
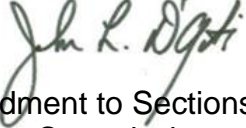




THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

TO: Professional Practice Committee
Higher Education Committee

FROM: Douglas E. Lentivech 
John L. D'Agati 

SUBJECT: Proposed Amendment to Sections 59.4 and 80-1.3 of the Regulations of the Commissioner of Education Relating to Citizenship

DATE: May 9, 2016

AUTHORIZATION(s):  

SUMMARY

Issue for Decision

Should the Board of Regents amend Sections 59.4 and 80-1.3 of the Regulations of the Commissioner of Education relating to citizenship for the professions and teaching and educational leadership service?

Reason(s) for Consideration

Review of Policy and Case Law.

Proposed Handling

The proposed amendment will be presented to the Joint Committees of Professional Practice and Higher Education as an action item at the May 2016 Regents meeting.

Procedural History

A Notice of Proposed Rule Making was published in the State Register on March 9, 2016. Attachment A is a copy of the proposed amendment. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

Federal law, 8 U.S.C. § 1621[a], [d], prohibits states from issuing any state or local public benefit including professional licenses to any individual that is not a qualified alien [as defined in 8 U.S.C. §1641][,a nonimmigrant under the Immigration and Nationality Act [[8 U.S.C. §1101](#) et seq.], or an alien who is paroled into the United States under section 212(d)(5) of such Act [[8 U.S.C. §1182\(d\)\(5\)](#)] for less than one year. **However, since 1996 this federal *prohibition does not apply if the state enacts a state law expressly authorizing the licensing of such undocumented aliens.***

Currently, individuals granted deferred action childhood arrivals (DACA) relief under Federal Executive Order and are allowed to continue to be lawfully present in the United States without fear of deportation are not eligible for State licensure in the professions or those seeking their professional teaching certification under the Regulations of the Commissioner. However, New York enables hundreds of thousands of undocumented students, including DACA students, to receive education through the state's public school system and graduate with New York high school diplomas. Yet their futures historically have been circumscribed by current federal law restricting the issuance of professional licenses based on immigration status and State laws and/or regulations that imposed citizenship requirements for professional licensing in certain professions and for certification as a teacher or school leader. These young people generally derive their immigration status from their parents. If their parents are undocumented, most of these individuals have no mechanism to obtain legal residency, even if they have lived most of their lives in the United States.

However, the case law on the citizenship requirements for State licensure has been evolving over the past decade and recent case law dictates that it is time for a change.

State Law and the Dandamudi Case

Prior to 2012, New York State law prohibited individuals from receiving licenses in 13 of the Title VIII professions (including medicine, pharmacists, engineers, etc.) unless the individual was a U.S. citizen or permanent lawful resident. These statutes were struck down by the U.S. Second Circuit Court of Appeals as unconstitutional in [Dandamudi v Tisch](#), 686 F.3d 55 (2012) and in violation of the Equal Protection Clause of the U.S. Constitution.

- Following this decision, the Department revised its application forms for all licensed professions under Title VIII of the Education Law to require any applicant, including temporary immigrant aliens, to become licensed provided

they fall within one of the immigration statuses set forth in 8 USC § 1621. This was done to comply with that federal law.

The Department also advanced Regents priority legislation last session that would repeal the statutes in the 13 professions that were declared unconstitutional by the Second Circuit and expressly authorize individuals in DACA status to be licensed in all of the professions under Title VIII of the Education Law.

Recent case law described below appears to authorize the Board of Regents to fulfill the requirement for an exception to the federal prohibition against professional licensure of undocumented aliens under 8 U.S.C. § 1621 [d] based on State law enacted after August 22, 1996 by using their broad authority to adopt regulations governing licensure in the Title VIII professions (Education Law §§6501 and 6506) and the certification of teachers and school leaders (Education Law §§3001 and 3003) to expressly authorize the licensure of undocumented aliens in regulation, as opposed to State statute.

Vargas Decision (2015 WL 3479561)

In June 2015, the Appellate Division, Second Department issued a decision on whether the federal law (8 U.S.C. § 1621[a], [d]) prohibits an alien in DACA status from receiving bar admission. The U.S. Department of Justice submitted an amicus brief opposing the applicant's admission to the bar based on the federal law. The NY Attorney General submitted a brief arguing that the license should be issued despite the federal law. The Second Department stated that "a narrow reading of 8 USC § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 USC § 1621(d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621(a), unconstitutionally infringes on the sovereign authority of the state under the Supremacy Clause (10th Amendment) to divide power among its three coequal branches of government.

