TO: P-12 Education Committee

FROM: Sharon Cates-Williams

SUBJECT: 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.

DATE: June 6, 2016

AUTHORIZATION(S):

Summary

Issue for Discussion

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 decisions to a State Review Officer, make technical corrections to citations and references and expedite and otherwise facilitate the processing of petitions for review to State Review Officers?

Reason for Consideration

Review of Policy.

Proposed Handling

The proposed amendment has been revised after the public comment period and is presented for discussion before the P-12 Education Committee at the June 2016 Regents meeting.

Background Information

The proposed amendment is needed to correct citations and references, provide clarification of and update the procedures concerning appeals of impartial hearing officer decisions to a State Review Officer, and to expedite and otherwise facilitate the processing of petitions for review to State Review Officers. The proposed amendments were related to 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.

The proposed amendments to Part 279 were initially discussed 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. The oral and written public comments expressed a mixture of support and opposition to particular changes. An assessment of the public comments is attached. After analyzing the public comments, the Office of State Review recommends that many of the proposed amendments continue to be appropriate, but that several modifications to the proposed amendments should be made to address a number of valid public concerns that were identified. The revisions to the proposed amendments are as follows:

- clarifying that the scope of a State Review Officer's subject matter jurisdiction includes the provision of 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 Officers 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 with the proposed 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.

A Notice of Revised Rulemaking will be published in the State Register on June 29, 2016. The last day for receipt of public comment on the revised rulemaking will be July 29, 2016.

A copy of the proposed amendment is attached. Supporting materials for the proposed regulation are available upon request from the Secretary to the Board of Regents.

Timetable for Implementation

It is anticipated that the proposed amendment will be presented for adoption at the September 2016 Regents meeting, after publication in the State Register and expiration of the 30-day public comment period prescribed for State agency revised rule makings. If adopted 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 may[to] 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 Proposed Rule Making in the State Register on January 27, 2015 the State Education Department has received the following comments.

1. COMMENT:

Regarding the proposed regulation permitting parties to challenge the impartiality of a State Review Officer in their pleadings, a commenter states that, at the time of filing their pleadings, there is no way for a party to know which State Review Officer is assigned to the appeal and requests that parties be provided advance notice of such assignment and a means to challenge the State Review Officer's impartiality.

DEPARTMENT RESPONSE:

The Department agrees with the commenter's suggestion. Considering the 30-day period provided by federal and State law for the rendering of a final decision, while it would be ideal to have challenges to impartiality and responses thereto set forth in full in the parties' pleadings, it is not feasible to add additional notice and pleading mechanisms to an already robust pleading system. Additionally, the commenters are correct that parties cannot be expected to challenge the impartiality of a State Review Officer at the time of their pleading when, in some cases, the State Review Officer has not been assigned at the time the pleading has been executed. The proposed change has been withdrawn.

2. COMMENT:

Several commenters objected to the proposed amendment of language regarding the scope of review of impartial hearing officer determinations by State

Review Officers. In particular, one commenter objects to the removal of the word "program" without conforming the language of the regulation to the language used in Part 200 of the regulations of the Commissioner, which specifies that impartial hearings may be held on any matter relating to the provision of a free appropriate public education to a student with a disability. Another commenter asserts that the new wording could be interpreted to mean that parents are not permitted to seek review of a determination concerning a program recommendation.

DEPARTMENT RESPONSE:

The commenter is correct that Part 200 includes additional language not originally included with the proposed regulation; the proposed amendment has been revised to specify that State Review Officers may review determinations made by impartial hearing officers regarding the provision of a free appropriate public education to a student with a disability. With respect to the comment expressing a preference for the word program, the proposed amendment aligns the language used in the Part 279 regulations with that used in the Education Law and Part 200 regulations.

3. COMMENT:

One commenter objects to the proposed regulation extending the requirement for personal service of a notice of intention to seek review on the opposing party to school districts. Two commenters support the proposed regulation.

