

May 28, 2015

Via Email

Charles Szuberla, Acting Deputy Commissioner, P-12 Education
New York State Education Department
State Education Building 2M
89 Washington Avenue
Albany, New York 12234

**Re: Comments on Proposed Amendment of Section 100.2(y) of the Commissioner's
Regulations Relating to Student Enrollment**

Dear Acting Deputy Commissioner Szuberla:

We are a group of civil rights and immigrant rights advocates, and we submit these comments in response to the proposed amendments to § 100.2(y) of the Commissioner's Regulations, passed by emergency action at the Regents meeting of April 13-14, 2015.

We strongly support NYSED's attempts to ensure that immigrant children can exercise their constitutional right to enroll in school. Part of the new regulation, however, fails to address the problems faced by immigrant children and may, in fact, exacerbate the difficulty these children face in enrolling in New York schools. Specifically, we write to propose that NYSED amend the requirement that a "person in parental relation" must demonstrate "total and permanent custody and control" over an enrolling child.¹ 8 N.Y.C.R.R. § 100.2(y)(2)(i)(c).

This requirement is derived from several administrative decisions by the Commissioner. *See, e.g., Appeal of L.H., D.S., & F.S.*, 49 Educ. Dep't Rep. Decision No. 15,947 (June 24, 2009), available at <http://www.counsel.nysed.gov/Decisions/volume49/d15947>. The Commissioner has held that, to meet the residency requirement for enrollment, a parent must have relinquished

¹ This comment addresses one problematic aspect of the regulation and is not intended to be exhaustive. Several of the advocates that have signed on in support of this comment are members of the Long Island Education Advocates Table (formerly the Long Island Immigrant Children's Education Project), which submitted a comment on February 17, 2015 addressing many other important concerns that remain unresolved in the proposed amendment.

“total and permanent custody and control” to a non-parent adult in order to rebut the presumption that a child’s domicile is the same as that of the child’s parent. *Id.* “[I]f parents or legal guardians continue to provide financial support for room, board, clothing and other necessities,” the Commissioner has found, “custody and control has not been relinquished.” *Id.* Further, “where parents or legal guardians retain control over important issues such as medical and educational decisions, total control is not relinquished.” *Id.*

We understand the legitimate concern motivating the requirement of “total and permanent custody and control”: preventing parents from moving their children to a different district solely to take advantage of that district’s schools. But children do not make long and hazardous journeys and cross our borders alone to gain access to a particular school district. At least 58% of unaccompanied immigrant children (*i.e.*, those who entered the United States without a parent or legal guardian) surveyed in a U.N. study were forcibly displaced because they suffered or faced harms – such as intense gang violence, familial abuse, trafficking, and/or extreme poverty – that indicated a potential or actual need for international protection. U.N. High Comm’r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 41-47 (Mar. 2014), available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.²

A requirement that their caretakers show “total and permanent custody and control” is unmoored from the living situations of many of these children. Though their natural parents (who often continue to reside in the countries from where these children fled) are no longer their primary caretakers, many such children still depend on their natural parents to some extent to provide for their well-being. For example, many parents still provide input on medical and educational decisions for their children. Under the current regulation, however, these children would not be able to enroll in the school district unless they severed this remaining connection with their parents. Instead of addressing the legitimate concern of preventing parents from shopping for superior school districts, the “total and permanent custody and control” standard erects a high barrier to enrollment for the very children the emergency regulation seeks to protect.

Moreover, the “total and permanent custody and control” standard is confusing. It suggests a legal relationship, even though the regulations prohibit districts from requiring the “submission of a judicial custody order or an order of guardianship as a condition of enrollment.” The reality is that many immigrant children live in the United States for months or years with relatives with whom they have no legal relationship.

² In Fiscal Year 2014, 53,518 unaccompanied immigrant children were apprehended by immigration officials and placed with sponsors somewhere in the United States; 5,955 of them were placed in New York. U.S. Dep’t of Health & Human Servs., *Unaccompanied Children Released to Sponsors by State*, <http://www.acf.hhs.gov/programs/orr/programs/ucs/state-by-state-uc-placed-sponsors> (last visited Apr. 28, 2015). Approximately 95% came from Guatemala, El Salvador, and Honduras; more than a third were girls; 27% were under 14 years old. U.S. Dep’t of Health & Human Servs., *About Unaccompanied Children’s Services: General Statistics*, <http://www.acf.hhs.gov/programs/orr/programs/ucs/about#facts> (last visited Apr. 28, 2015).

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,” this provision does not solve the problem. First, not all immigrant children have such documentation. Some cross the border and locate their relatives without encountering federal authorities. They lack documentation of their placement with a sponsor but are nevertheless entitled to enroll in school. Second, among those who were apprehended at the border and placed with sponsors by the federal Office of Refugee Resettlement (ORR), not all live with their official sponsor. For example, a relative who has been granted lawful permanent residency may serve as the minor’s official sponsor, but the child may actually live with another relative who is undocumented. Or the sponsor may become overwhelmed and ask another relative to care for the child. A Release Form from the ORR will not be helpful to these children, as it will list a sponsor who is not in fact the child’s caretaker.

NYSED should not deprive unaccompanied immigrant children of an education because of their continued relationship with natural parents who reside outside the United States, or because the caretaker with whom they are actually living is not the sponsor identified in their ORR Release Form. We recommend shifting the focus from whether the adult caretaker living in the school district 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” authority over the child. This shift can address NYSED’s concerns about fraudulent school district shopping without placing unnecessary hurdles in front of immigrant children seeking to enroll. Indeed, this is a better standard for all children.

In light of these concerns, we request the following modifications to § 100.2(y)(3)(i)(c):

(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. An individual is “in parental relation” to a child if the individual’s home is the child’s permanent residence and the individual has primary responsibility with respect to the child’s support and wellbeing, over whom they have total and permanent custody and control. The person(s) in parental relation may also be required to affirm: and describing (a)-how they obtained physical custody of the child and primary responsibility with respect to the child’s support and wellbeing, and (b) that they did not assume such custody and responsibility for the purpose of enabling the child to attend school in the district of residence. ~~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.

With this suggested change, we are confident that this regulation will help all children obtain the education to which they are entitled. Thank you for your time and consideration. If you have any questions or concerns, you can reach Phil Desgranges, an attorney at the New York Civil Liberties Union, at 212.607.3360.

Sincerely,

New York Civil Liberties Union
Atlas: DIY
Central American Refugee Center (CARECEN)
Christ Episcopal Church, Rev. Alejandra Trillos
Empire Justice Center
Family & Children's Association
Family Violence Litigation Clinic & Immigration Project, Albany Law School
Hagedorn Foundation
Health and Welfare Council of Long Island
Herstory Writers Workshop
Immigration Law Clinic, Touro Law Center
Kids in Need of Defense (KIND)
Long Island Advocacy Center
Long Island Immigrant Alliance
Long Island FQHC
Long Island Language Advocates Coalition
Long Island WINS
Make the Road New York
MercyFirst
New York Communities for Change
New York Immigration Coalition
Peter Cicchino Youth Project, Urban Justice Center
Safe Passage Project
The Door, A Center of Alternatives
The Safe Center Long Island
Worker Justice Center of New York
Youth Advocacy Clinic, Maurice A. Deane School of Law at Hofstra University

cc: Chancellor Merryl H. Tisch
Vice Chancellor Anthony S. Bottar
Chancellor Emeritus Robert M. Bennett
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Regent Kathleen M. Cashin
Regent Christine D. Cea
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Regent Wade S. Norwood
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Regent James R. Tallon
Regent Roger Tilles
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