



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:** May 11, 2015

**AUTHORIZATION(S):**

*Richard A. Santorum*

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## SUMMARY

### Issue for Decision (Consent Agenda)

Should the Board of Regents readopt as an emergency action the amendment of 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 May 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 was revised in response to public comment. At the April 2015 Regents meeting, the February emergency rule was repealed and the revised proposed amendment was adopted as an emergency action, effective April 14, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on April 29, 2015.

It is anticipated that the revised proposed amendment will be presented for permanent adoption at the June 15-16, 2015 Regents meeting. However, the April emergency rule will expire on June 12, 2015. Another emergency action is necessary at the May 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.<sup>1</sup> 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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<sup>1</sup> 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.

### **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 June 13, 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 April 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.

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 was revised in response to public comment. At the April 2015 Regents meeting, the February emergency rule was repealed and the revised proposed amendment was adopted as an emergency action, effective April 14, 2015.

The April emergency rule will expire on June 12, 2015. If adopted at the May Regents meeting, the emergency action will become effective on June 13, 2015 for a 60-day period. It is anticipated that the proposed 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 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 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.

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 was subsequently revised in response to public comment. At the April 2015 Regents meeting, the February emergency rule was repealed and the revised proposed amendment was adopted as an emergency action, effective April 14, 2015. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on April 29, 2015.

It is anticipated that the revised proposed amendment will be presented for permanent adoption at the June 15-16, 2015 Regents meeting, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period for revised rule makings prescribed by the State Administrative Procedure Act. However, the April emergency rule will expire on June 12, 2015. 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 April 2015 Regents meeting remains continuously in effect until the effective date of its permanent adoption.

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

Subdivision (y) of section 100.2 of the Regulations of the Commissioner of Education is amended, effective June 13, 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](http://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.