Further, the court held, in light of this State's allocation of authority to the Judiciary to regulate the granting of professional licenses to practice law (see Judiciary Law § 53[1]), that the Judiciary may exercise its authority as the state sovereign under the Supremacy clause to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York. As a result, the Court ordered that Vargas receive his law license, provided he met certain other licensure requirements.

While the Vargas decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court's reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution. In concluding that requiring the State Legislature to have enacted a State law after August 22, 1996 authorizing professional licensure in order to qualify for

the exception under 8 USC §1621(d) would be unconstitutional, the Second Department ruled that:

“[W]e hold that the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation is not a legitimate concern of the federal government.”

The Board of Regents, as the head of the State Education Department, has been granted broad authority under Education Law §§207 and 6506 to supervise the admission to the professions under Title VIII of the Education Law, including the authority to adopt rules related thereto. The Commissioner of Education and the Department have similarly been granted broad authority under Education Law §6507 to administer the admission of the professions, and to adopt regulations related thereto subject to approval by the Board of Regents pursuant to §207. In the case of teaching, Education Law §3001(3), which itself has been amended subsequent to 1996, explicitly authorizes the Commissioner to adopt regulations exempting alien teachers from the citizenship requirement and permitting their employment. Collectively, these statutes provide the Board of Regents and the Commissioner with the requisite authority to adopt regulations on this subject.

In addition, the New York Court of Appeals in the Matter of Aliessa v. Novello, (96 NY2d 418), a case involving Medicaid benefits for legal aliens, relying upon the Supreme Court decision in Graham v. Richardson, ruled that the federal law impermissibly authorizes states to disqualify otherwise eligible aliens from Medicaid—indicating that Congress cannot authorize a violation of equal protection.

Based on the rationale in the above-referenced cases, the Department recommends that the Board of Regents use its broad authority over the granting of licenses in the Title VIII professions and the certification of teachers to promulgate regulations expressly authorizing otherwise qualified aliens who are not unlawfully present in the U.S. and who meet all other licensure requirements except citizenship to become licensed or certified.

Following the 45-day public comment period required under the State Administrative Procedure Act, the Department received multiple comments on the proposed amendment, many supporting the proposed changes. Attachment B contains an Assessment of the Public Comment received.

Recommendation

Department staff recommends that the Board of Regents take the following action:

VOTED that section 59.4 is repealed and that new sections 59.4 and 80-1.3 be added to the Regulations of the Commissioner of Education as submitted, effective June 1, 2016.

Timetable for Implementation

If adopted at the May meeting, the proposed amendment will become effective as a permanent rule on June 1, 2016.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 210, 215, 305, 3001, 3003, 3009, 6504 and 6506 of the Education Law.

1. Section 59.4 of the Regulations of the Commissioner of Education is repealed a new section 59.4 is added to the Regulations of the Commissioner of Education, effective June 1, 2016, to read as follows:

§59.4 Citizenship

Notwithstanding any other provision of this Title to the contrary, no otherwise qualified applicant shall be denied a license, certificate, limited permit or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC §1621 or any other applicable federal law. Provided, however that pursuant to 8 USC §1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to individuals granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.

2. Section 80-1.3. of the Regulations of the Commissioner of Education is repealed and a new section 80-1.3 of the Regulations of the Commissioner of Education is added, effective June 1, 2016, to read as follows:

§80-1.3 Citizenship.

(a) Notwithstanding any other provision this Part to the contrary, no otherwise qualified applicant shall be denied a certificate under this Part, or registration pursuant

to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC §1621 or any other applicable federal law. Provided, however that pursuant to 8 USC §1621(d), no otherwise qualified alien shall be precluded from obtaining a professional license under this Title if an individual is not unlawfully present in the United States, including but not limited to applicants granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.

(b) The requirements of subdivision (a) of this section shall not preclude a candidate who is not a citizen of the United States from qualifying for a permit or other authorization to teach in the public schools of New York State, in accordance with specific provisions of the Education Law that authorize such teaching service by a candidate who is not a citizen of the United States, such as section 3005 of the Education Law.

8 NYCRR §§59.4 and 80-1.5

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on March 9, 2016, the State Education Department (SED) received the following comments:

1. COMMENT:

Commenter supports the proposed amendment because a person's education and competence should be the most important criteria for licensing, not citizenship.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements.

2. COMMENT:

Commenter expressed full support for the proposed regulation. This is the right thing to do for New York and New Yorkers, both economically and morally. I look forward to this rule going into effect.