DEPARTMENT RESPONSE:

The proposed requirement is intended to ensure that responding parents are given some advance notice of a school district's possible imminent challenge of an impartial hearing officer's determination, especially in light of the proposed reduction in

time in which parties may answer a request for review or serve a cross-appeal from an impartial hearing officer's determination. The notice of intention to seek review consists of a one-page document, containing a simple statement that the petitioner intends to seek review of an impartial hearing officer's determination. The proposal places little additional burden on a school district but, without compromising the integrity of the appeal process, provides significant aid to parents who are, in general, less familiar with the process for appealing a due process decision.

4. COMMENT:

One commenter states that the proposed change requiring parties to file a notice of intention to cross-appeal an impartial hearing officer's decision within 30 days after the date of the impartial hearing officer's decision will harm parents by requiring filing of a notice prior to submission of a cross-appeal. Other commenters state that the 30-day notice provision provides insufficient time for an attorney to discuss an issue with a client and for the client to make an informed decision as to whether or not to cross-appeal. One commenter requests that the proposed change be revised to require service within 30 business days. Another commenter requests that at least 10 days be afforded to preparation and service of a notice of intention to cross-appeal.

DEPARTMENT RESPONSE:

Although the commenters' suggestions have been given careful consideration, no changes to the proposed regulation have been made due to the interest of ensuring that parties are aware of the intentions of the opposing party to cross-appeal the determination of an impartial hearing officer. Every potential responding party to an appeal is provided notice at the conclusion of the IHO's decision that an aggrieved party

may choose to appeal from an unfavorable IHO's decision. It is not reasonable for a party to assume that the losing party will accept the IHO's unfavorable decision and waive their right to appeal the loss. Consequently, a prevailing party must be chargeable with the knowledge that they may have to defend themselves in an appeal and that such defenses may require a cross-appeal of any determinations made by the IHO that were unfavorable to the prevailing party. Accordingly even a prevailing party is responsible to review the various aspects of an IHO's decision and any specific points therein that are unfavorable to the prevailing party. The party that plans to initiate an appeal must provide notice of the forthcoming appeal 25-days after the date of the IHO's decision. The cross-appealing party has five more days to consider filing a notice of intention to cross-appeal, and the deadline for the notice of intention to cross-appeal is set at 30 days after the IHO's decision in order to allow the prevailing party ample time to consider whether a notice of intention to cross-appeal may be necessary. Counsel for the responding party is not precluded from discussing options regarding a cross-appeal with their clients prior to receiving notice that the opposing party is seeking review of an impartial hearing officer's determination. Furthermore, nothing in the regulations requires that a party who serves a notice of intention to seek review or cross-appeal actually serve and file a pleading invoking the jurisdiction of a State Review Officer. Accordingly, a party may protect their right to cross-appeal by filing a notice of intention to cross-appeal and later choose not to cross-appeal any aspect of the impartial hearing officer's determination. Additionally, in accordance with prior practice of the Office of State Review, proposed subdivision (f) of section 279.2 provides State Review Officers with the discretion to excuse the failure to timely serve a

notice of intention to seek review or cross-appeal, such that that a failure to properly serve a notice of intention does not preclude review of an impartial hearing officer's determination where a pleading is timely filed.

5. COMMENT:

One commenter requests that the notice of intention to seek review or cross-appeal be required to include a binding statement of the issues to be raised. The commenter also requests that the notice of intention to seek review or cross-appeal should be required to include a statement that issues not identified will be deemed abandoned.

DEPARTMENT RESPONSE:

As described above, one of the purposes of the notice of intention to seek review or cross-appeal is to permit opposing parties to begin to contemplate a position to be stated in responsive pleadings, in light of the short timelines permitted by State and federal regulations for State Review Officers to issue decisions. Because the documents which invoke the jurisdiction of a State Review Officer are the request for review and cross-appeal (if any), it would not be appropriate to limit the ability of the parties to modify their positions at any time prior to the submission of these pleadings to a State Review Officer. It is expected that parties will fill out the case information statement in good faith.

