TO: P-12 Education Committee

FROM: Cosimo Tangorra, Jr.

SUBJECT: Proposed Amendment of Section 100.2(y) of the Commissioner's Regulations, Relating to Student Enrollment

DATE: April 6, 2015

AUTHORIZATION(S):

SUMMARY

Issue for Decision

Should the Board of Regents adopt as an emergency rule the proposed revised section 100.2(y) of the Commissioner's Regulations, regarding student enrollment and procedures for unaccompanied minors and other undocumented youth?

Reason(s) for Consideration

To ensure that all New York State school districts comply with federal and State laws regarding student access to public education.

Proposed Handling

The proposed amendment is being presented to the P-12 Education Committee for recommendation and to the full Board for adoption as an emergency rule at the April 2015 Regents meeting. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

The proposed amendment was adopted as an emergency action at the December 2014 Regents meeting, effective December 16, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on December 31, 2014.

The proposed amendment was readopted as an emergency action at the February 2015 Regents meeting to ensure that the rule remains continuously in effect until it can be presented for adoption and take effect as a permanent rule.

The proposed amendment has been revised in response to public comment. It is anticipated that a Notice of Emergency Adoption and Revised Rule Making will be published in the State Register on April 29, 2015.

A copy of the proposed amendment and an Assessment of Public Comment are attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

During the 2014-2015 school year, many school districts across the State experienced an influx of unaccompanied minors and other undocumented youth. It has been reported that some school districts have refused to enroll unaccompanied minors and undocumented youth if they, or their families or guardians, were unable to produce documents sufficiently demonstrating guardianship and/or residency in a district. Such enrollment policies, as well as highly restrictive requirements for proof of residency, may impede or prevent unaccompanied minors and undocumented youth from enrolling or attempting to enroll in school districts throughout the State.

Under federal and state law, all children have a right to a free public education, regardless of immigration status. New York State Education Law entitles each person over five and under twenty-one years of age, who has not received a high school diploma, to attend a public school in the district in which such person resides. Furthermore, school districts must ensure that all resident students of compulsory school age attend upon full-time instruction. *See* Education Law §§3202(1) and 3205. Under federal law, school districts may not deny resident students a free public education on the basis of their immigration status. The United States Supreme Court has held that allowing undocumented students to be denied an education would, in effect, "deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation." *Plyler v. Doe*, 457 U.S. 202, 223 (1982). Under established law, the undocumented or non-citizen status of a student (or his or her parent or guardian) is irrelevant to such student's entitlement to an elementary and secondary

public education.[1] Moreover, unaccompanied minors and undocumented youth may also be entitled to the protections of the federal McKinney-Vento Homeless Education Assistance Improvements Act, 42 U.S.C. § 11431, *et seq*., and implementing state law and regulations concerning the education of homeless children. Together, these federal and state laws are driven by the dual purposes of ensuring student access to, and continuity within, a free public education system.

A series of preliminary actions have been taken to address the needs of unaccompanied minors and undocumented youth who are being denied enrollment and to ensure that all school districts understand and comply with their obligation to enroll all resident students regardless of their immigration status. On August 30, 2010, the State Education Department ("Department") issued guidance to districts on their obligations in enrolling students and making residency determinations, particularly for students who are not citizens of the United States.

On September 10, 2014, the Department expanded the guidance to address the specific circumstances of unaccompanied minors who have recently entered the country in larger numbers.

On October 17, 2014, following allegations that the Hempstead School District was not complying with the law and preventing 34 Hispanic children from enrolling in school and receiving an education, the Department launched a full investigation of enrollment policies in Hempstead. The District subsequently committed to enroll the students and to provide them with an appropriate public education.

On October 23, 2014, the Department and the Office of the New York State Attorney General ("OAG") initiated a joint compliance review of school district enrollment procedures for unaccompanied minors and other undocumented youth. This review began by focusing on Nassau, Suffolk, Rockland, and Westchester Counties, which are experiencing the largest influx of unaccompanied minors from Central and South America, and has expanded to include additional districts statewide based upon complaints and reports received by the two agencies. The review is examining whether school districts maintain policies and procedures that bar or impede students from enrolling in school on the basis of their citizenship or immigration status or that of their parents or guardians. The review is also examining whether districts are complying with state and federal registration and enrollment guidance, which emphasizes the need for flexibility in accepting and evaluating records – *e.g.*, of residency or age – presented on behalf of a student seeking to enroll in a district, and requires that homeless students be afforded a free public education as well.

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[1] *See, e.g.,* 42 U.S.C. §§ 2000c-6, 2000-d; 28 C.F.R. § 42.104(b)(2); 34 C.F.R. § 100.3(b)(2) (Titles IV and VI of the Civil Rights Act of 1964 and associated federal regulations, prohibiting discrimination on the basis of, *inter alia*, race, color, or national origin by public elementary and secondary schools).

The Department and OAG have also received inquiries from districts across the State regarding their obligations under federal and state law. These inquiries make clear the need for more comprehensive action to address the lack of clarity among districts regarding lawful enrollment and registration policies.

The proposed amendment will codify applicable federal and state laws, as well as existing Department guidance to districts, in order to ensure that unaccompanied minors and undocumented youth are provided their constitutional right to a free public education. Specifically, the proposed amendment will establish:

(1) Clear and uniform requirements, which comply with federal and state laws and guidance on the enrollment of students, particularly for unaccompanied minors and undocumented youth;
(2) Prohibited enrollment application policies which are unlawful and/or have had a disparate impact on unaccompanied minors and undocumented youth;
(3) Enrollment requirements whereby districts must accept additional forms of proof beyond the highly restrictive forms listed in the enrollment instructions/materials of school districts under review to date; and
(4) Clear guidance for parents and guardians and public availability of enrollment instructions, requirements and procedures.