DEPARTMENT RESPONSE:

SED agrees with this comment.

3. COMMENT:

Dreamers should be allowed to become licensed teachers in our state. If they completed their schooling and have the skills for the job their immigration status should not impede them from becoming employed by the DOE.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can be employed in this State.

4. COMMENT:

Several commenters support granting licenses to individuals in the Title VIII professions and the certification of teachers and educational leaders to candidates who meet all other requirements except citizenship. These candidates are often bilingual or multilingual and can assist New York State in addressing the current shortage of qualified bilingual teachers, service providers and school leaders. Based on our experience working with immigrant families in New York City public schools, the shortage of bilingual educators often precludes the families of ELLs from exercising their right to a bilingual education under Part 154 of the Commissioner's Regulations. For immigrant families whose children have disabilities, the shortage of bilingual psychologists, speech therapists, social workers, occupational therapists, and physical therapists often results in their children being denied a free appropriate public education. We frequently hear from families whose children require bilingual evaluations that their children experience longer than the legally mandated wait times for evaluations and/or are inappropriately evaluated in English. We also hear from many families whose children require bilingual services, as mandated by their Individualized Education Programs (IEPs), that their children are receiving these services in English, because of the shortage of bilingual service providers.

In addition, bilingual and multilingual individuals embarking on careers in education and the Title VIII professions are likely to have a deep personal understanding of the challenges that immigrant students and ELLs face. They are

therefore uniquely qualified to provide culturally responsive services and supports to the growing ELL and immigrant student population across New York State.

Finally, for New York State students who are not citizens, the proposed amendment will open doors to potential postsecondary opportunities, which we believe will help promote their engagement in school and contribute to lower high school drop-out rates.

DEPARTMENT RESPONSE: SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can be employed in this State.

5. COMMENT:

Commenter supports the granting of licenses to individuals in the Title VIII professions and the certification of teachers and educational leaders to non-citizens who are not unlawfully present in the U.S. and who meet all other licensure or certification requirements. We strongly believe this amendment will aid in addressing the projected physician shortage gap, increase the diversity of our clinical and research workforce, and most importantly provide an opportunity to a talented group of young immigrants to fulfill their passion and dreams.

DEPARTMENT RESPONSE:

SED agrees with this comment.

6. COMMENT:

The YWCA is dedicated to eliminating racism, empowering women, promoting peace, justice, freedom and dignity for all. We are a dynamic community united in our passion for racial justice and economic empowerment. As a national movement beginning in 1858 we are now the largest and oldest women's organization in the United

States. Nationally we have over 2 million participants and 1,300 locations. In New York State we have 21 local associations from New York City to Buffalo. In small towns and major cities we offer women of all ages leadership opportunities, job training, life skills, support groups, shelter for safety and recovery, wellness resources, and programs focused on empowering women and girls.

We support granting licenses to individuals in the Title VIII professions and the certification of nurses, teachers and educational leaders to qualified candidates who meet all other requirements except citizenship. These candidates are New Yorkers who come from diverse backgrounds, are often bilingual or multilingual, and can assist New York State in addressing the current shortage of qualified bilingual teachers, service providers and school leaders.

Finally, for New York State students who are not citizens, the proposed amendment will open doors to potential post-secondary opportunities, which we believe will help promote their engagement in school and contribute to lower high school drop-out rates.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can receive potential post-secondary opportunities.

7. COMMENT:

I support this amendment because it will give me security and assurance that all my hard work will pay off, and that I will be allowed to give back to my community and the people of New York State by becoming a Primary Care Physician for underserved communities. I deeply care about New York, its community, and other passionate students like me, I respectfully request that you approve the proposed amendment to of

sections 59.4 and 80-1.3 of Title 8 NYCRR, allowing dedicated students to get a professional licensing after duly completing their academic requirements. Please keep in mind that this amendment will be helping the people that want to contribute to this State and its residents, people like me who have spent most of their lives in New York, and that consider themselves New Yorkers.

DEPARTMENT RESPONSE:

SED agrees with this comment.

8. COMMENT:

Several commenters and advocacy groups support granting licenses to individuals in the Title VIII professions and the certification of nurses, teachers and educational leaders to qualified candidates who meet all other requirements except citizenship. These candidates are New Yorkers who come from diverse backgrounds, are often bilingual or multilingual, and can assist New York State in addressing the current shortage of qualified bilingual teachers, service providers and school leaders. Finally, for New York State students who are not citizens, the proposed amendment will open doors to potential post-secondary opportunities, which we believe will help promote their engagement in school and contribute to lower high school drop-out rates.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can be employed in this State.

