The]A party seeking review (petitioner) shall [file with the Office of State Review of the State Education Department the petition]personally serve a notice of request for review and a request for review[, and the notice of intention to seek review where required, together with proof of service]

upon the [other]opposing party (respondent) [to the hearing,] within [three]40 days after [service is complete. No filing by facsimile or electronic transmission shall]the date of the decision of the impartial hearing officer sought to be [permitted]reviewed. The [petition]request for review shall clearly [indicate]specify the reasons for challenging the impartial hearing officer's decision, [identifying]identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner. The request for review must conform to the form requirements in section 279.8 of this Part.

(b) In the event that a school district is named as a respondent in a request for review, personal service of the request for review upon such school district shall be made by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service.

(c) In the event that a parent of a student with a disability is named as a respondent in a request for review, personal service of the request for review shall be made by delivering a copy thereof to the parent; if delivery of the request for review to the parent cannot be made after diligent attempts, the board of education may serve the request for review upon the parent:

(1) by delivering and leaving the same at the parent's residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening, and mailing by certified mail the request for review to the parent's last known residence; or

(2) if the board of education is unable to effectuate service pursuant to paragraph (1) of this subdivision, as directed by a State Review Officer.

(3) Where service is made pursuant to paragraphs (1) or (2) of this subdivision, the board of education must complete service within the timeline specified in subdivision (a) of this section and submit to the Office of State Review with its request for review proof of service, setting forth the attempts made to personally serve the request for review and specifying the dates, addresses, and times of each of its attempts at effectuating service.

(d) Completion of Service. Service shall be complete upon delivery to the party being served; the alternate service permitted by paragraphs (c)(1) and (c)(2) of this section shall be complete upon performance of all the actions required.

(e) A petitioner shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete. No filing by facsimile or electronic mail shall be permitted.

[(b)](f) Cross-appeals. A respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in [respondent's]an answer served within the time permitted by section 279.5 of this Part. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent.[A cross-appeal shall be deemed to be timely if it is included in an answer which is served within the time permitted by section 279.5 of this Part. The petitioner shall answer respondent's cross-appeal within 10 days after service of a copy of the answer and cross-appeal upon petitioner, and shall file the answer to the cross-appeal, together with proof of service, with the Office of State

Review of the State Education Department, within two days after service is complete.

No filing by facsimile or electronic transmission shall be permitted.]

(g) Additional papers in support of a request for review. A memorandum of law, if any, must be served upon the other party to the hearing and filed with the Office of State Review together with the request for review. A memorandum of law shall comply with the requirements of section 279.8 of this Part.

§ 279.5 [Service of answer]Answer.

(a) The respondent [shall]may, within [10]5 business days after the date of service of [a copy of]the [petition]request for review, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer[, with any written argument, memorandum of law, and additional documentary evidence]. Such answer shall conform to the requirements in section 279.8 of this Part.

(b) The petitioner may, within 5 business days after the date of service of a cross-appeal, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer to the cross-appeal. Such answer shall conform to the requirements in section 279.8 of this Part.

(c) [Such]An answer [or agreed statement of facts], together with proof of service [of a copy of such documents] upon the petitioner, shall be filed with the Office of State Review of the State Education Department[,] within two days after such service, together with the respondent's notice of intention to cross-appeal in the case of an answer with cross-appeal. No filing by facsimile or electronic [transmission]mail shall be permitted.

(d) Additional papers in support of an answer. A memorandum of law in support of an answer (or answer with cross-appeal), if any, must be served upon the other party to the hearing and filed with the Office of State Review together with the answer (or

answer with cross-appeal). Such memorandum of law shall comply with the requirements of section 279.8 of this Part.

(e) Service. Service of an answer or answer with cross-appeal may be made by personal delivery, United States mail, or overnight delivery service upon the opposing party or such party's attorney.

§ 279.6 Additional pleadings.

(a) No pleading other than [the petition]a request for review, [or] answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by a State Review Officer [of the State Education Department], except a reply [by the petitioner]to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed [by respondent]in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal. Such reply shall be served upon the opposing party within three days after service of the answer is complete or together with an answer to a cross-appeal served in accordance with section 279.5 of this Part, and shall conform to the requirements of section 279.8 of this Part.

(b) [Such]The reply, together with proof of service, shall be filed with the Office of State Review within two days after service of the reply is complete. No filing by facsimile or electronic [transmission]mail shall be permitted.

(c) Service. Service of a reply may be made by personal delivery, United States mail, or overnight delivery service upon the opposing party or such party's attorney.