Proposed revisions to the rule

In response to public comment, the proposed rule has been revised to:

1. expressly state the purpose of section 100.2(y), and to further provide that nothing in the regulation shall be construed to change or shift the burden of proof of the parent/person in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the school district and intent to reside in the district;

2. clarify that, as soon as practicable but no later than July 1, 2015, school districts shall update their publicly available information on enrollment and residency procedures and enrollment/registration materials as necessary to come into compliance with section 100.2(y), as revised; and provide such updated information and materials to all parents, persons in parental relation or children, as appropriate, who request enrollment in the district; and post such updated information and materials on the district's website, if one exists.

3. clarify that nothing in section 100.2(y) shall require the school district to enroll a child if a determination of non-residency is made, in accordance with the regulation, on the date of such request for enrollment;

4. clarify the procedures and timeline for the district to make its residency determination. As soon as practicable but no later than three business days after a child is initially enrolled upon request:

    - the parent/person in parental relation or the child, as appropriate, shall submit documentation and/or information in support of the child's residency in the district; and the board of education/board's designee shall review all such documentation and/or information and make a residency determination in accordance with section 100.2(y)(3)(i) and (ii);

    - if such documentation and/or information is submitted on the third business day after initial enrollment, the district in its discretion may make the residency determination no later than the fourth business day after initial enrollment;

5. clarify that for purposes of proof of parental relationship or proof that the child resides with the parent/person in parental relation, the district may accept an affidavit of the parent(s)/person(s) in parental relation indicating either: (1) that they are the parent(s) with whom the child lawfully resides; or (2) that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise;

6. clarify the documentation and/or information that a school district may require the parent/person in parental relation to submit as evidence of the physical presence of the parent/person in parental relation and the child in the school district;

7. clarify that at any time during the school year the board of education or its designee may determine in accordance with section 100.2(y)(6) that a child is not a district resident entitled to attend the schools of the district, notwithstanding any prior determination to the contrary at the time of the child's initial enrollment or re-entry into the public schools of the district.

8. make certain technical changes relating to terminology and organizational structure within the proposed amendment.

Recommendation

Staff recommends that the Board of Regents take the following action:

VOTED: That the emergency rule amending subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education that was adopted at the February 9-10, 2015 Regents meeting, is repealed, effective April 14, 2015; and it is further

VOTED: That subdivision (y) of section 100.2 of the Regulations of the Commissioner is amended as submitted, effective April 14, 2015, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to immediately adopt the revised proposed rule for purposes of clarifying requirements for school districts regarding the enrollment of students, particularly as it pertains to procedures for unaccompanied minors and other undocumented youth, and thereby ensure compliance with federal and State laws regarding access to a free public education system.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the December 2014 Regents meeting, effective December 16, 2014, and readopted at the February Regents meeting to ensure that the rule remains continuously in effect until it can be presented for adoption and take effect as a permanent rule. If action is taken at the April Regents meeting, the February emergency rule will be repealed and the revised proposed amendment will take effect as an emergency rule, effective April 14, 2015. It is anticipated that the rule will be presented for permanent adoption at the June 2015 Regents meeting, after expiration of the 30-day public comment period for revised rule makings as prescribed in the State Administrative Procedure Act. If adopted at the June meeting, the proposed amendment will take effect as a permanent rule on July 1, 2015.

8 NYCRR§ 100.2(y)

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment is designed to: (1) address reports that districts are denying enrollment of unaccompanied minors and undocumented youths if they are unable to produce documents sufficiently demonstrating age, guardianship, and/or residency in a district; and (2) provide clear requirements for school districts regarding enrollment of students, particularly as it pertains to procedures for unaccompanied minors and other undocumented youths.

Many school districts across the State have experienced an influx of unaccompanied minors and other undocumented youths. It has been reported that some school districts are refusing to enroll unaccompanied minors and undocumented youths if they, or their families or guardians, are unable to produce documents sufficiently demonstrating guardianship and/or residency in a district. These enrollment policies, as well as highly restrictive requirements for proof of residency, may impede or prevent many unaccompanied minors and undocumented youths from enrolling or attempting to enroll in school districts throughout the State. The proposed amendment is necessary to ensure that all children are enrolled in school, regardless of immigration status, pursuant to New York State and Federal law and to ensure that all school districts understand and comply with their obligation to enroll all resident students regardless of their immigration status.

The proposed amendment was adopted by emergency action at the December 15-16, 2014 Regents meeting, effective December 16, 2014. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on December 31, 2014. The proposed amendment was readopted as an emergency action at the February 2015 Regents meeting to ensure that the rule remains continuously in effect until it can be presented for adoption and take effect as a permanent rule.

The proposed rule has been revised in response to public comment as set forth in the Revised Regulatory Impact Statement submitted herewith. Emergency action to adopt the proposed rule is necessary now for the preservation of the general welfare to immediately repeal the February emergency rule and adopt the revised proposed rule for purposes of clarifying requirements for school districts regarding the enrollment of students, particularly as it pertains to procedures for unaccompanied minors and other undocumented youth, and thereby ensure compliance with federal and State laws regarding access to a free public education system.

It is anticipated that the revised rule will be presented to the Board of Regents for adoption as a permanent rule at the June 15-16, 2015 Regents meeting, which is the first scheduled meeting after expiration of the 30-day public comment period mandated by the State Administrative Procedure Act section 202(4-a) for revised proposed rulemakings.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 3202, 3205 and 3713

1. The emergency rule amending subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education, that was adopted at the February 9-10, 2015 meeting of the Board of Regents, is repealed, effective April 14, 2015.

2. Subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective April 14, 2015, as follows:

(y) Determination of student residency and age. [The board of education or its designee shall determine whether a child is entitled to attend the schools of the district.]

