



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: Cosimo Tangorra, Jr. *Cosimo Tangorra Jr.*
SUBJECT: Proposed Amendment of Section 100.2(y) of the
Commissioner's Regulations relating to Student Enrollment

DATE: February 2, 2015

AUTHORIZATION(S):

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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 as it pertains to 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 Full Board for adoption as an emergency rule at the February 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 December emergency rule will expire on March 15, 2015. A second emergency action is necessary 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. A copy of the proposed amendment is 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.

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 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.

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.

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 March 16, 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 to ensure that the emergency rule adopted at the December 2014 Regents meeting remains continuously in effect until the proposed rule can be presented for adoption and take effect as a permanent rule.

Timetable for Implementation

The proposed amendment was adopted as an emergency rule at the December 2014 Regents meeting, effective December 16, 2014, and will expire on March 15, 2015. If adopted at the February Regents meeting, the second emergency action will become effective on March 16, 2014 for a 60-day period. It is anticipated that the proposed rule will be presented for permanent adoption at the March 2015 Regents meeting, after expiration of the 45-day public comment period prescribed in the State Administrative Procedure Act. If adopted at the March meeting, the proposed amendment will take effect as a permanent rule on April 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 as an 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. Because the Board of Regents meets at scheduled intervals, the earliest the proposed amendment could be presented for regular (non-emergency) adoption, after publication in the State Register and expiration of the 45-day public comment period provided for in State Administrative Procedure Act (SAPA) section 202(1) and (5), is the March 16-17, 2015 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the March meeting, would be April 1, 2015, the date a Notice of Adoption would be published in the State Register. However, the December emergency rule will expire on March 15, 2015, 90 days from its filing with the Department of State on December 16, 2014. A lapse in the rule's effective date could disrupt enrollment of students, particularly unaccompanied minors and other undocumented youths, in potential violation of federal and State laws regarding access to a free public education system.

Emergency action is therefore necessary for the preservation of the general welfare to ensure that the proposed rule adopted by emergency action at the December 2014 Regents meeting remains continuously in effect until the effective date of its permanent adoption.

It is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the March 16-17, 2015 Regents meeting, which is the first meeting scheduled after expiration of the 45-day period for public comment pursuant to the State Administrative Procedure Act.

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 March 16, 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) 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. By no later than January 31, 2015, such information shall be included in the 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 school district's website, if one exists.

(2) 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. Within three business days of such initial enrollment, the board of education or its designee must review all documentation submitted by the child's parent(s), the person(s) in parental relation to the child or the child, as appropriate, and

make a residency determination in accordance with the following:

(i) Documentation Regarding Enrollment and/or Residency.

(a) The 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 district may require that the parent(s) or person(s) in parental relation submit documentation and/or information establishing physical presence of the parent(s) or person(s) in parental relation and the child in the school district. Such documentation may include but shall not be restricted to: (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; or (3) such other statement by a third party establishing the parent(s)' or person(s) in parental relation's physical presence in the district. If the documentation listed in this clause is not available, the district shall consider other forms of documentation and/or information establishing physical presence in the district, in lieu of those described in this clause, which may include but not be limited to those listed in clause (d) of this subparagraph.

(c) The district may also require the parent(s) or person(s) in parental relation to provide an affidavit either: (1) indicating that they are the parent(s) with whom the child lawfully resides; or (2) indicating 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. 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. A district may not require submission of a judicial custody order or an order of guardianship as a condition of enrollment.

(d) The district 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 school district 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, a school district 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 within 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 district attempts to obtain such verification.

(iii) 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), or an enrolled student who is suspended from instruction for disciplinary reasons pursuant to Education Law §3214. 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.

(3) Within three business days of a child's initial enrollment, the board of education or its designee shall determine whether a child is entitled to attend the schools of the district. For purposes of this paragraph, 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, an opportunity to submit information concerning the child's right to attend school in the district, which shall be the information submitted by the parent(s) or person(s) in parental relation pursuant to paragraph (2) of this subdivision.

(4) At any time during the school year, 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 except as otherwise provided in paragraph (3) of this subdivision. 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.