6. COMMENT:

Regarding proposed subdivision (f) of section 279.2, providing State Review Officers with the discretion to excuse the failure to timely serve a notice of intention to seek review or cross-appeal, several commenters state that the provision appears to

give a State Review Officer the ability to review issues decided by an impartial hearing officer without either party seeking review.

DEPARTMENT RESPONSE:

No changes to the proposed regulation are required as the proposed regulation does not provide a State Review Officer with the authority to review an impartial hearing officer's decision without a request for review. Initiation of review of the decision of an impartial hearing officer is made by personal service and filing of a notice of request for review and a request for review, not by a notice of intention to seek review (8 NYCRR 279.4[a]), and a State Review Officer may only excuse a failure to timely serve a request for review "for good cause shown" (8 NYCRR 279.13). The proposed amendment serves to codify the long-standing practice of State Review Officers to excuse a party's failure to timely serve a notice of intention to seek review, so long as the party timely serves a request for review and the opposing party is not prejudiced. It does not permit a State Review Officer to address the decision of an impartial hearing officer in the absence of a request for review.

7. COMMENT:

Regarding the proposed change requiring parties to serve a case information statement with a notice of intention to seek review and cross-appeal, several commenters state that the proposal should be eliminated because it is unclear what purpose the provision serves and that, because the statement does not preclude parties from raising additional issues in their pleadings for review, the requirement does not serve a purpose, is unduly burdensome, and could lead to claims that issues not raised should be precluded from review.

DEPARTMENT RESPONSE:

The proposed case information statement provides each party with increased notice of the topics that will be raised in the pleadings for review which will provide the parties additional time to focus on reviewing the evidence in the hearing record and the impartial hearing officer's decision relative to those topics. In turn, this will provide the parties with an early opportunity to consider possible responsive arguments, especially given the strict timelines in which parties are required to answer and State Review Officers must issue decisions. The Department envisions a case information statement as a simplified version of the request for judicial intervention forms used in state courts, identifying common topics in due process litigation in a check-the-box format (i.e., Child Find, Independent Evaluation, Transition Services, Least Restrictive Environment, Pendency). Sample forms have been posted in draft format which are available on the website of the Office of State Review (www.sro.nysed.gov). Because the regulation clearly states that parties are not precluded from raising additional claims in their pleadings, any argument to the contrary is forestalled by the express terms of the proposed regulation. Although a check-the-box case information statement cannot sufficiently substitute for a pleading, it can quickly and efficiently communicate the major topics of the request for review or cross-appeal and thereby allow the parties to begin carefully considering their positions with respect to an impartial hearing officer's reasoning and decision well ahead of service of the request for review or cross-appeal. The Department has carefully considered the commenters' suggestion and believes no change is necessary.

8. COMMENT:

Regarding the proposed language regarding the filing of the contents of the hearing record, one commenter objects to the proposed amendment requiring the filing of copies of the due process complaint notice, the response to the due process complaint notice, any written interim orders, rulings, or decisions rendered by the impartial hearing officer, and any written post-hearing briefs or memoranda of law submitted to the impartial hearing officer. The commenter suggests that the proposed regulation imposes a burden on school districts and that it is outside the control of school districts to produce documents that are in possession of impartial hearing officers, who are independent contractors. The commenter suggests adding 10 days to the timeline for production of the hearing record and that the Office of State Review develop incentives and penalties for impartial hearing officers who do not comply.

DEPARTMENT RESPONSE:

The proposed regulation conforms the language in Part 279 with requirements already set forth in 8 NYCRR 200.5(j)(5)(vi), which provide that the additional documents added to the proposed regulation are a part of the hearing record. As school districts are already required to file these documents as a part of the hearing record, the proposed amendment does not impose any new or additional burden on school districts, and rather clarifies, when only referencing the appeal procedures of Part 279, that the hearing record includes those documents. With regard to the suggestion to add an additional 10 days for the school district to copy and file the hearing record, the 30-day timeline imposed by federal law for the State Review Officer to review the entire record and issue a written decision precludes the feasibility of that suggestion. As for the suggestion for developing incentives and penalties for impartial

hearing officers, Part 279 governs appeal procedures and it is beyond the scope of Part 279 to regulate the conduct of impartial hearing officers, who, by design, are to have no role in the appeals process. Accordingly, no change to the proposed regulation is necessary.