(1) The purpose of this subdivision is to establish requirements for determinations by a board of education or its designee of student residency and age, for purposes of eligibility to attend the public schools in the school district without the payment of tuition pursuant to Education Law section 3202, in order to ensure that all eligible students are admitted to such schools without undue delay; provided that nothing in this subdivision shall be construed to change or shift the burden of proof of the parent(s), the person(s) in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the school district and intent to reside in the district.

(2) Each school district shall make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age in accordance with this subdivision. Such publicly available information shall include a non-exhaustive list of the forms of documentation that may be submitted to the district by parents, persons in parental relation or children, as appropriate, in

accordance with the provisions of this subdivision. Such list shall include, but not be limited to, all examples of documentation listed in this subdivision. No later than January 31, 2015, such information shall be included in the school district's existing enrollment/registration materials and shall be provided to all parents, persons in parental relation or children, as appropriate, who request enrollment in the district, and shall be posted on the district's website, if one exists. As soon as practicable but no later than July 1, 2015, the school district shall update such information and the district's existing enrollment/registration materials as necessary to come into compliance with the provisions of this subdivision; and provide such updated information and materials to all parents, persons in parental relation or children, as appropriate, who request enrollment in the district; and post such updated information and materials on the district's website, if one exists.

(3) When a child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and shall begin attendance on the next school day, or as soon as practicable, provided that nothing herein shall require the district to enroll such child if a determination of non-residency is made, in accordance with this subdivision, on the date of such request for enrollment. As soon as practicable but no later than three business days after such initial enrollment, the parent(s), the person(s) in parental relation to the child or the child, as appropriate, shall submit documentation and/or information in support of the child's residency in the district and the board of education or its designee shall review all such documentation and/or information and make a residency determination in accordance with subparagraphs (i) and (ii) of this paragraph; provided

that if such documentation and/or information is submitted on the third business day after initial enrollment, the board of education or its designee in its discretion may make the residency determination no later than the fourth business day after initial enrollment.

(i) Documentation Regarding Enrollment and/or Residency.

(a) The school district shall not request on any enrollment/registration form(s) or in any meeting or other form of communication any of the following documentation and/or information at the time of and/or as a condition of enrollment:

(1) Social Security card or number; or

(2) any information regarding or which would tend to reveal the immigration status of the child, the child's parent(s) or the person(s) in parental relation, including but not limited to copies of or information concerning visas or other documentation indicating immigration status.

(b) The board of education or its designee may require that the parent(s) or person(s) in parental relation submit documentation and/or information as evidence of the physical presence of the parent(s) or person(s) in parental relation and the child in the district. Such documentation may include:

(1) a copy of a residential lease or proof of ownership of a house or condominium, such as a deed or mortgage statement;

(2) a statement by a third-party landlord, owner or tenant from whom the parent(s) or person(s) in parental relation leases or with whom they share property within the district, which may be either sworn or unsworn;

(3) such other statement by a third party relating to the parent(s)' or person(s) in parental relation's physical presence in the district; and/or

(4) other forms of documentation and/or information establishing physical presence in the district, which may include but not be limited to those listed in clause (d) of this subparagraph.

(c) For purposes of proof of parental relationship or proof that the child resides with the parent(s) or person(s) in parental relation, the board of education or its designee may accept an affidavit of the parent(s) or person(s) in parental relation indicating either: (1) that they are the parent(s) with whom the child lawfully resides; or (2) that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. The board of education or its designee may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency. The board of education or its designee may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

(d) The board of education or its designee shall consider other forms of documentation produced by the child, the child's parent(s) or person(s) in parental relation, including but not limited to the following:

(1) pay stub;

(2) income tax form;

(3) utility or other bills;

(4) membership documents (e.g., library cards) based upon residency;

(5) voter registration document(s);

(6) official driver's license, learner's permit or non-driver identification;

(7) state or other government issued identification;

(8) documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement); or

(9) evidence of custody of the child, including but not limited to judicial custody orders or guardianship papers.

(ii) Documentation of Age. In accordance with Education Law §3218:

(a) where a certified transcript of a birth certificate or record of baptism (including a certified transcript of a foreign birth certificate or record of baptism) giving the date of birth is available, no other form of evidence may be used to determine a child's age;

(b) where the documentation listed in clause (a) of this subparagraph is not available, a passport (including a foreign passport) may be used to determine a child's age; and

(c) where the documentation listed in both clauses (a) and (b) of this subparagraph are not available, the board of education or its designee may consider certain other documentary or recorded evidence in existence two years or more, except an affidavit of age, to determine a child's age. Such other evidence may include but not be limited to the following:

(1) official driver's license;

(2) state or other government issued identification;

(3) school photo identification with date of birth;

(4) consulate identification card;

(5) hospital or health records;

(6) military dependent identification card;

(7) documents issued by federal, state or local agencies (e.g., local social service agency, federal Office of Refugee Resettlement);

(8) court orders or other court-issued documents;

(9) Native American tribal document; or

(10) records from non-profit international aid agencies and voluntary agencies.

(d) With respect to the documentation listed in clause (c) of this subparagraph, if the documentary evidence presented originates from a foreign country, the board of education or its designee may request verification of such documentary evidence from the appropriate foreign government or agency, consistent with the requirements of the federal Family Educational Rights and Privacy Act (20 USC §1232g), provided that the student must be enrolled in accordance with paragraph (2) of this subdivision and such enrollment cannot be delayed beyond the period specified in paragraph (2) of this subdivision while the the board of education or its designee attempts to obtain such verification.

(iii) (a) School districts are required to comply with Public Health Law §2164(7) and all other applicable provisions of the Public Health Law and its implementing regulations, including orders issued by a state or local health department pursuant to such laws or regulations, that impact a student's admission to or attendance in school. Nothing in this subdivision shall be construed to require the immediate attendance of an enrolled student lawfully excluded from school temporarily pursuant to Education Law §906 because of a communicable or infectious disease that imposes a significant risk of infection of others, or an enrolled student whose parent(s) or person(s) in parental relation have not submitted proof of immunization within the periods prescribed in Public

Health Law §2164(7)(a).