(d) Notwithstanding the foregoing, nothing in this section shall be construed to prohibit a State Review Officer, in his or her discretion, from requiring a party to clarify a pleading or submit further briefing upon request.

§ 279.7 [Verification]Names of parties or attorneys to be endorsed on all papers and verification of pleadings.

(a) All pleadings and papers submitted to a State Review Officer in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney.

(b) All pleadings shall be verified. The [petition]request for review shall be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustees, [or] the board of trustees, or the board of education of a school district, it shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such trustees or board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting such answer, except that when the respondent is [a domestic corporation, the verification shall be made by an officer thereof. If the appeal is brought from the action of] the trustees, [or]the board of trustees, or the board of education of a school district, verification of the answer shall be made by any person who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer shall be made by at least one of them who is familiar with the facts underlying the appeal. A reply shall be verified in the manner set forth for the verification of an answer.

(1) Affidavit of verification. The affidavit of verification shall be in substantially the following form:

STATE OF _____

COUNTY OF _____ ss.:

_____, being duly sworn, deposes and says that
[he/she] is the _____ in this proceeding; that [he/she] has read the

annexed _____ and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged upon information and belief, and as to those matters [he/she] believes it to be true.

(Signature)

Subscribed and sworn to before me this

_____ day of _____, 20_____

(Signature and title of officer)

(2) Oaths. All oaths required by this Part may be taken before any person authorized to administer oaths by the State of New York.

§ 279.8 Pleadings and memoranda of law.

(a) Form of pleadings and memoranda of law. Documents that do not comply with the form requirements listed in this [subdivision]section or the provisions of sections 279.4, 279.5, and 279.6 of this Part may be rejected in the sole discretion of [the]a State Review Officer. All pleadings and memoranda of law shall be in the following form:

(1) on 8 1/2 by 11 inches white paper of good quality, without erasures or interlineation materially defacing the pleading;

(2) typewritten in black ink, single sided, and text double-spaced (block quotation and footnotes may be single-spaced). All text, with the exception of page numbering, shall appear on pages containing margins of at least one inch. Text shall appear as minimum 12-point type in the Times New Roman font (footnotes may appear as minimum 10-point type in the Times New Roman font). Compacted or other compressed printing features are prohibited;

(3) [pleadings shall set forth the allegations of the parties in numbered paragraphs;

(4)]pages consecutively numbered and fastened together; and

(4) All pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney.

[(5)](b) the [petition]request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length; the memorandum of law in support of a request for review, answer, or answer with cross-appeal shall not exceed [20]30 pages in length; a [reply]memorandum of law in support of an answer to a cross-appeal or reply shall not exceed 10 pages in length. A party shall not circumvent page limitations through incorporation by reference. Extensive footnotes may not be used to circumvent page limitations[; and

(6) the memorandum of law shall contain a table of contents].

[(b)](c) The [petition]request for review, answer, [reply and memorandum of law] or answer and cross-appeal shall each set forth;

(1) the specific relief sought in the underlying action or proceeding;

(2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and

(3) citations to the record on appeal, and [shall identify]identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(d) The memorandum of law shall include a table of contents and set forth:

(1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and

(2) a statement of the party's arguments, including the party's contentions regarding the decision of the impartial hearing officer and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal.

§ 279.9 Record of the proceeding before the impartial hearing officer.

(a) Contents of the hearing record. The board of education shall, whether it is the petitioner or the respondent, file with the Office of State Review of the State Education Department, a copy of the record before the impartial hearing officer as defined in section 200.5(j)(5)(vi) of this Title, including a copy of the due process complaint notice, a copy of the response to the due process complaint notice, a copy of the decision of the impartial hearing officer, a copy of any written interim orders, rulings, or decisions rendered by the impartial hearing officer, a bound copy of the written hearing transcript before the impartial hearing officer that includes a word index for the written transcript, an electronic copy of the written transcript, copies of prehearing conference summaries or transcripts, a copy of the original exhibits accepted into evidence at the hearing~~[and]~~, an index to the exhibits, and a copy of any written post-hearing briefs or memoranda of law submitted to the impartial hearing officer. The board of education shall submit a signed certification with the record[,] that the record

submitted is a true and complete copy of the hearing record before the impartial hearing officer.

