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informed...



LAMB & BARNOSKY, LLP

ATTORNEYS AT LAW

MEMORANDUM

TO: OUR SCHOOL DISTRICT CLIENTS

FROM: LAMB & BARNOSKY, LLP

DATE: SEPTEMBER 16, 2010

RE: STUDENT REGISTRATION GUIDANCE

We are writing to make you aware of guidance recently issued by the New York State Education Department ("the Department") regarding student registration. Pursuant to the Department's Student Registration Guidance dated August 30, 2010, school districts may not deny resident students a free public education on the basis of their immigration status. This is because undocumented children, just like U.S. citizens' children, have the right to attend school full-time as long as they meet the age and residency requirements established by State law. Therefore, school districts may not ask for Social Security numbers, visas, or other information that would indicate a child's immigration status while registering students for school.

You are encouraged to review your policies and forms relating to student enrollment to ensure that they are in full compliance with the Department's Guidance, as well as the most recent case law and statutory and regulatory provisions, all of which are summarized below.

Age

Education Law § 3202(1) provides that a person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools in the district in which the person resides without the payment of tuition. Moreover, pursuant to Education Law § 3205, school districts must ensure that all students within the compulsory school age attend full-time instruction. In order to ensure that these students are in fact residents entitled to a free public education at district expense, school districts often require documentation to confirm a student's eligibility for admission to school.

The Commissioner of Education (“the Commissioner”) has stated that, if a parent has a birth certificate or record of baptism (giving the date of birth), no other form of evidence may be used to determine a child’s age. Where a birth certificate or record of baptism is not available, a passport (including a foreign passport) may be used to determine a child’s age.

If a birth certificate, record of baptism and passport are unavailable, the district may consider certain other documentary or recorded evidence to determine a child’s age. Below is a non-exhaustive list of examples of documents which may be used to establish a child’s age:

- Official driver’s license
- State or other government-issued ID
- School photo ID with date of birth
- Consulate identification card
- Hospital or health records
- Military dependent ID card
- Native American tribal document
- Record(s) from non-profit international aid agencies and voluntary agencies (VOLAGs)

Residency

Undocumented students have a constitutional right to attend public elementary and secondary schools for free if they are district residents. The Commissioner has noted that residency is established based on two factors: physical presence as an inhabitant within the district and intent to reside in the district. A student’s residence within the district is not determined or influenced by his or her immigration status.

Accordingly, at the time of registration, schools must avoid asking questions related to immigration status, or requesting information that may reveal a child’s immigration status (such as asking for a Social Security number). If a district needs to collect certain data pursuant to State and/or federal laws that could reveal a child’s immigration status, it should do so after the student has enrolled in school so as not to inadvertently give the impression that information related to immigration status will be used in making enrollment decisions.

Below is a non-exhaustive list of examples of documents which may be used to establish a student’s residency:

- Pay stub
- Income tax form
- Deed or lease to house or apartment
- Utility or other bills sent to the student’s home address

- Membership documents (such as library cards) establishing residency
- Voter registration document
- Official driver's license, learner's permit or non-driver ID
- State or other government-issued ID

We have enclosed a copy of the Department's Guidance. We encourage you to contact us if you have any questions regarding this Memorandum.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.



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

SENIOR DEPUTY COMMISSIONER FOR P-12 EDUCATION

August 30, 2010

To: District Superintendents
Superintendents of Schools
Administrators of Public, Charter, and Nonpublic Schools

From: John B. King Jr., Senior Deputy Commissioner for P-12 Education

Subject: Student Registration Guidance

Introduction

The Department has recently received questions from school districts regarding their obligations in enrolling and making residency determinations, particularly with respect to students who are not citizens of the United States. As detailed below, school districts may not deny resident students a free public education on the basis of their immigration status. This guidance is intended to provide an overview of and recommended strategies for addressing common issues that districts face in these areas. The Department encourages school districts to review their policies relating to student enrollment and residency to ensure that they are in full compliance with any applicable case law, statutory and regulatory provisions. School districts are advised to consult with their school attorneys in this review.

