



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

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**TO:** District Superintendents  
Superintendents of Schools  
Superintendents of State-Operated Schools  
Organizations, Parents and Individuals Concerned with Special Education  
Early Childhood Direction Centers  
Impartial Hearing Officers  
New York State Community Dispute Resolution Centers  
Commissioner's Advisory Panel for Special Education Services  
SETRC Project Directors and Professional Development Specialists  
Independent Living Centers

**FROM:** Kathy A. Ahearn

**SUBJECT:** Amendment to Part 279 of the Regulations of the Commissioner of Education

On January 1, 2004 amendments to Part 279 of the Regulations of the Commissioner became effective. Part 279 pertains to the practice on review, by a State Review Officer, of hearings for students with disabilities.

On June 22, 2004, the Board of Regents approved an amendment to conform section 279.12 of the Regulations of the Commissioner of Education to the federal Individual with Disabilities Education Act (IDEA) and 34 CFR section 300.511, by repealing a provision that authorized a State Review Officer to extend the timelines for issuing a decision, without the request of a party, to allow additional time to review an extensive record on appeal. A State Review Officer continues to have the authority to grant specific extensions of time in which to reach a final decision at the request of either party. The June 22, 2004 amendment to section 279.12 was adopted as an emergency measure and became effective on June 25, 2004. It is anticipated that the emergency amendment to section 279.12 will be presented to the Board of Regents for adoption on a permanent basis at the September 9-10, 2004 Regents meeting. A copy of Part 279, as amended, is attached.

To ensure dissemination to appropriate individuals within school districts, I ask Superintendents to please share this memorandum with individuals, such as directors of special education, school psychologists, chairpersons of Committees on Special Education, guidance counselors and directors of pupil personnel. If you have any questions regarding these regulatory changes, please contact the Office of Counsel (518) 474-6400.

Language repealed by the June 22, 2004 amendment is in brackets [ ]

**PART 279 (As amended, effective June 25, 2004)**

**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 placement 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 provisions of Parts 275 and 276 of this Title 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 4402(2) of the determination of an impartial hearing officer in a hearing related to the identification, evaluation, program or placement 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 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

(iii) such officer has at any time been personally involved in any aspect of the identification, evaluation, program or 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.

#### § 279.2 Notice of intention to seek review.

(a) The parent or person in parental relationship of a student with a disability who intends to seek review by a State Review Officer of the State Education Department of the decision of an impartial hearing officer shall serve upon the school district, in the manner prescribed for the service of a petition pursuant to section 275.8(a) of this Title, 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 placement 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 the 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 the original exhibits accepted into evidence at the hearing and an index to the exhibits must be filed by the Board of Education with the Office of State Review of the New York State Education Department within 10 days after service of this notice.

(b) The notice of intention to seek review shall be 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 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision 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 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.

### §279.3 Notice with petition.

Each petition must contain the following notice:

Notice:

You are hereby required to appear in this review and to answer the allegations contained in this petition. 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 from the Office of State Review of the New York State Education Department, 1450 Western Avenue, Albany, NY 12203.

Please take notice that such regulations require that an answer to the petition must be served upon the petitioner, or if petitioner is represented by counsel, upon such counsel, within 10 days after the service of the petition for review, and that a copy of such answer must, within 2 days after such service, be filed with the Office of State Review of the New York State Education Department, 1450 Western Avenue, Albany, NY 12203.

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 for review. The party seeking review shall file with the Office of State Review of the State Education Department the petition for review, including any written argument, memorandum of law, and additional documentary evidence, and the notice of intention to seek review where required, together with proof of service of a copy of such documents upon the other party to the hearing. No filing by facsimile transmission shall be permitted. The petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall briefly indicate what relief should be granted by the State Review Officer to the petitioner.

(b) 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 answer. 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. No filing by facsimile transmission shall be permitted.

§ 279.5 Service of answer.

The respondent shall, within 10 days after the date of service of a copy of the petition, 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 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. No filing by facsimile transmission shall be permitted.