9. COMMENT:

Regarding the proposed regulation requiring that, when a party appeals from the interim decision of an impartial hearing officer, a board of education must file a copy of the entire hearing record developed as of the date of the interim decision with the Office of State Review, one commenter states that there is no objection to providing the hearing record; however, the commenter suggests an additional 10 days to file the hearing record and that the Office of State Review or the State Education Department implement incentives and penalties to encourage impartial hearing officers to timely submit hearing records to the district's board of education.

DEPARTMENT RESPONSE:

Upon receipt of a notice of intention to seek review, a district has 10 days to file the completed and certified record of the impartial hearing with the Office of State Review (8 NYCRR 279.9[b]). Pursuant to State regulations, the decision of an impartial hearing officer must include a list identifying each exhibit entered into the hearing record and must identify all other items entered into the hearing record (8 NYCRR 200.5[j][5][v]). The Department believes that the method by which the board of education of the district obtains a copy of a hearing record is best left as a discretionary matter, and hearing transcripts and copies of the documentary evidence entered into a hearing record and any interim decision should be readily available to a school district at

any time, as it is the entity responsible for appointing the impartial hearing officer and a party to the due process proceeding. If a board of education believes that rare circumstances are preventing it from submitting a record to the Office of State Review within the 10-day period, the board may need to seek assistance from the State Education Department on a case by case basis.

10. COMMENT:

Some commenters object to the proposed regulation clarifying the authority of a State Review Officer to take specific actions when a district fails to file a hearing record in a proceeding where the district is the respondent. One commenter suggests that compliance with filing the hearing record is not within control of school districts and that no sanctions should be imposed on school districts. One commenter acknowledges that a few districts may have problems filing hearing records but requests that any failure to file a hearing record be addressed by the State Education Department rather than by a State Review Officer. Another commenter suggests that the Office of State Review first issue reminders and warnings to districts and refer such matters to the State Education Department before striking the district's papers or making a finding that the district denied a parent's right to due process.

DEPARTMENT RESPONSE:

The Department believes that modification of the proposed regulatory language is not required. The proposed amendment applies only to those situations in which a district is a respondent and has been served with a notice of intention to seek review. Although as a discretionary matter, State Review Officers often provide warnings and direction to school districts when they have not complied with the regulation to timely

provide impartial hearing records or have filed only partial records, upon receipt of a notice of intention to seek review a district has 10 days to file the completed and certified record of the impartial hearing with the Office of State Review (8 NYCRR 279.9[b]). Therefore, a district has been provided case-specific notice of its obligation to file a hearing record as a part of the review process and State Review officers are not obligated to provide additional reminders and warnings. The provision of repeated notice and warning procedures in light of the federally imposed 30-day timeline is likely to compromise the Office of State Review's ability to process an appeal and render a decision in a timely manner. Additionally, the proposed regulation includes referral of the district's board of education to the State Education Department; however, as a State Review Officer is obligated under federal law to review the record of the impartial hearing and render a decision within the strict timeline, State Review Officers are given the discretion to consider other case-specific actions, such as striking a party's answer or cross-appeal if the action provides appropriate remediation of the violation under the circumstances.

11. COMMENT:

Some commenters suggest that, because the regulations require the district to provide the Office of State Review with a copy of the hearing record, the regulations should also require the district to provide the parent with a copy of the hearing record.