9. COMMENT:

We strongly support the proposed amendment due to the positive impact it will have on our community, as well as our state. These DREAMers want to pursue their educations and contribute their work and achievements to New York State and the

nation. We respectfully ask you to allow us to use our best abilities to contribute to our local, state and national communities by finalizing this amendment and assuring that capable non-citizens can be licensed or certified for the professions they are educated and qualified for.

DEPARTMENT RESPONSE:

SED agrees with this comment.

10. COMMENT:

Commenter strongly supports the proposed amendment to sections 59.4 and 80-1.3 of Title 8 NYCRR. It will strengthen New York's professional resources by affording the State needed qualified licensed professionals. Additionally, having restrictions in the provision of licensure or certification for those who complete their academic requirements in New York is contrary to New York State's policies of educating its non-citizen population regardless of immigration category and counter-productive. The interests of New York are not furthered when students and educational institutions spend considerable time, effort and money to achieve degree qualifications for professions that the Education Department then bars them from pursuing. In fact, the State will be clearly benefited if these individuals were allowed to put their educations to use. This amendment will promote in-state education for students who are New Yorkers, resulting in the provision of more resources to the state's communities.

DEPARTMENT RESPONSE:

SED agrees with this comment.

11. COMMENT:

I support these amendments. Non-citizens who have been educated and meet the other qualifications for professional licenses or certifications should be able to engage in their chosen occupations regardless of their immigration status. By doing so,

they will benefit their communities and New York State. In addition, these licensed occupations provide a pathway for economic mobility and community stability for immigrant New Yorkers and provides young people with opportunities and encourages them to stay in school and pursue their educations.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can be employed in this State.

12. COMMENT:

Commenter supports the proposed amendment for qualified candidates who meet all other licensure requirements except citizenship. Because of their temporary immigration status, commenter's clients are survivors of domestic and gender-based violence and are often prevented from securing the licenses, and hence the employment opportunities, that would create the financial stability they need. Therefore, this amendment removed the citizenship-related barriers for some classes of licenses is critically important to thousands of survivors of domestic violence in New York in that it helps to remove a significant barrier to their achievement of safer, more economically stable lives.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they receive other post-secondary opportunities in this State.

13. COMMENT:

Commenter supports the proposed regulation. Many students that I teach are undocumented with an uncertain future of employment. These amendments would be a

great benefit to students and young people in allowing them to apply their knowledge and skills in the workplace, contribute to their communities as well as gain a living wage. I urge you and your colleagues to pass approve of these amendments to grant thousands of very qualified and talented young people the opportunity to contribute to their communities. I believe this is a very important step towards ensuring a more equitable society where all youth have the opportunity to achieve their dreams and live to their fullest.

DEPARTMENT RESPONSE:

SED agrees with this comment.

14. COMMENT:

Several commenters expressed strong support for this proposal. Commenters commend the Board of Regents for making this important step which will allow more young people in New York to be able to get licensed in professions they have worked hard to prepare for and to allow them to continue to work hard and support themselves and their families. Commenters believe this proposal must be passed.

DEPARTMENT RESPONSE:

SED agrees with this comment.

15. COMMENT:

I support these amendments. Non-citizens who have been educated and meet the other qualifications for professional licenses or certifications should be able to engage in their chosen occupations regardless of their immigration status. By doing so, they will benefit their communities and New York State.

DEPARTMENT RESPONSE:

SED agrees that individuals who are not unlawfully present in the United States should be licensed and/or certified if they meet all other licensure and/or certification requirements so they can be employed in this State.

16. COMMENT:

I enthusiastically support these amendments to New York State's policy on those who are eligible to receive professional licenses in these important fields. Those who would be affected by this policy have already proven themselves to be outstanding community members and dedicated professionals. Their position as having been previously excluded from benefits and opportunity makes them more compassionate professionals who will be able to help others in need. Many of those affected have lived in the US their whole lives, know no other way of life, and would be effectively barred from moving forward in their careers if not given the opportunity in the US; some have nowhere else to go. From the standpoint of the US economy, joining the workforce is more productive for society as well as the individual and they will surely contribute to the growth and sustenance of the economy.

DEPARTMENT RESPONSE:

SED agrees with this comment.