(b) Nothing in this subdivision shall be construed to require the immediate attendance of an enrolled student who is suspended from instruction for disciplinary reasons pursuant to Education Law §3214.

(c) Nothing in this subdivision shall be construed to interfere with the recordkeeping and reporting requirements imposed on school districts participating in the federal Student and Exchange Visitor Program (SEVP) in grades 9-12 pursuant to applicable federal laws and regulations concerning nonimmigrant alien students who identify themselves as having or seeking nonimmigrant student visa status (F-1 or M-1), and nothing herein shall be construed to conflict with such requirements or to relieve such nonimmigrant alien students who have or seek an F-1 or M-1 visa from fulfilling their obligations under federal law and regulations related to enrolling in grades 9-12 in SEVP schools.

(4) At any time during the school year and notwithstanding any prior determination to the contrary at the time of the child's initial enrollment or re-entry into the public schools of the district, the board of education or its designee may determine, in accordance with paragraph (6) of this subdivision, that a child is not a district resident entitled to attend the schools of the district.

(5) Determinations regarding whether a child is entitled to attend a district's schools as a homeless child or youth must be made in accordance with subdivision (x) of this section.

(6) Any decision by a school official, other than the board or its designee, that a child is not entitled to attend the schools of the district shall include notification of the

procedures to obtain review of the decision within the school district. Prior to making a determination of entitlement to attend the schools of the district, the board or its designee shall afford the child's parent, the person in parental relation to the child or the child, as appropriate, the opportunity to submit information concerning the child's right to attend school in the district. When the board of education or its designee determines that a child is not entitled to attend the schools of such district because such child is [neither] not a resident of such district [nor entitled to attend its schools pursuant to subdivision (x) of this section], such board or its designee shall, within two business days, provide written notice of its determination to the child's parent, to the person in parental relation to the child, or to the child, as appropriate. Such written notice shall state:

[(1)] (i) that the child is not entitled to attend the public schools of the district;

[(2)] (ii) the specific basis for the determination that the child is [neither] not a resident of the school district [nor entitled to attend its schools pursuant to subdivision (x) of this section], including but not limited to a description of the documentary or other evidence upon which such determination is based;

[(3)] (iii) the date as of which the child will be excluded from the schools of the district; and

[(4)] (iv) that the determination of the board may be appealed to the Commissioner of Education, in accordance with Education Law, section 310, within 30 days of the date of the determination, and that the instructions, forms and procedures for taking such an appeal, including translated versions of such instructions, forms and procedures, may be obtained from the Office of Counsel at www.counsel.nysed.gov, or

by mail addressed to the Office of Counsel, New York State Education Department, State Education Building, Albany, NY 12234 or by calling the Appeals Coordinator at (518) 474-8927.

8 NYCRR §100.2(y)

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on December 31, 2015, the State Education Department received the following comments:

1. COMMENT:

The proposed amendment is inconsistent with Education Law § 3202(1), which requires residency to be established through physical presence in the district and intent to remain in the district. The amendment appears to allow persons to establish residency based merely on physical presence, as established through one of the various forms of proof listed in the proposed amendment, which include unsworn statements from a third-party regarding the physical presence of a child's parent(s) or person(s) in parental relation to the child. Furthermore, since unsworn statements are inherently unreliable, the proposed amendment thwarts the ability of school districts to fulfill their fiduciary responsibility to taxpayers to protect against fraudulent claims of residency that restrict the availability of limited financial resources for legitimate purposes.

DEPARTMENT RESPONSE:

The comment misinterprets the proposed amendment, which is not intended to change the requirement that residency be established by both physical presence and intent to remain. The proposed amendment has been revised to add language clarifying the purpose of section 100.2(y), which is to ensure that that all students eligible to attend the schools of a district under Education Law section 3202 are

admitted without undue delay, and to expressly provide that nothing in section 100.2(y) shall be construed to change or shift the burden of proof of the parent, the person in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the school district and intent to reside in the district. With respect to sworn and unsworn statements, nothing in the proposed amendment precludes school districts from considering unsworn statements vis-à-vis sworn statements when weighing the evidence regarding a residency determination. If necessary, this matter can be addressed in guidance.

2. COMMENT:

With respect to residency determinations, the language in section 100.2(y)(2)(i)(b) appears to confuse ownership or leasing of property within a district with a person's physical presence in a district; ownership and/or leasing of a property do not necessarily mean someone is a resident of a district – only that they own a residence (such as a vacation home or cottage in a lake community) – or that they have rented an apartment (but have a home elsewhere). The second part of the residency determination is whether the individual actually resides in that residence with the intent to remain. Neither is established only by the submission of one document. But, the regulations as drafted appear to preclude a district from requiring anything else showing that a person actually lives in the residence they own or lease such as a driver's license, voter registration, bank statement, etc. if they provide us with a proof of ownership or a lease.

DEPARTMENT RESPONSE:

The proposed amendment is not intended to change the requirement that residency be established by both physical presence and intent to remain. The proposed amendment has been revised to add language clarifying that the documents listed in section 100.2(y)(2)(i)(b) are meant to be a non-exclusive list of items.

3. COMMENT:

The proposed amendment is overbroad and exceeds the scope of its purpose in that it makes no distinction between unaccompanied minors and other undocumented youths and other children who may seek admission to public school within any given school district, and requires school districts to accept every child seeking admission merely upon submission of proof of physical presence. Ensuring that unaccompanied minors and undocumented youth are provided their constitutional right to a free public education can be achieved with more education about, and greater enforcement of, the existing federal McKinney-Vento Act and various State laws implementing these federal requirements.

DEPARTMENT RESPONSE:

The comment in part misinterprets the proposed amendment. As stated in the Department Response to the immediately preceding Comment, the proposed amendment is not intended to change the requirement that residency be established by both physical presence and intent to remain.