DEPARTMENT RESPONSE

The Department believes no change is necessary. The purpose of the requirement is that the Office of State Review has a full and complete copy of the hearing record from the regulated entity, the district, in order to render a decision. The

elements of the hearing record should have been provided to the parents prior to any appeal and a new requirement for a duplicate copy is unnecessarily burdensome. Parents are already entitled to one written or electronic verbatim copy of the record of the impartial hearing proceedings pursuant to 8 NYCRR 200.5(j)(3)(v) and 34 CFR 300.512(a)(4). Documentary evidence used by the district at the impartial hearing must already be disclosed to the parents five days prior to the impartial hearing (8 NYCRR 200.5[j][3][xii]; 34 CFR 300.512[a][3]). Parents already have access the documentary evidence that they themselves proffered at the impartial hearing.

12. COMMENT:

Two commenters object to the requirement that districts effectuate personal service on parents on the basis that personal service is both intrusive and unnecessary.

DEPARTMENT RESPONSE:

The Department has carefully considered the comments and determined that no change to the proposed amendment is warranted. Initially, personal service achieves the important purpose of ensuring that the opposing party has notice of the proceeding and a fair opportunity to respond, which is of utmost importance when safeguarding the rights of students with disabilities and their parents. Furthermore, nothing in the regulations precludes the parties from agreeing to waive personal service. In addition, the proposed language explicitly permits alternate methods of service if personal delivery cannot be made after diligent attempts.

13. COMMENT:

One commenter objected to the alternate service provision permitting service by affixing the request for review to the door of the parent's residence, asserting that permitting this method of service raises serious privacy concerns.

DEPARTMENT RESPONSE:

After review of the comment, the Department has determined to withdraw the affix-and-mail service option from the proposed amendments. While used in many areas of civil practice, the Department agrees with the commenter's concern that it may be insufficiently protective of the confidentiality rights of students with disabilities and their families to permit on an unmonitored basis.

14. COMMENT:

Regarding the proposed change to the timeline to serve an Answer (or Answer and Cross-Appeal), a number of commenters state that it is not reasonable to provide 40 days to serve a request for review and 5 business days to serve an Answer. One commenter indicates that the proposal will have the effect of preventing parents from answering and cross-appealing. Other commenters state that compliance with the timelines will be challenging and that the period to submit an answer should be extended beyond the 10 days provided by the current regulation.

DEPARTMENT RESPONSE:

The Department has carefully considered the commenters' suggestions. Initially, New York is the most permissive of all states operating a two-tier administrative hearing system under the IDEA in terms of allowing answers as of right. State Review Officers are required, regardless of the contents of an answer, to conduct an impartial review of the entire hearing record and render an independent decision based on the hearing

record, all within 30 days of the receipt of a request for review. The restriction in time to answer and cross-appeal is intended to ensure the ability of the Office of State Review to timely review all appeals within the strict 30-day period provided by federal and State law. Because the requirement for service of a notice of intention to seek review has been extended to all parties seeking to appeal from the determination of an impartial hearing officer, any respondent will be aware of a parties' intention to appeal from such determination within 25 days after the date of the determination of the impartial hearing officer. The respondent will thus have advance notice to expect a request for review and to begin preparing a response. To the extent the comments claim inequity in permitting petitioners 40 days to request review and respondents 5 business days to answer, they presuppose that respondents are precluded from drafting an answer at any time during the 40 days after the impartial hearing officer's decision prior to service of the request for review. 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. As discussed elsewhere, the modification of

the length of memoranda of law submitted to the Office of State Review to comport with the length of post-hearing briefs submitted to impartial hearing officers should significantly diminish the amount of work that must be done at the appellate stage of the proceedings.

15. COMMENT:

Regarding length of pleadings, some commenters suggest that the 10-page limitation for a request for review, answer, and answer with cross-appeal will prejudice parties and result in a deprivation of due process. One commenter supports the increase in the page limitation of a memorandum of law from 20 pages to 30 pages, but opposes the decrease of the page limitation for a request for review, answer, and answer with cross-appeal. Another commenter opposes the page limitation because it will require extra legal work in that memoranda of law will be required in cases that may not require them if the page limitation remained at 20 pages. Another commenter suggests that the total page limitation should be 40 pages and parties should be able to choose how to allocate it between pleadings. Another commenter supports the proposed changes to the page limitations.