17. COMMENT:

Commenter supports the proposed amendments. Licensing of occupations should serve to ensure standards, not to exclude workers from a field. The state has a vested economic and fiscal interest in ensuring that the skills and talents of all of its residents are put to their best use. In many cases, the state has already invested in the education and training of people who it then illogically excludes from the occupation for which they have been trained. If we have in the state a group of people who are being held back from doing jobs that they are well qualified to do, in which they would earn more and

contribute more to the economy, that represents a potential economic capacity that is being left on the table. Clearly, other lawfully present immigrants are capable of filling these jobs. It represents a tangible loss to New York State to prevent an otherwise-qualified person from gaining a license.

DEPARTMENT RESPONSE:

SED agrees with this comment.

18. COMMENT:

I am in support of the new amendment to allow licenses to be granted widely to anyone seeking them, despite labels of DACA or TPS. If someone has expertise and qualified training in an area governed by the Board of Regents and their only impediment to work in that field is their immigration status, they should still be given licensure. We need all the experts we can find, particularly in urban public education where the demography of our student body is far more diverse than the demography of our teachers and extremely so in the case of administrators.

DEPARTMENT RESPONSE:

SED agrees with this comment.

19. COMMENT:

We support the proposed amendments, as they will increase the number and diversity of people engaged in vital professions such as education and health care in New York City and New York State; increase economic opportunity for New York immigrants who are otherwise eligible and qualified to work in the relevant professions; and, support economic vitality in New York City and New York State.

DEPARTMENT RESPONSE:

SED agrees with this comment.

20. COMMENT:

Several commenters stated that they believe that this regulation will benefit this state's economy, professional communities, immigrant communities, and the CUNY and SUNY school systems.

Both the CUNY and SUNY school systems provide excellent education and programs for those seeking their professional license or certificate in a wide range of career fields. These programs are open to non-citizen students. Moreover, any student who can show that he/she attended high school in New York for two or more years is considered a resident of New York and is thus eligible for in state tuition regardless of immigration status. This regulation will first give promise to CUNY and SUNY applicants that upon finishing the programmatic requirements, they will be able to receive their professional licenses or certificates. This could increase enrollment, given that non-citizen students may now be reluctant to even apply. Furthermore, this regulation will ensure that all CUNY and SUNY students who have obtained their professional licenses or certificates are able to then receive such licenses/certificates to work in the professional field and be financially stable. Indeed, CUNY and SUNY – which expends many resources to provide students with in state tuition – will in turn have professional graduates who can contribute to the state with their skills and work and taxes and who will also be able to pay their educational loans.

This regulation is in line with federal and state law, and will benefit the economic stability of immigrant communities and New York as a whole. This regulation, as interpreted by the Office of the Professions, should ensure that all persons who have completed their professional education for the licenses/certificates at issue could engage in the practice of their professional career, provide services to others, and be financially stable.

We support the amendment because providing professional licensing without immigration restrictions promotes financial stability and economic growth within immigrant communities and New York as a whole. This amendment will benefit the schools that educate, the students who seek and obtain this education, and the communities where the professionals are engaging in their fields of practice. However, we believe the Board and the Department would best serve New York by focusing on competency requirements, not immigration category. The federal government and federal immigration services have law and regulations regarding the employment of non-citizens. The Board of Regents, the Department of Education, and Office of the Professions should leave immigration category distinctions to the expertise of federal immigration authorities and remove any immigration related distinctions from licensing requirements. Their focus is best on the educational and training qualifications of professionals, which are within the expertise of the Office of the Professions, the Department of Education, and the Board of Regents.

DEPARTMENT RESPONSE:

SED agrees that the proposed amendment will benefit the state's economy, professional communities, immigrant communities and the CUNY and SUNY school systems. SED also believes that the regulation is consistent with federal and state law. With respect to the commenter's concerns over the immigration statuses set forth in the proposed amendment, the Department believes the terms of the proposed amendment is consistent with federal law and applicable case law on this issue. Federal law, 8 U.S.C. § 1621[a], [d], prohibits States from issuing any State or local public benefit including professional licenses to any individual that is not a qualified alien [as defined in 8 U.S.C. §1641][,a nonimmigrant under the Immigration and Nationality Act [[8 U.S.C. §1101](#) et seq.], or an alien who is paroled into the United States under section 212(d)(5)

of such Act [[8 U.S.C. §1182\(d\)\(5\)](#)] for less than one year. **However, since 1996 this federal prohibition does not apply if the State enacts a State law expressly authorizing the licensing of such undocumented aliens.**

Currently, individuals granted deferred action childhood arrivals (DACA) relief under Federal Executive Order and are allowed to continue to be lawfully present in the United States without fear of deportation are not eligible for State licensure in the professions or those seeking their professional teaching certification under the Regulations of the Commissioner. However, New York enables hundreds of thousands of undocumented students, including DACA students, to receive education through the state's public school system and graduate with New York high school diplomas. Yet their futures historically have been circumscribed by current federal law restricting the issuance of professional licenses based on immigration status and State laws and/or regulations that imposed citizenship requirements for professional licensing in certain professions and for certification as a teacher or school leader. These young people generally derive their immigration status from their parents. If their parents are undocumented, most of these individuals have no mechanism to obtain legal residency, even if they have lived most of their lives in the United States.