Furthermore, the proposed amendment is not overbroad and does not exceed its purpose. The proposed amendment is not limited to unaccompanied minors and other undocumented youths, but instead is meant to ensure that all students eligible to attend the schools of a district under Education Law section 3202 are admitted without undue

delay. The Department believes that the proposed amendment strikes an appropriate balance between ensuring that eligible students are admitted to school without undue delay by requiring immediate enrollment of a student upon request, and minimizing the negative effects on school districts of enrolling ineligible students by providing a three to four day period to resolve residency determinations. Nothing in the proposed amendment would preclude a parent/person in parental relation, or the child where appropriate, from submitting to the school district additional information relating to the child's residency as such information becomes available. In addition, section 100.2(y)(4) specifies that "[a]t any time during the school year, the board of education or its designee may determine ... that a child is not a district resident entitled to attend the schools of the district."

Nevertheless, the Department is concerned that some school districts have refused to enroll unaccompanied minors and undocumented youth if they, or their families or guardians, were unable to produce documents sufficiently demonstrating guardianship and/or residency in a district, and that such enrollment policies, as well as highly restrictive requirements for proof of residency, may impede or prevent unaccompanied minors and undocumented youth from enrolling or attempting to enroll in school districts throughout the State in violation of federal and State law. The Department believes that the proposed rule is necessary to codify applicable federal and State laws, as well as existing SED guidance to districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. Specifically, the proposed amendment establishes:

(1) Clear and uniform requirements, which comply with federal and State laws and SED guidance on enrollment of students, including unaccompanied minors and undocumented youths;

(2) Prohibited enrollment application policies which are unlawful and/or may have a chilling effect on unaccompanied minors and undocumented youths in their efforts to enroll in school;

(3) Flexible enrollment requirements, which allow districts to accept additional forms of proof beyond the highly restrictive forms listed in the enrollment instructions/materials of school districts under review to date; and

(4) Ensure there is clear guidance to parents and guardians, and that enrollment instructions are provided publicly, in both paper and electronic forms.

4. COMMENT:

The proposed amendment creates additional costs for school districts because it requires school districts to first admit all students, including non-resident students, upon parental request, and then make a determination as to whether a child is indeed a resident of their district. There is a cost to requiring districts to educate non-resident students, even if it is for a few days including, at a minimum, transportation costs. Additional costs are likely to result, as well, because of the three business day timeframe for completing residency determinations and the associated need for school districts to dedicate additional staff to process enrollment applications. Such costs will pose a significant financial impact on school districts and their taxpayers at a time when districts are already struggling financially to meet the demands of the Regents Reform Agenda under a state aid cap, gap elimination adjustments, and local tax levy

limitations. Furthermore, to the extent that the proposed amendment results in funds being expended by the district to educate non-resident children, the amendment authorizes an unlawful gift of public funds.

DEPARTMENT RESPONSE:

The three business day period in the proposed amendment is meant to be the maximum period within which a school district must make the residency determination, and does not preclude a school district from making an earlier determination if practicable. The proposed amendment has been revised to clarify that "[A]s soon as practicable but no later than three business days after such initial enrollment, the parent(s), the person(s) in parental relation to the child or the child, as appropriate, shall submit documentation and/or information in support of the child's residency in the district and the board of education or its designee shall review all such documentation and/or information and make a residency determination . . . ." and to also provide "that nothing herein shall require the school district to enroll such child if a determination of non-residency is made, in accordance with this section, on the date of such request for enrollment." While the Department acknowledges that there may be instances where non-resident children are enrolled for a short time, resulting in associated costs to school districts, the Department believes such costs will be minimized by the above clarifications and that the public interest in ensuring that children who are eligible to attend the public schools in the school district without the payment of tuition pursuant to Education Law section 3202 are admitted to school without undue delay, outweighs such associated costs.

5. COMMENT:

The proposed amendment is contrary to the best educational interest of students in that it requires school districts to admit students first, upon parental request, and then make a determination as to whether a child is indeed a resident of their district. To the extent this will result in the enrollment and removal from school of non-resident students, it is likely to cause instability and anxiety in such children.

DEPARTMENT RESPONSE:

As described in the Department Response to the preceding comment, the proposed amendment has been revised to provide "that nothing herein shall require the school district to enroll such child if a determination of non-residency is made, in accordance with this section, on the date of such request for enrollment." The Department acknowledges that there may be instances where non-resident children are enrolled for a short time and then removed and the negative effects it may have on some children, however the Department believes such instances will be minimized by the above clarifications and that the public interest in ensuring that eligible children are admitted to school without undue delay outweighs such potential negative effects.

6. COMMENT:

The proposed amendment is not required by federal law, regulation or administrative guidance. To the contrary, the federal guidance in this area acknowledges that rules for establishing residency within a school district vary among states and local school districts. According to that guidance, the only applicable limitation is that states and school districts cannot apply different rules, or apply the same rules differently, to children based on their or their parents' actual or perceived citizenship or immigration status. The guidance further limits itself to explaining how

pursuant to *Plyler v. Doe*, citizenship and immigration status may not be used to deny a child enrollment and attendance in a public school. Thus, inquiries into such matters are not relevant to establishing residency within a district. As a result, school districts need to avoid requiring parental submission of types of documentary proof of residency that would "bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school."

DEPARTMENT RESPONSE:

The Department disagrees and believes that the proposed rule is necessary to codify applicable federal and State laws, as well as existing SED guidance to districts, in order to ensure that unaccompanied minors and undocumented youths are provided their constitutional right to a free public education. Specifically, the proposed amendment establishes:

(1) Clear and uniform requirements, which comply with federal and State laws and SED guidance on enrollment of students, including unaccompanied minors and undocumented youths;

(2) Prohibited enrollment application policies which are unlawful and/or may have a chilling effect on unaccompanied minors and undocumented youths in their efforts to enroll in school;

(3) Flexible enrollment requirements, which allow districts to accept additional forms of proof beyond the highly restrictive forms listed in the enrollment instructions/materials of school districts under review to date; and

(4) Ensure there is clear guidance to parents and guardians, and that enrollment instructions are provided publicly, in both paper and electronic forms.