Pursuant to Education Law §3202(1), a person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition. Moreover, pursuant to Education Law §3205, school districts must ensure that all students within the compulsory school age attend upon full-time instruction. As a result, during the enrollment/registration process, school districts commonly request certain information and/or records, such as those establishing a student's date of birth and address, to determine a student's age and residency within the district. Districts may also request other information regarding the student's previous academic records, medical records, and proof of immunization (pursuant to Public Health Law and Department of Health regulations).

Undocumented children, like U.S. citizen children, have the right to attend school full time as long as they meet the age and residency requirements established by state law. In a 1982 decision, the U.S. Supreme Court recognized that children who are undocumented immigrants cannot be denied a free public education if they are, as a factual matter, district residents (Plyler v. Doe, 457 U.S. 202; see Appeal of Plata, 40 Ed Dept Rep 552, Decision No. 14,555). While Plyler did not expressly address the issue of whether a school district may inquire about a student's immigration status at the time of enrollment, the decision is generally viewed as prohibiting any district actions that might "chill" or discourage undocumented students from receiving a free public education. Accordingly, at the time of registration, schools should avoid

asking questions related to immigration status or that may reveal a child's immigration status, such as asking for a Social Security number (Note- The Department does not require districts to collect students' social security numbers for any purpose). Moreover, as discussed below, while school districts may need to collect certain data pursuant to State and/or federal laws, they should do so **after** a student has enrolled in school so as not to inadvertently give the impression that information related to immigration status will be used in making enrollment determinations. Additional guidance related to particular situations is provided below.

Age

In Appeal of R.L. (49 Ed Dept Rep 9, Decision No. 15,944), the Commissioner addressed the documentation a district may require as evidence to determine a student's age for admission to school. In that case, a parent of a child adopted from another country claimed that the child's birth certificate was inaccurate and instead attempted to provide medical information to demonstrate her child's age. The Commissioner, citing Education Law §3218, determined that if a parent has a birth certificate or record of baptism (giving the date of birth), no other form of evidence may be used to determine a child's age.

However, in cases where a birth certificate or record of baptism is not available, a passport (including foreign passport) may be used to determine a child's age (Education Law §3218[1][b]). If a birth certificate, record of baptism and passport are unavailable, the school district may consider certain other documentary or recorded evidence to determine a child's age (Education Law §3218[1][d]). Below is a list of examples of documentation that may be used for this purpose. **Please note that this list is intended only to provide examples of documentation that may be relevant to establishing a student's age** – it is not intended to be exhaustive, nor is it a list of required documentation.

- Official driver's license
- State- or other government-issued ID
- School photo ID with date of birth
- Consulate identification card
- Hospital or health records (in New York City, Hospital Birthing Records)
- Military dependent ID card
- Native American tribal document
- Record(s) from non-profit international aid agencies and voluntary agencies (VOLAGs)

School districts should be aware that the government of Puerto Rico recently enacted a new law affecting all birth certificates issued by Puerto Rico before July 1, 2010. Pursuant to the new law, all such birth certificates will be invalidated as of September 30, 2010. On July 1, 2010, the Puerto Rico Department of Health began issuing new birth certificates to affected persons. School districts are encouraged to work with families affected by this new law to develop appropriate procedures and strategies to establish student age. For more information, please see:

<http://www.pr.gov/gprportal/inicio> and
<http://www2.pr.gov/prgovEN/Pages/BirthCertificateInfo.aspx>

formal guardianship proceeding, it is necessary to demonstrate that a particular location is a child's permanent residence and that the individual exercising control has full authority and responsibility with respect to the child's support and custody (Appeal of Goldman, 46 Ed Dept Rep 224, Decision No. 15,488; Appeal of Palmieri, 45 *id.* 174, Decision No. 15,293).

Social Security Numbers

Neither federal nor state law requires that students present or have a Social Security number to enroll in school. Moreover, undocumented children are ineligible for Social Security numbers. Therefore, school districts should not ask for a child's Social Security number during the student enrollment/registration process.