However, the case law on the citizenship requirements for State licensure has been evolving over the past decade and recent case law dictates that it is time for a change.

State law and the Dandamudi Case

Prior to 2012, New York State law prohibited individuals from receiving licenses in 13 of the Title VIII professions (including medicine, pharmacists, engineers, etc.)

unless the individual was a U.S. citizen or permanent lawful resident. These statutes were struck down by the U.S. Second Circuit Court of Appeals as unconstitutional in Dandamudi v Tisch, 686 F.3d 55 (2012) and in violation of the Equal Protection Clause of the U.S. Constitution.

Following this decision, the Department revised its application forms for all licensed professions under Title VIII of the Education Law to require any applicant, including temporary immigrant aliens, to become licensed provided they fall within one of the immigration statuses set forth in 8 USC § 1621. This was done to comply with that federal law.

Recent case law described below appears to authorize the Board of Regents to fulfill the requirement for an exception to the federal prohibition against professional licensure of undocumented aliens under 8 U.S.C. § 1621 [d] based on State law enacted after August 22, 1996 by using their broad authority to adopt regulations governing licensure in the Title VIII professions (Education Law §§6501 and 6506) and the certification of teachers and school leaders (Education Law §§3001 and 3003) to expressly authorize the licensure of undocumented aliens in regulation, as opposed to State statute.

Vargas Decision (2015 WL 3479561)

In June 2015, the Appellate Division, Second Department issued a decision on whether the federal law (8 U.S.C. § 1621[a], [d]) prohibits an alien in DACA status from receiving bar admission. The U.S. Department of Justice submitted an amicus brief opposing the applicant's admission to the bar based on the federal law. The NY Attorney General submitted a brief arguing that the license should be issued despite the federal law. The Second Department stated that "a narrow reading of 8 USC § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the

State of New York exercises its authority granted in 8 USC § 1621(d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621(a), unconstitutionally infringes on the sovereign authority of the state under the Supremacy Clause (10th Amendment) to divide power among its three coequal branches of government.

Further, the court held, in light of this State's allocation of authority to the Judiciary to regulate the granting of professional licenses to practice law (see Judiciary Law § 53[1]), that the Judiciary may exercise its authority as the state sovereign under the Supremacy clause to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York. As a result, the Court ordered that Vargas receive his law license, provided he met certain other licensure requirements.

While the Vargas decision is based on an intrusion on the role of the judiciary over bar admissions in violation of the Supremacy Clause, we believe that the Court's reasoning applies equally to the adoption of regulations having the force and effect of law by an administrative agency that is part of the executive branch of New York government, another one of the three coequal branches of government under the New York Constitution. In concluding that requiring the State Legislature to have enacted a State law after August 22, 1996 authorizing professional licensure in order to qualify for the exception under 8 USC §1621(d) would be unconstitutional, the Second Department ruled that:

“[W]e hold that the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation is not a legitimate concern of the federal government.”

The Board of Regents, as the head of the State Education Department, has been granted broad authority under Education Law §§207 and 6506 to supervise the admission to the professions under Title VIII of the Education Law, including the authority to adopt rules related thereto. The Commissioner of Education and the Department have similarly been granted broad authority under Education Law §6507 to administer the admission of the professions, and to adopt regulations related thereto subject to approval by the Board of Regents pursuant to §207. In the case of teaching, Education Law §3001(3), which itself has been amended subsequent to 1996, explicitly authorizes the Commissioner to adopt regulations exempting alien teachers from the citizenship requirement and permitting their employment. Collectively, these statutes provide the Board of Regents and the Commissioner with the requisite authority to adopt regulations on this subject.

In addition, the New York Court of Appeals in the Matter of Aliessa v. Novello, (96 NY2d 418), a case involving Medicaid benefits for legal aliens, relying upon the Supreme Court decision in Graham v. Richardson, ruled that the federal law impermissibly authorizes states to disqualify otherwise eligible aliens from Medicaid—indicating that Congress cannot authorize a violation of equal protection.