7. COMMENT:

The Department should consider the following alternatives to the proposed amendment:

(a) Consistent with state law, revise the proposed amendment to incorporate the intent to remain requirement for purposes of establishing legal residency within a school district.

DEPARTMENT RESPONSE:

The proposed amendment is not intended to change the requirement that residency be established by both physical presence and intent to remain. Nevertheless, the proposed amendment has been revised to add language clarifying the purpose of section 100.2(y), which is to ensure that that all students eligible to attend the schools of a district under Education Law section 3202 are admitted without undue delay, and to expressly provide that nothing in section 100.2(y) shall be construed to change or shift the burden of proof of the parent, the person in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the school district and intent to reside in the district.

(b) Consistent with federal guidance, revise the proposed amendment to specifically prohibit school districts from requesting types of proof of residency that would unlawfully bar or discourage a student who is undocumented or whose parents are undocumented from enrolling in or attending school, with express reference to relevant federal and state guidance, fact sheets, and other related materials.

DEPARTMENT RESPONSE:

The purpose of the proposed amendment is to set forth requirements for

determinations by a board of education of student residency and age, for purposes of eligibility to attend the public schools in the school district without the payment of tuition pursuant to Education Law section 3202, in order to ensure that all eligible students are admitted to such schools without undue delay. The proposed amendment is therefore not limited to only undocumented students, but is broader in scope and effect. The Department believes the proposed amendment is sufficient to protect the rights of undocumented students. If necessary, the Department may consider issuing further guidance on matters affecting undocumented students.

(c) Absent evidence of state-wide systemic violations of applicable law, address individual non-compliance issues on a case-by-case basis, based on findings by the Office of the New York State Attorney General audits in this area, and/or audits conducted by the State Education Department itself.

DEPARTMENT RESPONSE:

The Department believes that the proposed amendment is the best means to ensure that all students who are eligible to attend the public schools in the school district without the payment of tuition pursuant to Education Law section 3202 are admitted to such schools without undue delay.

(d) Allow school districts to use multiple types of evidence that serve to corroborate each other, such as a lease and a utility bill, instead of requiring that school districts end the residency determination process upon receipt of one of the “primary” types of evidence such as an unsworn third-party statement.

DEPARTMENT RESPONSE:

The comment misinterprets the proposed amendment, which is not intended to change the requirement that residency be established by both physical presence and intent to remain. The burden of proof remains on the parent, the person in parental relation or the child, as appropriate, to establish residency through physical presence as an inhabitant of the school district and intent to reside in the district. Nothing in the proposed amendment precludes districts from using multiple types of corroborating evidence to determine residency, and the proposed amendment has been revised to add language clarifying that the documents listed in section 100.2(y)(2)(i)(b) are meant to be a non-exclusive list of items.

(e) Allow school districts to make residency determinations prior to enrolling a student but within a specified timeframe – such as three business days from a request for enrollment, require that districts decide any local parental appeal from an initial residency determination on an expedited basis, and provide for an expedited 310 appeal to the Commissioner of final the non-residency determinations.

DEPARTMENT RESPONSE:

The three business day period in the proposed amendment is meant to be the maximum period within which a school district must make the residency determination, and does not preclude a school district from making an earlier determination if practicable. The proposed amendment has been revised to clarify that "[A]s soon as practicable but no later than three business days after such initial enrollment, the parent(s), the person(s) in parental relation to the child or the child, as appropriate, shall submit documentation and/or information in support of the child's residency in the district and the board of education or its designee shall review all such documentation

and/or information and make a residency determination . . . ." and to also provide "that nothing herein shall require the school district to enroll such child if a determination of non-residency is made, in accordance with this section, on the date of such request for enrollment." While the Department acknowledges that there may be instances where non-resident children are enrolled for a short time, resulting in associated costs to school districts, the Department believes such costs will be minimized by the above clarifications and that the public interest in ensuring that children who are eligible to attend the public schools in the school district without the payment of tuition pursuant to Education Law section 3202 are admitted to school without undue delay, outweighs such associated costs.

8. COMMENT:

School districts should be required to translate any documents submitted by parents or persons in parental relation that would establish physical presence in the school district, and any enrollment-related documents that are made publicly available pursuant to the proposed regulation, and provide educational services to any child or youth pending receipt, translation, and analysis of such records.

DEPARTMENT RESPONSE:

School districts must comply with existing federal and state civil rights laws concerning language access for English Language Learners (ELLs) and limited English proficient parents / persons in parental relation. The Department believes that imposing additional unfunded, translation mandates on school districts would be unduly burdensome.

9. COMMENT:

Provided that a child is immediately enrolled in a school district, and remains enrolled, while a residency determination is pending, districts should be given 15 business days at a minimum, instead of three business days, to conduct their review so that parents may be afforded more time to collect and submit the requested documents and so that districts have sufficient time to translate and review the documents provided.

DEPARTMENT RESPONSE:

The proposed amendment provides that when a child's parent/person in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and shall begin attendance on the next school day, or as soon as practicable. The proposed amendment has been revised to clarify that "[A]s soon as practicable but no later than three business days after such initial enrollment, the parent(s), the person(s) in parental relation to the child or the child, as appropriate, shall submit documentation and/or information in support of the child's residency in the district and the board of education or its designee shall review all such documentation and/or information and make a residency determination . . . ." and to also provide that if such documentation and/or information is submitted on the third business day after initial enrollment, the district in its discretion may make the residency determination no later than the fourth business day after initial enrollment. The Department believes that the proposed amendment strikes an appropriate balance between ensuring that eligible students are admitted to school without undue delay by requiring immediate enrollment of a student upon request, and minimizing the negative effects on school districts of enrolling ineligible students by providing a three to four day

period to resolve residency determinations. Nothing in the proposed amendment would preclude a parent/person in parental relation, or the child where appropriate, from submitting to the school district additional information relating to the child's residency as such information becomes available. In addition, paragraph (4) of the emergency regulation specifies that "[a]t any time during the school year, the board of education or its designee may determine ... that a child is not a district resident entitled to attend the schools of the district."