DEPARTMENT RESPONSE:

The purpose of the proposed amendment is to clarify procedures for practice on State-level review of impartial hearing officer determinations for students with disabilities. After considering the commenter's suggestions, no changes have been made at this time. While the length of a request for review or answer has been shortened to 10 pages, from 20, the length of the memorandum of law accompanying the pleadings has concomitantly been increased to 30 pages, from 20, such that the

total length of permitted submissions has remained the same. The increase in the length of the memorandum of law now aligns it with the length of the memoranda which may be accepted by impartial hearing officers (8 NYCRR 200.5[j][3][xii][g]). The additional guidance provided regarding the expected form of pleadings in proposed section 279.8(c) is intended to streamline the process of drafting pleadings and encourage parties to make legal arguments in their memoranda of law, in accordance with standard legal practice.

16. COMMENT:

Some commenters oppose the proposed regulation eliminating the requirement that pleadings set forth the parties' allegations in numbered paragraphs and adding a requirement that a request for review, answer, or answer and cross-appeal number and set forth each distinct issue separately, and suggest that the proposed regulation will make it more difficult for parties to respond to allegations. One commenter supports the proposed regulation. One commenter notes that the existing regulations have resulted in "cumbersome pleadings with multiple allegations in one paragraph" and suggests changing the regulation to require "clear, concise, and separately numbered paragraphs."

DEPARTMENT RESPONSE:

The Department has reviewed the commenters' suggestion and believes no change is required. The proposed regulation requires that pleadings include "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," which more closely follows the existing requirement that a petition specify the reasons

for challenging the impartial hearing officer's decision and identify the findings, conclusions, and orders to which exceptions are taken (8 NYCRR 279.4[a]). Additionally, the proposed change allows more flexibility to attorneys as they are not prohibited from separately numbering each factual allegation if they believe it will assist them in creating a clear and concise statement identifying the specific issues presented on appeal.

17. COMMENT:

Some commenters oppose the proposed regulation requiring the filing of electronic copies of all pleadings and memoranda of law, request clarification of the proposed regulation as the regulations do not permit electronic filing, and also note that the regulations should provide for an exception for pro se parents.

DEPARTMENT RESPONSE:

The purpose of the proposed regulation is to improve the efficiency of the Office of State Review by providing the office with a searchable electronic format for pleadings. The regulations do not permit filing by facsimile or electronic mail and it was expected that electronic copies of pleadings would be filed on a disk as is the current practice with the filing of electronic copies of transcripts. The Department has considered the commenters' concerns over the unintended potential burden of requiring parties to file electronic copies of pleadings on a large variety of storage media. Additionally, while the Department has considered permitting filing by electronic mail, which would alleviate some of the commenters' concerns, Education Law § 2-d(3)(b)(3) requires that if electronic transmissions are utilized, encryption and firewall protocols must be set up between the sending and receiving party, and the Department is not

currently in a position to establish such protocols in the short term. Accordingly, the Department, upon weighing the benefit of efficiency in the practice procedures before the Office of State Review and the commenters' concerns, has removed the proposed change at this time and will study the issue further.

18. COMMENT:

Regarding the continuation of the regulation requiring that all pleadings filed with the Office of State Review be verified, two commenters state that the verification requirement is unnecessary to an appeal process and is burdensome on parents because it requires that attorneys have their clients appear in person to review the pleading and sign an affidavit of verification.