Based on the rationale in the above-referenced cases, the Board of Regents used its broad authority over the granting of licenses in the Title VIII professions and the certification of teachers to promulgate regulations expressly authorizing otherwise qualified aliens who are not unlawfully present in the U.S. and who meet all other licensure requirements except citizenship to become licensed or certified.

21. COMMENT:

Commenter expressed support for the proposed amendment to the regulations of Commissioner of Education. I urge you to please continue with the amendment and also

to make clear what “not unlawful status” means because not everyone has DACA, but we all deserve a chance to better our communities and ourselves.

DEPARTMENT RESPONSE:

SED agrees with this comment.

22. COMMENT:

I support the proposed amendments, because they are valid under the U.S. Constitution, particularly under the 10th amendment, 14th amendment, and Supremacy Clause. The proposed amendments are also consistent with New York State’s public policy interests.

I would also like to express my support for the Board of Regents to go even further – in this rulemaking or in a subsequent rulemaking – and extend eligibility for professional licenses without any regard to immigration status, following the example of the state of California. In California, the state legislature passed a statute extending eligibility to all California residents without regard to immigration status, and the judiciary has upheld this statute.

DEPARTMENT RESPONSE:

SED agrees that the proposed amendment is valid under the U.S. Constitution and that the proposed amendment is consistent with New York’s public policy interests.

As for the commenter’s request to extend eligibility for professional licenses without regard to immigration status, the Department believes the proposed amendment strikes a balance between the prohibitions in federal law and the applicable case law at this time.

23. COMMENT:

Commenter supports the proposed amendments but, to ensure that the regulations achieve this goal and accord with the U.S. and New York Constitutions’

guarantees of equal protection under law, we urge NYSED to make clear that all noncitizens permanently residing under color of law in the United States (“PRUCOLs”) will be eligible to obtain licenses. We urge this clarification for two reasons: (1) to reduce the administrative burden of implementing the regulations; and (2) to ensure that they comport with equal protection law.

PRUCOL New Yorkers frequently have built their lives in New York and are here to stay. Pursuant to Aliessa v. Novello, (96 N.Y.2d 418 (2001)) and the constitutional guarantee of equal protection, the new regulations should make clear that New York will afford them an opportunity to pursue their aspirations on an equal basis with other applicants for professional licenses. In accordance with these principles, we urge consideration of the following clarifying language to the proposed new section 59.4 (and equivalent modifications to the proposed new section 80-1.3(a)):

Notwithstanding any other provision of this Title to the contrary, no otherwise qualified applicant shall be denied a license, certificate, limited permit or registration pursuant to this Title by reason of his or her citizenship or immigration status, unless such applicant is otherwise ineligible for a professional license under 8 USC § 1621 or any other applicable federal law. Provided, however that pursuant to 8 USC § 1621(d), no otherwise qualified applicant alien shall be precluded from obtaining a professional license under this Title if an individual is permanently residing under color of law ~~not unlawfully present~~ in the United States, including but not limited to individuals granted Deferred Action for Childhood Arrivals relief or similar relief from deportation.

DEPARTMENT RESPONSE:

The current language in the proposed amendment includes all aliens permanently residing under color of law and covered by Aliessa v. Novello, 96 N.Y.2d 418, 422 n.2 (2001), because such individuals are lawfully present in the United States and the language specifically indicates that the beneficiaries of the regulation include but are not limited to those who receive DACA and similar relief from deportation.

The language intentionally includes the phrase “not unlawfully present”, rather than relying solely on the phrase “permanently residing in the United States under color of law.” Permanently residing in the United States under color of law could be read to exclude from licensing several important categories, including nonimmigrants (whose status is temporary, and who are therefore not considered to be “permanently residing under color of law”), and aliens in Temporary Protected Status, see 8 USC 1254a(f)(1) (aliens in temporary protected status “ shall not be considered to be permanently residing in the United States under color of law”). Therefore, the Department does not believe any revisions to the current language are needed.

24. COMMENT:

Several commenters are not in support of the proposed regulation to allow undocumented aliens to apply for teaching licenses in light of the fact that a U.S. Citizen coming from another state or a military transferee are not afforded the same privilege. The Board of Regents needs to be more focused on supporting our military personnel and their families rather than passing constitutionally questionable immigration policies. Commenters urged the Board of Regents to take the necessary actions to implement the common sense policies laid forth in S.2947 rather than investing time and taxpayer dollars exploring a proposal which is not only out of touch with New York’s values, but places laws breakers in front of military service members and their families.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing. The Department is also currently working with the Legislature on proposed legislation to expedite the professional licensure process for military spouses.