§ 279.6 Additional pleadings

No pleading other than the petition or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer. Such reply shall be served and filed within three days after service of the answer. No filing by facsimile transmission shall be permitted.

§ 279.7 Verification.

All pleadings shall be verified. The petition shall be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or 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 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 trustee or board of trustees or 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. A reply shall be verified in the manner set forth for the verification of an answer.

§279.8 Pleadings and Memoranda of Law.

(a) Form of pleadings and memoranda of law. Documents that do not comply with the requirements listed in this subdivision may be rejected in the sole discretion of the 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, text double-spaced (block quotation and footnotes may be single-spaced) with typed material in minimum 12 point type (footnotes minimum 10 point type) and not exceeding 6 1/2 by 9 1/2 inches on each page;

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

(4) pages consecutively numbered and fastened together;

(5) the petition, answer, or memorandum of law shall not exceed 20 pages in length; the reply shall not exceed 10 pages in length. Extensive footnotes may not be used to circumvent page limitations; and

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

(b) The petition, answer, reply and memorandum of law shall each reference the record on appeal, identifying the page number in the hearing decision and transcript, the exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

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

(a) It shall be the responsibility of the board of education, whether it is the petitioner or the respondent, to file with the Office of State Review of the State Education Department, the decision of the impartial hearing officer, a bound copy of the written transcript before the impartial hearing officer, including a word index for the written transcript, as well as an electronic transcript, and the original exhibits accepted into evidence at the hearing and an index to the exhibits, together with the petition or answer submitted on behalf of such board. The board of education shall submit a certification with the record, that the record submitted is the complete hearing record.

(b) Where the board of education is the petitioner, such board shall file the record before the hearing officer together with the petition. Where the board of education is the respondent, such board shall file the record before the hearing officer within 10 days after the date of service of the notice of intention to seek review. A State Review Officer may dismiss, at his or her discretion, an appeal by the board of education when a complete hearing record is not filed within such timelines.

#### §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 State Review Officer may seek additional oral testimony or documentary evidence if the State Review Officer determines that such additional evidence is necessary. Hearings 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(i)(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(1) of this Title shall apply exclusively in such appeals. A determination of pendency pursuant to subdivision 4 of section 4404 of the Education Law shall be made in writing, in the first instance, by the impartial hearing officer and may be reviewed by a State Review Officer.

(d) Interim determinations. Appeals from an impartial hearing officer's ruling, decision 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 State Review Officer from a final determination of an impartial hearing officer, a party may seek review of any interim ruling, decision or refusal to decide an issue.

(e) Extensions of time to answer or reply. No extension of time to answer the petition or to reply to an answer will be granted by the State Review Officer unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the Office of State Review, must be postmarked not later than the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer 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.

The date upon which personal service of the petition was made upon the respondent shall be excluded in the computation of the 10-day period in which service of the answer must be made. If the answer has been served by mail upon petitioner or petitioner's counsel, the date of mailing and the two days subsequent thereto shall be excluded in the computation of the three-day period in which a response to additional documentary evidence served with the answer may be served and filed by the petitioner. 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 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 timelines in which the State Review Officer must issue a decision may be extended once for a period not to exceed 60 days from the date upon which the decision was originally due to be

issued upon request by the Office of State Review and upon consent of both petitioner and respondent for the purpose of allowing a State Review Officer sufficient time to review an extensive record on appeal. For purposes of this subdivision, an extensive record on appeal is a record that contains more than 1,000 pages of transcript. The timeline for issuing a decision may also be extended by the Office of State Review: (i) for a period of time equal to the additional time that the Office of State Review has granted respondent and petitioner for the filing of an answer and reply, and/or (ii) in appeals in which the petitioner is the board of education, for the period of time during which the hearing record on appeal filed pursuant to section 279.9 of this Part is not complete.

(c)] 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, 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.

#### §279.13 Limitation of time for initiation of appeal.

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

#### §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 by the State Review Officer.