10. COMMENT:

Permitting school districts to require parents or persons in parental relation to provide affidavits indicating that they are the parent with whom the child lawfully resides; or indicating that they are the person in parental relation to the child, places an undue and unnecessary burden on parents. This provision should be reframed so that if the district requires proof of parental relationship or proof that the child resides with the parent(s) or person(s) in parental relation, a parent or person in parental relation may satisfy this requirement by submitting an affidavit indicating that the child lawfully resides with that parent or that they are the person(s) in parental relation to the child, and that districts may also accept other proof such as a judicial custody order or order of guardianship. Additionally, the provision should be revised to make clear that unaccompanied homeless youth are not required to submit proof of parental relation or that the person in parental relation has custody and control of the youth.

DEPARTMENT RESPONSE:

The proposed amendment has been revised to provide that for purposes of proof of parental relationship or proof that the child resides with the parent(s) or person(s) in

parental relation, the district may accept an affidavit of the parent(s) or person(s) in parental relation indicating either: (1) that they are the parent(s) with whom the child lawfully resides; or (2) that they are the person(s) in parental relation to the child, over whom they have total and permanent custody and control, and describing how they obtained total and permanent custody and control, whether through guardianship or otherwise. The provisions that "[a] district may also accept other proof, such as documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency" and that "[a] district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment" have been retained. Because of the above revision, it is unnecessary to address the suggested revision concerning unaccompanied homeless youths.

11. COMMENT:

We recommend providing more options for supporting documents that may be used to establish residency in the school district, such as: mail addressed to the parent or person in a parental relation; property tax statements; bank account statements; jury summons or Court order issued by New York State or a federal court; and insurance policy statements.

DEPARTMENT RESPONSE:

The supporting documents which may be use to establish residency include, but are not limited to, the list of documents specifically identified in proposed 8 NYCRR §§ 100.2(y)(2)(i)(b) and 100.2(y)(2)(i)(d). Therefore, parents and persons in parental relation may submit documents such as those identified in this comment to establish residency, and the district must make a determination as to such documents' sufficiency

to establish residency in the school district. If a need is shown, the Department may consider issuing further guidance on this issue.

12. COMMENT:

In instances where undocumented and unaccompanied youth will not have access to the documents listed in section 100.2(y)(2)(ii), an affidavit of age, provided by an individual present at the time of a child's birth, baptism, or other religious ceremonies akin to a baptism, should be considered as proof of a student's age. We urge the Department to work with the State Legislature to amend Education Law §3218 to allow for the use of affidavits as described above for purposes of establishing the age of a student. We also recommend that the regulations allow for the submission of an uncertified copy of the child's birth certificate as sufficient proof of age for the reasons stated above.

DEPARTMENT RESPONSE:

Education Law §3218 governs what forms of evidence may be used to determine a child's age, and any amendments to this statute must be enacted by the State Legislature. The Department will take into advisement the recommendation to work with the State Legislature to amend Education Law §3218 to expand allowable documents to establish a student's age.

13. COMMENT:

Because gathering documents from foreign countries is a lengthy and time-consuming process, in order to ensure that families are provided with the maximum amount of time allowed by Public Health Law § 2164(7) to gather proof of immunization,

we recommend that the regulation be revised to specify that school districts may provide families with up to 30 days to secure the necessary immunization records.

DEPARTMENT RESPONSE:

The Department is not the agency with regulatory authority for implementation of Public Health Law §2164(7), which governs school authority to gather proof of immunization. However, proposed 8 NYCRR § 100.2(y)(2)(iii) clarifies that districts are required to comply with Public Health Law §2164(7), which includes the provision that a student may be allowed to attend school for up to 30 days such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization, as well as other applicable provisions of the Public Health Law and implementing regulations.

14. COMMENT:

How can a district determine parental rights if there is no requirement for a birth certificate? Not all proof of age includes both parent names.

DEPARTMENT RESPONSE:

The proposed amendment comports with Education Law §3218, which provides that if a birth certificate is not available, then a passport showing the date of birth, or other documentary evidence or other recorded evidence in existence two years or more (except an affidavit of age) may be presented as evidence of age. The proposed amendment provides a non-exclusive list of what may be considered as “other documentary evidence or other recorded evidence.”

15. COMMENT:

If a school district finds a student is NOT a resident and the parent re-submits documentation that is still not valid; the parent can appeal. Does the student stay in our school during the appeal?

DEPARTMENT RESPONSE:

Pursuant to 8 NYCRR section 276.1, a person bringing an appeal to the Commissioner of Education under Education Law section 310 may apply for a stay of the school district's determination which, if granted, will allow the student to remain in school during the pendency of the appeal.

16. COMMENT:

Does the three-day residency determination rule apply if registration is done over the summer months?

DEPARTMENT RESPONSE:

The proposed amendment provides that when a child's parent/person in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and "shall begin attendance on the next school day, or as soon as practicable." Therefore, if the child would be eligible to attend summer school if a resident of the district, then the child must be enrolled upon request and begin attendance on the next school day that summer school is in session or as soon as practicable. The district must then make its residency determination as soon as practicable but no later than three business days (or four business days if documentation/information on residency is submitted on the third business day). If the child is not eligible to attend summer school, but is eligible to attend regular session, then the child must be enrolled upon request and the district must make its residency

determination in accordance with the above (i.e. as soon as practicable, but no later than three/four days etc.). However, the child would be required to be admitted to attendance pending a residency determination within the three/four day period only on those school days, if any, that fall within the regular session.

