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

TO: The Honorable the Members of the Board of Regents

FROM: Charles A. Szuberla, Jr.

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

DATE: June 8, 2015

AUTHORIZATION(S):

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents amend section 100.2(y) of the Commissioner's Regulations to provide clear requirements for school districts regarding student enrollment, particularly as it pertains to procedures for unaccompanied minors and other undocumented youths?

Reason(s) for Consideration

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

Proposed Handling

The proposed amendment is being presented to the Full Board for adoption as a permanent rule at the June 2015 Regents meeting.

Procedural History

The proposed amendment was adopted as an emergency rule 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 rule at the February 2015 Regents meeting and revised and adopted as an emergency rule at the April 2015 Regents meeting. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on April 29, 2015.

A copy of the proposed rule 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 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. Such enrollment policies, as well as highly restrictive requirements for proof of residency, may impede or prevent unaccompanied minors and undocumented youths 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.

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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).

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 youths. 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.

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 youths 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 youths;
(2) Prohibited enrollment application policies which are unlawful and/or have had a disparate impact on unaccompanied minors and undocumented youths;
(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.

Recommendation

Staff recommends that the Regents take the following action:

VOTED: That subdivision (y) of section 100.2 of the Regulations of the Commissioner is amended as submitted, effective July 1, 2015.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the December 2014 Regents meeting, effective December 16, 2014, readopted as an emergency rule at the February 2015 Regents meeting, and revised and adopted as an emergency rule at the April 2015 Regents meeting. If adopted at the June Regents meeting, the proposed amendment will take effect as a permanent rule on July 1, 2015.

AMENDMENT OF THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

Subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective July 1, 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 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 Revised Rule Making in the State Register on April 29, 2015, the State Education Department received the following comments:

1. COMMENT:

The rulemaking is contrary to the best educational interest of students and creates additional costs for school districts. There will be instances where non-resident children are enrolled for a period of time and then removed after a determination of non-residency, which will create additional costs for school districts to educate and provide transportation for non-resident school students and pose a significant financial impact on school districts and their taxpayers. In addition, a revolving door of non-resident students in and out of classrooms is likely to cause instability and anxiety in a child, and will cause disruption in classrooms and impact the other students as well. Furthermore, because school districts now have to make publicly available their enrollment forms, procedures, and instructions and requirements for student residency and age, it is not unreasonable to require that parents/persons in parental relation submit proof of residency prior to enrollment. If the Department fears that districts will delay residency determinations, it can maintain the three business day rule but permit the determinations to occur prior to enrollment.

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 provides 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 also provides "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, <u>on the date of such request for enrollment</u> [emphasis added]." 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. The Department acknowledges that there may be instances where non-resident children are enrolled for a short time and then removed, 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.

2. COMMENT:

The rulemaking is not authorized under State law and is not required by federal law, regulation or administrative guidance. Federal guidance clearly acknowledges that

with the exception of homeless students, it is legally permissible for school districts to require parents/persons in parental relation to submit proof of residency before enrollment. In addition, the rulemaking raises legal questions under State law regarding a school district's authority to enroll and provide services to children prior to a residency determination. Such an outcome is clearly not what the Legislature intended when it enacted Education Law §3202(1) to set limitations on the right to receive a tuition-free public education within any given school district. Furthermore, to the extent the rulemaking requires school districts to admit a student without a residency determination, it authorizes an unlawful gift of public funds.

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. 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.

3. COMMENT:

There are more appropriate alternatives that are legally viable and address the concerns underlying the rulemaking, and which should be considered prior to permanent adoption of the rulemaking:

(a) Consistent with federal guidance, amend section 100.2(y) 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.

(b) 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 audits conducted by the Department or the Attorney General.

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.

(c) 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 and submission of requisite documentation, and require that any local parental appeal from an initial residency determination be decided on an expedited basis. Provide for an expedited appeal to the Commissioner from a final school district determination of non-residency.

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 provides 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 further provides "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, <u>on the date of such request for enrollment</u> [emphasis added]." 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.

4. COMMENT:

School districts should be required to translate any enrollment-related documents that are made publicly available pursuant to the proposed regulation and any documents submitted by the child or parent/person in parental relation that would establish proof of parental relation or age of the child, and any medical and academic records from foreign countries. At a minimum, the regulation should specify that school districts must comply with federal and state civil rights laws concerning language access for limited English proficient families.

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 and this compliance is necessitated by such laws themselves. It is therefore unnecessary to repeat such requirement in the Commissioner’s regulations and it is more appropriate, if necessary, to address such compliance in Department guidance.