(b) Where the petitioner is a party other than the board of education, the board of education shall file the completed and certified record with the Office of State Review within 10 days after service of the notice of the intention to seek review. If a board of education fails to comply with such timeline, a State Review Officer may, at his or her discretion, make appropriate determinations regarding such failure, among them:

(1) to strike an answer, other responsive paper, or any part thereof, filed by such board of education;

(2) to dismiss a cross-appeal filed with the answer by such board of education;

(3) to make a finding that the board of education has violated the parent's right to due process; or

(4) to refer such board of education to the office of the State Education Department responsible for enforcing compliance with Article 89 of the Education Law and the provisions of this Title.

(c) Where the board of education is the petitioner, such board shall file the record before the impartial hearing officer together with the [petition]request for review.

[A]If a board of education fails to do so, a State Review Officer may, at his or her discretion, make appropriate determinations regarding such failure, among them to dismiss an appeal by the board of education when a completed and certified hearing record is not filed with the [petition]request for review.

(d) Where a party has appealed an interim decision of an impartial hearing officer according to the provisions of subdivision (d) of section 279.10 of this Part, the board of education shall include in the record transmitted to the Office of State Review

copies of the entire record, consisting of those items described in subdivision (a) of this section, developed as of the date of the interim decision.

§ 279.10 Rules of practice.

(a) Oral argument. In the event that a State Review Officer determines that oral argument is necessary, the State Review Officer shall direct that such argument be heard at a time and place which is reasonably convenient to the parties.

(b) Additional evidence. [The]A State Review Officer may seek additional oral testimony or documentary evidence if [the State Review Officer]he or she determines that such additional evidence is necessary. [Hearings]The procedures for hearings before a State Review Officer for the purpose of taking additional evidence [will be conducted before the State Review Officer at a time and place which is reasonably convenient to the parties, and procedures at such hearings]shall be consistent with the requirements of section 200.5(j)(3) of this Title.

(c) [Stay of proceedings. The provisions of section 276.1 of this Title regarding stay of proceedings shall not apply to appeals brought pursuant to section 4404 of the Education Law seeking review of a determination of an impartial hearing officer. The provisions of subdivision 4 of section 4404 of the Education Law and section 200.5(m) (regarding a student's status during proceedings) of this Title shall apply exclusively in such appeals. A determination of pendency pursuant to subdivision 4 of section 4404 of the Education Law and section 200.5(m) of this Title shall be made in writing, in the first instance, by the impartial hearing officer and may be reviewed by a State Review Officer.]Remand to an impartial hearing officer. A State Review Officer may remand a matter to an impartial hearing officer to take additional evidence or make additional findings.

(d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision, or failure or refusal to decide an issue prior to or during a hearing shall not be permitted, with the exception of a pendency determination made pursuant to subdivision 4 of section 4404 of the Education Law. However, in an appeal to the Office of State Review [Officer] from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision, or failure or refusal to decide an issue.

(e) Extensions of time to answer or reply. No extensions of time to answer the [petition]request for review, interpose a cross-appeal, or to reply to an answer will be granted by the State Review Officer unless timely application is made therefor, upon written notice to all parties, and upon good cause shown, which shall be determined in the sole discretion of the State Review Officer. Such application shall be in writing, addressed to the Office of State Review, must be postmarked [not]no later than one business day prior to the date on which the time to answer or reply will expire, shall set forth in full the reasons for the request, shall indicate whether the student is currently receiving special education services, and shall briefly state whether the other party consents to or opposes the application for extension. For the purposes of this subdivision, good faith settlement negotiations shall be deemed good cause. The time to respond to a pleading may not be extended solely by stipulation of the parties or their counsel.

§ 279.11 Computation of days within which service must be made.

(a) Unless specifically stated otherwise, the term days, as used in this Part, shall mean calendar days.

(b) The date upon which personal service of the [petition]request for review was made upon the respondent shall be excluded in the computation of the [10-day]period in which service of the answer or answer and cross-appeal must be made. If the

answer or answer and cross-appeal has been served by mail upon petitioner or petitioner's counsel, [the date of mailing and the two days subsequent thereto]three days shall be [excluded in the computation of]added to the [three-day]period in which an answer to the cross-appeal or a reply [to procedural defenses or a response to additional documentary evidence served with the answer]may be served and filed[by the petitioner] pursuant to this Part. If the last day for service of [a notice of intention to seek review, a petition for review, an answer or a response to an answer]any paper permitted under this Part 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.

§ 279.12 Decision of State Review Officer.

(a) The decision of the State Review Officer shall be based solely upon the record before the State Review Officer and shall be final, unless an aggrieved party seeks judicial review. The decision of the State Review Officer shall be binding upon the parties and the State Education Department with respect to the provision of special education to the student with a disability involved, but shall not constitute binding precedent in any judicial action or proceeding or administrative appeal in any forum whatsoever.