Immunization

New York State Public Health Law ("PHL") §2164 requires immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenza type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B for all New York State students. Pursuant to a February 2010 health advisory published by the New York State Department of Health ("DOH"), in certain cases, immunization records may be unavailable for children from other countries – such as those who have been displaced due to the earthquake in Haiti – seeking admission to New York State schools. In such situations, students should be allowed to attend school while the school ascertains the child's immunization status and the person in parental relation to the child arranges for immunizations, if necessary.

PHL §2164 provides that no school shall allow a child to attend for more than 14 days without a proper certificate of immunization. However, when a student is transferring from another country, PHL §2164 states that a principal (or other designee) may allow that child to attend school for up to 30 days if there is evidence of a good faith effort to obtain immunizations or proof of past immunization via serologic testing.

Please note that, under 10 NYCRR §66-1.3, a child should be considered in compliance with school immunization requirements, and should remain in school, if he or she has received at least one dose of each of the required vaccines and has appointments to return to his health care provider for the remainder of the required immunizations.

For the full text of DOH's February 2010 Health Advisory, please see:
http://www.nyhealth.gov/prevention/immunization/2010-02-19_immun_recommend_haitian_refugees.htm

For more information on immunization requirements for school entrance/attendance, please see:
<http://www.nyhealth.gov/prevention/immunization/schools/> and
<http://schools.nyc.gov/Offices/Health/ImmunizationInfo/default.htm>

Homeless Students

Students who are covered by the federal McKinney-Vento Homeless Education Assistance Improvements Act (42 USC §11431 *et seq.*, "McKinney-Vento") are also entitled to enrollment in public schools. Pursuant to McKinney-Vento, a designated school district must

immediately enroll a homeless child, even if the child is unable to produce records normally required for enrollment, such as previous academic records, medical records, proof of immunization and proof of residency. If the child needs to obtain immunizations, or immunization or medical records, the enrolling school district must immediately refer the child's parent or guardian to the district's homeless liaison, who must assist the child's parent or guardian in obtaining the necessary immunizations or records.

Data Collection

As noted above, schools should avoid asking questions related to immigration status at the time of registration. Similarly, the Department makes every attempt to avoid such questions in its own data collection policies and practices (e.g., the Department does not require that school districts report students' social security numbers or their status as "legal" or "undocumented" immigrants). However, several State and federal laws require that the Department (and/or school districts) collect certain student demographic data (see Attachment A). For example, in order to receive funding under certain federal Title III programs, states and school districts must also collect and report data on "immigrant children and youth" served (see 20 USC §6961 *et seq.*).

In attempting to collect such information, school districts are reminded to use extreme sensitivity and to ensure that such attempts do not inadvertently discourage resident students from enrolling or attending school and that such information (or its unavailability) is not used to deny resident students a free public education (see *Plyler v. Doe*, 457 U.S. 202). For example, school boards are encouraged to adopt policies to ensure that such data is used only for its intended purpose pursuant to applicable State or federal requirements, and that district staff do not **require** such data or information as a **condition** of enrollment or continued attendance. To ensure that requests for such information do not inadvertently chill students' access to a free public education, the Department recommends that districts collect such data after students are enrolled in school. School districts should also consider seeking or providing training on the appropriate techniques and strategies to employ in the district's enrollment, registration, and data collection processes. Finally, the Department recommends that school districts review the data collection components of their student information management systems with their system provider to ensure that only those required elements are collected.

School districts are advised to visit our website regularly for any updates related to these issues (www.emsc.nysed.gov/sss/).

Student Visas/Foreign Exchange Students

Inquiries on the federal student visa process should be directed to the appropriate federal agency (e.g., U.S. Department of Homeland Security, U.S. Department of Education, U.S. Student and Exchange Visitor Program [SEVIP]).

For More Information

This guidance document will be updated and revised as appropriate. For more information, please see: <http://www.emsc.nysed.gov/sss/lawsregs/>

Technical assistance is also available from the Department's Student Support Services Unit at (518) 486-6090.