5. COMMENT:

After initial enrollment, school districts should be given a minimum of 15 days, instead of three to four business days, to conduct their review, so that parents may be afforded more time to collect and submit the requested documents and districts have sufficient time to translate and review the documents provided.

DEPARTMENT RESPONSE:

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."

6. 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 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.

7. 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.

8. COMMENT:

Section 100.2(y)(5) should be modified to clarify that enrollment determinations regarding whether a child is considered homeless must be made in accordance with subdivision (x) and to make clear that students in temporary housing are never required

to submit proof of residency and that unaccompanied homeless youth are never required to submit proof of parental relation.

DEPARTMENT RESPONSE:

Section 100.2(y)(5) of the proposed amendment clarifies that 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 section 100.2(x). Should it become necessary, the Department may issue guidance to address the matters raised in the comment.

9. COMMENT:

Revise the requirement in 100.2(y)(2)(i)(c) that a "person in parental relation" must demonstrate "total and permanent custody and control" over an enrolling child. For many unaccompanied immigrant children, though their natural parents are no longer their primary caretakers, the children still depend on their natural parents to some extent to provide for their wellbeing, including providing input on medical and educational decisions for their children. Moreover, the "total and permanent custody and control" standard is confusing in that it suggests a legal relationship. Many immigrant children live in the United States for months or years with relatives with whom they have no legal relationship. While it is helpful that the regulation permits proof of custody and control through "documentation indicating that the child resides with a sponsor with whom the child has been placed by a federal agency", not all immigrant children have such documentation and not all live with their official sponsor. We recommend shifting the focus from whether the adult caretaker of an unaccompanied immigrant child has "total and permanent custody and control" of the child to whether the caretaker's home is the

child’s permanent residence and whether the caretaker has “primary responsibility with respect to the child’s support and wellbeing.”

DEPARTMENT RESPONSE:

The requirement in 100.2(y)(2)(i)(c) that a “person in parental relation” must demonstrate “total and permanent custody and control” over an enrolling child is consistent with the State Education Department’s longstanding interpretation of Education Law section 3202(4)(a), which obligates a school district to provide tuition-free education to children of eligible school age who reside within the school district. The Commissioner has long held that the presumption that a child resides with his or her parents or legal guardians can be rebutted upon a determination that there has been a total and permanent transfer of custody and control to someone residing in the district (Appeal of D.P., 54 Ed Dept Rep, Decision No. 16.673; Appeal of Polynice, 48 Ed Dept Rep 490, Decision No. 15,927; Appeal of Wilkerson, 32 Ed Dept Rep 58, Decision No. 12,757). The Department’s interpretation of Education Law §3202(4)(a) was accepted and applied by the Court of Appeals in Catlin v. Sobol, 77 NY2d 552, where the Court noted: “[t]he general rules under section 3202 are that a school district is bound to furnish tuition-free education only for children whose parents or legal guardians reside within the district [citation omitted]; that where the parents or guardians reside outside the district the child presumably resides outside the district also and is not entitled to free education; and that this presumption may be overcome by showing that the parents or guardians have given up parental control and that the child’s permanent domicile - i.e. the child’s “actual and only residence” – is within the district [citations omitted].” Subsequently, the Court of Appeals in Longwood Central School

Dist.v. Springs Union Free School Dist., 1 NY3d 385 once again ruled that residency under Education Law §3202(4)(a) means permanent domicile, holding that "We … conclude that the term "residence" in Education Law §3202(4)(a) requires an intent to remain in a place permanently." Id. at 38 . Therefore, both the Commissioner and the Court of Appeals have interpreted the relevant statute as requiring a determination of permanent domicile, with the presumption that the student permanently resides with their parents. The interpretation proposed by the commenters, that a temporary change in custody and control, rather than a permanent change of custody and control, should be sufficient to establish residency for school purposes, would be inconsistent with the longstanding interpretation of Education Law §3202(4)(a) both by the Commissioner and by the courts.

To the extent the comment can be read to recommend that the Department create a different standard (i.e., whether the caretaker has "primary responsibility with respect to the child's support and wellbeing") to apply in residency determinations involving unaccompanied immigrant children, applying such standard would necessitate identifying children as unaccompanied immigrant children, including undocumented youth. 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 and school districts are generally prohibited from inquiring about such status, and school districts are generally prohibited from inquiring about the immigrant status of students.

Accordingly, residency determinations must be made in accordance with a uniform standard, applicable to all children in the State regardless of their immigrant

status. The Department believes that the present “total and permanent custody and control” standard is necessary to fulfill the Legislative intent of Education Law §3202(4)(a), as it has been interpreted both administratively and judicially for many years, and that at this juncture a change in the standard for determining residency to eliminate the element of permanency can only be accomplished through legislation.