25. COMMENT:

Commenter expressed that she was not in support of the proposed regulation as it encourages aliens to come to the United States and live off of the taxpayers. Where is the deterrent to anyone from anywhere just coming here with no documentation, even if they are the sons or daughters born in the US of illegal parents?

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing. Moreover, the individuals covered under the proposed amendment are already lawfully present in the United States under current immigration law.

26. COMMENT:

Several commenters expressed that, by passing this regulation, New York State is sending a terribly mixed message to the public. Allowing illegal immigrants to teach our children is a direct contradiction of the lessons of right versus wrong. This is especially the case when New York State continues to reject licensed individuals, including certain military trained personnel, from being able to obtain proper employment in the Empire State.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing. Moreover, the individuals covered under the proposed amendment are lawfully present in the United States under current immigration law.

27. COMMENT:

Commenter expressed that teaching licenses should not be granted to undocumented workers.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing, including the certification of teachers. Moreover, the individuals covered under the proposed amendment are already lawfully present in the United States under current immigration law and teachers and subject to a background check prior to certification and/or employment in a school in this State.

28. COMMENT:

Several commenters are opposed to allowing undocumented workers to apply for teaching licenses. Many American citizens with teaching licenses are unable to find work and undocumented workers should become legal prior to being permitted to apply for a teaching license.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing, including the certification of teachers. Moreover, the individuals covered under the proposed amendment are already lawfully present in the United States under current immigration law.

29. COMMENT:

Several commenters expressed opposition to allowing undocumented aliens to apply for teaching licenses as they are criminals who have violated immigration laws and should not be rewarded for doing so.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing, including the certification of teachers. Moreover, the individuals covered under the proposed

amendment are already lawfully present in the United States under current immigration law. Moreover, all teachers are required to have a criminal history record check prior to certification and as a condition of employment in the schools of this State.

30. COMMENT:

Commenter expressed concern regarding the ability to run a background check on an undocumented alien and the consequences of the same.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing, including the certification of teachers because the individuals covered under the proposed amendment are lawfully present in the United States under current immigration law.

Moreover, all teachers are required to have a criminal history record check prior to certification and as a condition of employment in the schools of this State.

31. COMMENT:

Commenter stated that it is not a question of fairness but a question of legality. If you don't like the Federal Immigration Laws work to have them changed at the Federal level, not side step them on the state level. What kind of example does it set for the children to have someone who's breaking a law teaching them? If the state is bent on fairness how about allowing returning veterans and/or their spouses from out of state (all citizens), be licensed in a more expeditious manner?

DEPARTMENT RESPONSE:

The Department believes that the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing, including the certification of teachers. Moreover, the individuals covered under the proposed

amendment are already lawfully present in the United States under current immigration law.

The Department is also working with the Legislature on proposed legislation to expedite the licensing of military spouses.

32. COMMENT:

Commenter is a retired assistant principal and expressed that we already certify substandard educators and until there is a national database of teachers who lost their licenses in other states, I feel our children deserve the highest caliber personnel to educate them. If military spouses have licenses in states we have reciprocity with, they should be given provisional certification. Not all states are as stringent as we are and we should not lower our standards. Our children deserve the best.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing. The Department is also currently working with the Legislature on proposed legislation to expedite the licensure process for military spouses.

33. COMMENT:

Commenter expressed dismay and disgust for the proposed regulation to let undocumented workers apply for teaching licenses. These people are in the United States ILLEGALLY. They are in this country because the law has been broken. You think it is fair to the legal residents of this state to reward people that have broken the law by letting them teach our children? If they want to come here, they need to follow the legal process for doing so. What kind of a lesson is this to our youth ... that breaking the law is acceptable? Why should my hard-earned tax dollars be spent

putting people illegally in the United States on the state payroll? You honestly think this is fair to me?

Why should people who are in the United States ILLEGALLY be afforded the same rights and privileges as those in this country legally? THEY BROKE THE LAW! What part of that do people not understand? We now live in a society so politically correct that breaking the law is acceptable because people fall into certain demographics?

The citizens of New York need to FIRE everyone at the State Education Department and start over by hiring people that respect our immigration laws.

DEPARTMENT RESPONSE:

The Department believes the proposed amendment is consistent with federal law and applicable case law relating to immigration and professional licensing. Moreover, the individuals covered under the proposed amendment are already lawfully present in the United States under current immigration law.