DEPARTMENT RESPONSE:

As indicated by the commenters, the proposed regulation regarding verification is a continuation of the current regulation requiring the verification of all pleadings, that is, a declaration under oath before a notary public or commissioner of deeds that the facts alleged in the pleading are true. By comparison, all courts of record in New York continue to require that pleadings by parties set forth true statements (see 22 NYCRR § 130-1.1[a]), and the Department believes that eliminating the sole requirement in appeals before the Office of State Review calling for similar accountability of parties to state accurate facts in their pleadings is not justified. Furthermore, while not frequently resorted to by State Review Officers, another purpose served by verification is that a pleading may be given the same force and effect as an affidavit if necessary; that is, as evidence of the matters sworn to in the pleading, especially in matters where no other similar evidence is available in the hearing record, but the parties are in agreement as

to the facts. Thus verified pleadings provide the opportunity to increase efficiency of the process through adoption as stipulated fact. While the commenters express concern that the requirement is overly burdensome, the Office of State Review has not received any requests from attorneys for parents requesting that the verification requirement be waived on the basis of hardship. In addition, State Review Officers have on occasion excused a failure to timely file an affidavit of verification and permitted a party to file the verification subsequent to submission of their pleading.

19. COMMENT:

Several commenters asserted that the proposal to require parties to serve an answer to a cross-appeal within 5 days could lead to confusion, since parties may serve an answer to a request for review within 5 business days.

DEPARTMENT RESPONSE:

The proposal was intended to decrease the time period in which to answer a cross-appeal to ensure compliance with State and federal timelines for issuing a decision, as responsive pleadings filed by mail have previously been received by the Office of State Review after a decision has been issued. Nonetheless, upon review the Department agrees that the distinction could lead to confusion among parties, and has revised the proposed amendment to provide 5 business days to answer a cross-appeal.

20. COMMENT:

Several commenters objected to the time provided to reply to an answer. In particular, several commenters expressed concern that the time to reply might expire before an answer served by U.S. mail is received.

DEPARTMENT RESPONSE:

The three-day timeline in which a reply must be served is not modified by the proposed amendments to section 279.6. In general, the federal 30-day timeline necessitates a short period of time to serve a reply and no change to section 279.6 is warranted. To the extent two commenters expressed concern that the time to reply might expire before an answer is received, the proposed amendments of section 279.11 governing the computation of service timelines specifically clarified that, if an answer or answer with cross-appeal is served by mail, an additional three days shall be added to the computational period in which a reply must be served. The Department believes that additional time is not warranted beyond the three-day period set forth in section 279.6 when combined with the three-day exception for mailing.

21. COMMENT:

Two commenters support the proposed regulation permitting a reply to address any claims raised for review by an answer or cross-appeal that were not addressed in the request for review.

DEPARTMENT RESPONSE:

Because the comment is supportive in nature, no response from the Department is required.

22. COMMENT:

Regarding the proposed regulation that provides a State Review Officer with the authority to seek additional oral testimony or documentary evidence, a commenter states that additional provisions should be added to clarify the manner in which parties

may submit additional evidence and the standard that will be applied by a State Review Officer in determining whether to accept such evidence.

DEPARTMENT RESPONSE:

The proposed regulation does not provide parties with a right to submit additional evidence, but rather authorizes a State Review Officer to seek additional evidence if it is necessary to render a decision on an appeal (8 NYCRR 279.10[b]), which in turn reflects the federal standard regarding additional evidence (34 CFR 300.514[b][2][iii]). The manner in which additional evidence is sought depends upon the circumstances of each case and, therefore, is in the discretion of the State Review Officer; however, it may include remand to an Impartial Hearing Officer or a hearing before a State Review Officer consistent with the requirements of section 8 NYCRR 200.5(j)(3) (8 NYCRR 279.10[b], [c]). No change to the proposed language is required.

23. COMMENT:

Regarding the proposed regulation requiring that requests for extensions be postmarked no later than one business day prior to the date on which the time to answer or reply will expire, some commenters state that, without allowing for electronic filing of an extension request, the timeframe could prevent a party from receiving a response to a request for extension from the Office of State Review until after the party's deadline to serve the relevant pleading has already passed. One commenter requests that the proposed regulation be removed because it restricts the parties' ability to review and negotiate the resolution of proceedings.