17. COMMENT:

Does the McKinney-Vento (our Enrollment Form) Form need to be included in the registration packet?

DEPARTMENT RESPONSE:

School districts that receive federal funding as part of the State's Consolidated Application must administer the McKinney-Vento Residency/Enrollment Questionnaire, and the Questionnaire must be included in the school district's registration packet. It is recommended that the Questionnaire be placed in the registration packet as the first page, to eliminate enrollment delays.

18. COMMENT:

Can the Home Language Questionnaire (HLQ) be provided at the time of enrollment - for example, as a part of the registration intake process, so that the school district can immediately identify whether there is a need for assessment and, if so, which school the student needs to be sent for assessment and attendance based upon the need and resources, especially as it may be different than the school located in the child's normal attendance zone? If the HLQ cannot be provided then but the district needs to wait, there may be delay for the student in terms of the assessment piece. This isn't an issue for small school districts, but for larger districts with multiple schools for each level (elementary, secondary).

DEPARTMENT RESPONSE:

The HLQ, in its current form, should be administered as soon after the point of enrollment as possible. If the proposed regulations are approved by the Board of Regents, guidance will be created and released by the Department.

19. COMMENT:

Can a district ask a question on their enrollment form as to “migrant status” and include resource information for migrant families as a part of their enrollment packet? The information would not be used in any way as a determination as to enrollment eligibility, but as a means to get families in touch with appropriate resources. Is that problematic under the new regulations?

DEPARTMENT RESPONSE:

To the extent that asking about “migrant status” on enrollment forms may tend to reveal immigration status, districts may not ask such questions. However, districts may ask other questions pertinent to the provision of resources for migrant families including, but not related to, the accessing of resources.

20. COMMENT:

Strong support was expressed for the proposed amendment. Specifically, requiring that enrollment information and instructions be made publicly available, and on district websites where they exist, is a necessary step towards transparency of a process that is often confusing, particularly for immigrant families. Further, requiring that students be enrolled and begin attendance immediately upon request even where there is a pending review of residency, will ensure children have the opportunity to be educated without falling further behind their peers. Finally, clarifying that districts may

not require certain specified materials to establish residency, age, and guardianship will help diminish the discouragement that many families experience when faced with burdensome or impossible documentation requests.

DEPARTMENT RESPONSE:

No response is necessary as the comment is supportive.

21. COMMENT:

In order to clarify and strengthen the proposed amendment, the following revisions are suggested as essential to ensuring that all students are enrolled and begin attendance without delay:

(a) Revise section 100.2(y)(1) to add: "Such information shall be made available in the six most common non-English languages spoken by individuals with limited-English proficiency in the school district. Language assistance shall be made available in languages other than the six most common languages spoken by individuals with limited-English proficiency" to ensure that families seeking to register recent immigrant children are informed of the school district's enrollment requirements in a language they understand.

DEPARTMENT RESPONSE:

School districts must comply with existing federal and state civil rights laws concerning language access for English Language Learners (ELLs) and limited English proficient parents / persons in parental relation. The Department believes that imposing additional unfunded, translation mandates on school districts would be unduly burdensome.

(b) Revise 100.2(y)(2) to add a new (iv) to state: “School attendance shall not be delayed during the aforementioned document review” to ensure that school districts do not delay enrollment while collecting and reviewing documents and to make clear that schools are required to provide for regular attendance and instruction immediately following the initial request for enrollment.

DEPARTMENT RESPONSE:

The comment’s suggestion is unnecessary, as the proposed amendment provides that when a child’s parent/person in parental relation or the child, as appropriate, requests enrollment of the child in the school district, such child shall be enrolled and shall begin attendance on the next school day, or as soon as practicable. The proposed amendment has been revised to clarify that “[A]s soon as practicable but no later than three business days after such initial enrollment, the parent(s), the person(s) in parental relation to the child or the child, as appropriate, shall submit documentation and/or information in support of the child’s residency in the district and the board of education or its designee shall review all such documentation and/or information and make a residency determination . . . .” and to also provide that if such documentation and/or information is submitted on the third business day after initial enrollment, the district in its discretion may make the residency determination no later than the fourth business day after initial enrollment. The Department believes that the proposed amendment strikes an appropriate balance between ensuring that eligible students are admitted to school without undue delay by requiring immediate enrollment of a student upon request, and minimizing the negative effects on school districts of

enrolling ineligible students by providing a three to four day period to resolve residency determinations.

(c) Revise 100.2(y)(2)(i)(a)(2) to state: “any oral or written information regarding or which would tend to reveal the immigration status of the child, the child’s parent(s) or the person(s) in parental relation, including but not limited to copies of or information concerning visas, permanent residence cards, or other documentation indicating immigration status of the child or any family members . . ." to clarify that the regulation prohibits verbal questions about immigration status when interviewing families for purposes of enrollment, as well as questions on forms.

DEPARTMENT RESPONSE:

The Department believes that the language in section 100.2(y)(2)(i)(a)(2) is sufficient for its purposes and that further specification or elaboration can best be addressed, if necessary, in guidance.

(d) Revise 100.2(y)(2)(iii) to add: ”In certain cases, immunization records from other countries may be unavailable immediately. In such situations, students should be allowed to attend school while the school ascertains the child’s immunization status and the person in parental relation to the child arranges for immunizations, if necessary” thereby incorporating NYSED registration guidance prohibiting schools from refusing admission to students who cannot immediately provide proof of immunization.

DEPARTMENT RESPONSE:

The Department believes that the language in section 100.2(y)(2)(iii) is sufficient for its purposes and that further specification or elaboration should be left to guidance.