

REGULATIONS OF THE COMMISSIONER OF EDUCATION

PART 279 (Effective January 1, 2017)

PRACTICE ON REVIEW OF HEARINGS FOR STUDENTS WITH DISABILITIES

§ 279.1 Scope of Part.

- (a) Review by a State Review Officer of a determination made by an impartial hearing officer concerning the identification, evaluation, 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 this Part shall govern the practice on such reviews.
- (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, 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 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 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; or
 - (iii) such officer has at any time been personally involved in any aspect of the identification, evaluation, 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) A party, as described in subdivision (c) of this section, who intends 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 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, educational placement, provision of a free appropriate public education, or manifestation determination of (name of student with a disability). 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 served upon the opposing party no later than 25 days after the date of the decision of the impartial hearing officer sought to be reviewed.
- (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 of request for review.

Each request for review must contain the following notice:

Notice:

You are hereby required to appear in this review and may answer the allegations contained in this 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 provide that an answer to the request for review may be served upon the petitioner, or if the petitioner is represented by counsel, upon such counsel, within 5 business days after the service of the request for review, and 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) Request for review. A party seeking review (petitioner) shall personally serve a notice of request for review and a request for review upon the opposing party (respondent) within 40 days after the date of the decision of the impartial hearing officer sought to be reviewed. The request for review 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 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.
- (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 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.
- (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 Answer.

- (a) The respondent may, within 5 business days after the date of service of the request for review, answer the same, either by concurring in a statement of facts with petitioner or by service of an answer. 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) An answer, together with proof of service 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 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 a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by a State Review Officer, except a reply 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 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) 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 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 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 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, 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 the trustees, 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 section or the provisions of sections 279.4, 279.5, and 279.6 of this Part may be rejected in the sole discretion of 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) 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.
- (b) the 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 30 pages in length; a 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.
- (c) The request for review, answer, 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 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, 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 request for review. 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 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. A State Review Officer may seek additional oral testimony or documentary evidence if he or she determines that such additional evidence is necessary. The procedures for hearings before a State Review Officer for the purpose of taking additional evidence shall be consistent with the requirements of section 200.5(j)(3) of this Title.
- (c) 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 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 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 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 request for review was made upon the respondent shall be excluded in the computation of the 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, three days shall be added to the period in which an answer to the cross-appeal or a reply may be served and filed pursuant to this Part. If the last day for service of 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 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 request for review to a State Review Officer must be served and filed within the timelines specified in section 279.4 of this Part. A State Review Officer may dismiss sua

sponte a late request for review or, in his or her sole discretion, may excuse a failure to timely serve or file a request for review within the time specified for good cause shown. The reasons for such failure shall be set forth in the 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 request for review by the State Review Officer.