DEPARTMENT RESPONSE:

The Department believes that revision of the proposed regulation is not necessary. The proposed regulation does not change the requirement that requests for extension be postmarked but merely requires that the request be submitted one day before the time to answer or reply expires, rather than on the day that the time to answer or reply expires as provided in the current regulations. Additionally, although under current office practice the Office of State Review reviews requests for extension submitted via facsimile, the physical copy of the request for an extension sent by mail is the official filing. The proposed regulation does not impact on the Office of State Review's ability to review requests for extension that are submitted via facsimile provided that those requests are also submitted via mail. If a party is concerned that they may not receive a response to a request for an extension in time and require an alternative means of making that request or an expedited decision on that request, they are encouraged to contact the Office of State Review to seek assistance on how to proceed. To the extent that one commenter indicates that the requirement that a request for extension be postmarked one day prior to the time to answer or reply would expire restricts the parties' ability to review and negotiate the resolution of proceedings, it is unclear why a party would not know whether an extension is necessary one day before a pleading is due and accordingly no change to the proposed regulation is necessary.

24. COMMENT:

Regarding the proposed regulation identifying good faith settlement negotiations as good cause for a request for an extension of time to submit an answer or reply, one commenter supports the proposed regulation.

DEPARTMENT RESPONSE:

Because the comment is supportive in nature, no response from the Department is required.

25. COMMENT:

Regarding the proposed changes to the service and filing requirements for pleadings, some commenters state that the requirement that pleadings be filed with the Office of State Review within two days after the date of service provides insufficient time for a party to file a pleading in the absence of an electronic filing option.

DEPARTMENT RESPONSE:

The requirement that pleadings be filed with the Office of State Review within two days after the completion of service is consistent with prior regulations; however, the proposed regulations clarify that the filing of a pleading with the Office of State Review is complete upon receipt of the pleading by the Office of State Review (8 NYCRR 279.8[f]). The current regulations do not identify when filing of a pleading is complete; however, under the current and proposed regulations all pleadings must be filed with the Office of State Review within two days after service is complete. Under current practice, pleadings have been accepted as timely filed provided they are postmarked within the two day period after timely service of the pleading; however, it is possible that, due to delays in mailing, pleadings may actually arrive at the Office of State Review at the conclusion or beyond the 30-day federal timeline for rendering a decision, and a decision may therefore be rendered without consideration of such pleadings in order to comply with federally-imposed timelines. The proposed language was intended to prevent such occurrences. However, in light of the commenters' concerns, the

proposed regulation that the filing of a pleading is complete upon receipt by the Office of State Review has been removed. The result is that, in the event a pleading arrives at the end of the 30-day review period for issuing a final decision, due to federal law constraints, it may not be reviewed in the absence of a specific request by a party to extend the review period and the decision due date.

26. COMMENT:

One commenter objected to the proposed change from "petition" to "request for review." The commenter states that the term "request for review" is confusing and that there is no reason for the proposed change.

DEPARTMENT RESPONSE:

The proposed change conforms the language used in the regulations governing practice before the Office of State Review to the terminology used by both State and federal regulations, which specify that the timeline in which a State Review Officer must issue a decision is measured by reference to "the receipt of a request for review." Additionally, the proposal was based in part upon experience of staff of the Office of State Review with pro se parents seeking assistance from the Office of State Review via telephone, during which such parents appeared to be confused more often by the term "petition" rather than "request for review" of an impartial hearing officer's decision.

27. COMMENT:

One commenter suggested that the proposal to designate periods of time "after" the date of an impartial hearing officer's determination, rather than "from" the date of the decision, was unclear. The commenter expresses concern that use of the word "after" implies that the timeline begins the day after the date of the impartial hearing officer's

decision. The commenter also notes that the regulations use both "from" and "after" when referencing the period within which an action must be taken.

DEPARTMENT RESPONSE:

The use of the word "after" was intentional, because as the commenter correctly notes, it implies that the timeline begins the day after the date of the impartial hearing officer's decision. In keeping with standard legal practice, the computation of days excludes the day on which an event occurs in making the reckoning of time within which an act is required to be done (see General Construction Law § 20). All remaining instances of "from" have been amended to read "after."