(b) The decision of the State Review Officer shall be mailed by the Office of State Review to counsel for petitioner and respondent, parties appearing [pro se]without counsel, and the superintendent of the school district involved as a party in the appeal or the superintendent's designee. The superintendent, or the superintendent's designee, shall forward a copy of the decision as soon as practicable to the principal and chairperson of the committee on special education of the school involved in

developing the most recent individualized education program (IEP) that was in contention in the appeal.

(c) The decision of a State Review Officer shall be final with respect to the parties involved except as provided in section 200.5(k)(3) of this Title, provided, however, that this subdivision shall not preclude the Office of State Review from correcting typographical or clerical errors in a decision. Such corrections cannot result in a change to the factual or legal basis of the State Review Officer's decision.

§ 279.13 Limitation of time for initiation of appeal.

A [petition]request for review to a State Review Officer must be served and filed within the timelines specified in section [279.2]279.4 of this Part. A State Review Officer may dismiss sua sponte a late [petition]request for review[. A State Review Officer] or, in his or her sole discretion, may excuse a failure to timely serve or file a [petition]request for review within the time specified for good cause shown. The reasons for such failure shall be set forth in the [petition]request for review.

§ 279.14 Pre-review conference.

Staff of the Office of State Review may schedule and direct the attorneys for the parties, and any unrepresented party, to participate in a pre-review telephone conference with staff counsel. The purpose of the conference is to consider the possibilities of settlement, to simplify the issues, to resolve procedural problems, or to discuss any matters which may aid in the expeditious disposition of the appeal. In the absence of good cause, the failure of a petitioner's attorney, or of an unrepresented petitioner, to attend and participate in a scheduled pre-review conference shall result in dismissal of the [petition]request for review by the State Review Officer.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Revised Rule Making in the State Register on June 29, 2016, the State Education Department received the following comments.

1. COMMENT:

One commenter objects to the revisions to section 279.(3), to replace the word "must" with the word "may" in the notice included with a request for review and further states that the language, "an answer to the request for review may be served upon the petitioner," is ambiguous because it could be read to indicate that service of an answer is not mandatory and that service within 5 business days is not mandatory.

DEPARTMENT RESPONSE:

The Department believes that revision of the proposed regulation is not necessary. As noted by the commenter, the purpose of the proposed language is to clarify that a respondent is not required to answer a request for review.

To the extent that a respondent may be confused as to whether service of an answer is mandatory, 8 NYCRR 279.5(a) provides that a party may answer a request for review "either by concurring in a statement of facts with petitioner or by service of an answer" and 8 NYCRR 279.5(e) provides that service of an answer "may be made by personal delivery, United States mail, or overnight delivery service upon the opposing party or such party's attorney". Therefore, the Department believes that the existing regulation is clear that an answer is optional, but if an answer is submitted, it must be served in accordance with the procedures set forth in Part 279.

2. COMMENT:

One commenter believes the 5-day time limit for submitting an answer to a request for review or cross-appeal is too short. DEPARTMENT RESPONSE:

The commenter's concerns were previously addressed in the Assessment of Public Comment to the Notice of Proposed Rule Making published in the State Register on June 29, 2016, as reflected below.

Because pleadings are filed by mail with the Office of State Review, and often are not filed until several days after they are served, it is not feasible to extend the time to answer as requested by some commenters and still maintain compliance with State and federal timelines. To the extent that a party may be unable to meet the timeline to answer, the regulations provide for the possibility of an extension of time to answer upon good cause shown. Finally, State Review Officers are required to conduct an independent review of the record and render an impartial decision thereon; accordingly, an answer to a request for review is expected to address only the specific issues raised in the request for review. It is expected that parties will have set forth their positions during the impartial hearing, such that it is unnecessary for those positions to be fully reiterated on appeal.

3. COMMENT:

One commenter suggests that, with respect to the record submitted on appeal, the regulations should specify that any briefs or memoranda of law submitted by the parties during the course of the hearing are included as a part of the hearing record.

DEPARTMENT RESPONSE:

The department has considered the commenter's suggestion and does not believe any changes are necessary. Briefs and memoranda of law are already included as a part of the hearing record pursuant to 8 NYCRR 200.5(j)(5)(vi)(b).

4. COMMENT:

One commenter requests an expansion of the scope of permissible appeals from interim determinations of impartial hearing officers who decline a request to recuse themselves from presiding over an impartial hearing.

DEPARTMENT RESPONSE:

The proposed regulation does not alter the scope of permissible appeals from interim determinations. Therefore, the Department believes that this comment is beyond the scope of the proposed amendment and that no further revisions are necessary.

Moreover, in civil practice and administrative law, interlocutory appeals are generally disfavored; however, the Department has made a limited exception for interlocutory appeals from pendency determinations in order to effectuate the stability that Congress intended the pendency provision to provide to disabled students. At this time, the Department does not find that further regulatory action is necessary to address the commenter's perception of an inordinate number of improper interim recusal decisions rendered by impartial hearing officers.

5. COMMENT:

One commenter requests clarification as to whether a party has the option of filing an appeal from an interim determination on pendency or waiting for a final determination of the impartial hearing officer before filing an appeal regarding the impartial hearing officer's determination on pendency.

5. DEPARTMENT RESPONSE:

The regulation states that appeals from interim determinations are not permitted, "with the exception of a pendency determination." The regulation goes on to state that in an appeal from a final determination, "a party may seek review of any interim ruling,

decision or refusal to decide an issue." Therefore, the Department does not believe a regulatory revision is necessary.

6. COMMENT:

One commenter requests that State Review Officers be given explicit authority to grant an extension of time to file a request for review to allow parties to attempt to resolve their differences post-hearing decision.

DEPARTMENT RESPONSE:

The Department believes that negotiated resolutions often result in the best outcomes for parties and students with disabilities, and to that end the resolution period and settlement opportunities are potentially available during the impartial hearing process (8 NYCRR 200.5[j][1], [iii]) and again during the second tier administrative appeal process (8 NYCRR 279.10[e]). However, the Department also believes that permitting extensions prior to the filing of an appeal with the Office of State Review and an overreliance on the possibility of settlement can have negative consequences for students and school districts by causing delays in the administrative process, and ordering a remedy becomes more cumbersome when the administrative process is delayed by multiple rounds of settlement discussions that ultimately fail. On balance, the commenter's concern is not consistent with the overall objective of streamlining the administrative process. Therefore, the Department does not believe that revisions to the regulation are warranted. .

7. COMMENT:

One commenter issued comments disagreeing with the Department's reasoning in the Assessment of Public Comment to the Notice of Revised Rule Making published

in the State Register on June 29, 2016. Specifically, the commenter disagrees with the Department's response to Comment #11 and reiterates that the district should be required to send the parent a copy of an index to the record that is filed with the Office of State Review.

The commenter also disagrees with the Department's response to Comment #14 and argues that it is at odds with the prohibition against incorporation by reference. The commenter further argues that some impartial hearing officers refuse to accept briefs and/or restrict the length of briefs they will consider and requests that the Department advise impartial hearing officers that submission of and length of briefs should be at the discretion of the parties. In addition, the commenter asserts that the analysis of the issues in a brief to an impartial hearing officer is inherently different than on appeal. On appeal, the focus is on how the impartial hearing officer erred.

DEPARTMENT RESPONSE:

Initially, the comment regarding the Department's response to Comment #11 is beyond the scope of the proposed amendments because the amendments did not modify the requirement that districts file the hearing record with the Office of State Review but only clarified the contents of the record required to be filed. See Department's Response to Comment #11. In addition, while the Department encourages parties to make arrangements between themselves so that parents are made aware of the contents of the record filed with the Office of State Review, because parents should already be aware of the contents of the hearing record, the Department does not believe that any further revisions to the regulation are necessary.

With respect to the commenter's concern regarding the Department's response to Comment #14, the Department reiterates the prior response. See Department Response to Comment #14. In addition, while the commenter identifies the prohibition

on incorporation by reference, parties are discouraged from providing a lengthy recitation of relevant facts supporting an assertion and are instead encouraged to move directly to the argument with citation to the underlying facts in the record, as State Review Officers are required to conduct an independent review of the factual record and render an impartial decision thereon. With respect to the commenter's concern that impartial hearing officers do not always permit the submission of memoranda of up to 30 pages in length and request that the Department direct impartial hearing officers that submission of post-hearing memoranda should be at the discretion of the parties, such circumstances may provide a basis for a granting of an extension of time to serve and file an answer and supporting memorandum of law and should be addressed on a case-by-case basis.

With respect to the commenter's concern that the focus of legal analysis on appeal is different from that during the impartial hearing, as previously mentioned the expansion of the requirement for service of a notice of intention to seek review to all parties ensures that parties are aware, no later than 25 days after the date of the impartial hearing officer's determination, that the opposing party is planning to appeal and the subject of that appeal, so that the party may begin preparing a responsive pleading and memoranda.