

MEMORANDUM

TO: County Superintendents
FROM: James B. Phares, Ed.D. 
DATE: May 22, 2014
RE: Birth Certificate Requirement for Enrollment

Several questions have been brought to my attention concerning the operation of West Virginia Code § 18-2-5c, which requires a person enrolling a student to present a certified copy of the student's birth certificate or to execute an affidavit explaining the absence of the birth certificate in order to enroll the child in public school:

1. Does a birth certificate issued by another state or country need to be certified by the West Virginia registrar of vital statistics? If not, will a certified birth certificate from another state or country satisfy the requirements of W. Va. Code § 18-2-5c?
2. If the person enrolling the student does not present a certified birth certificate, should he/she be allowed an amount of time in which to produce the birth certificate following the student's enrollment or should the person be required to execute an affidavit as a condition of enrollment?
3. What information should the affidavit contain? Should the person submit documents in addition to the affidavit?
4. What law enforcement agency should receive notice that a student has been enrolled with an affidavit in lieu of a certified copy of the birth record?
5. Should the failure and/or refusal of the person to produce a certified birth certificate or complete an affidavit prevent a child from being enrolled in school?
6. Does the operation of this statute have the effect of discouraging those for whom English is a second language or who may be illegal immigrants from enrolling their children?

I will answer each question in turn after first providing background on this statutory requirement.

W. Va. Code § 18-2-5c is titled, **“Birth certificate is required upon admission to public school; required notice to local law-enforcement agency of missing children.”** It mandates that no student be admitted for the first time to any public school unless the person enrolling the student presents a certified copy of his or her original birth record certified by the state registrar of vital statistics confirming identity, age and state file number of the original birth record. If a certified copy of a student’s birth record cannot be obtained, the person enrolling the student must submit an affidavit explaining the inability to produce a certified copy of the birth record. If an affidavit is submitted in lieu of a birth record, the school principal must immediately notify the local law enforcement agency and include copies of the affidavit and proof of the student’s identity and age that was provided the school. Principals are statutorily immune from civil or criminal liability for reporting to local law enforcement agencies or for failing to report.

The statute’s primary purpose is to help locate missing children; it operates in conjunction with West Virginia Code § 16-5-12, which is part of the statute creating the State Registrar of Vital Statistics. When the State Registrar receives a missing child report from a law enforcement agency, the child’s missing status is noted on his or her birth certificate. Upon receiving a request for a missing child’s birth certificate, the State Registrar immediately notifies the

law enforcement agency issuing the missing child report of the request and any information it has about the requester. If a parent or guardian does not provide a birth certificate, bypassing this safeguard, § 18-2-5c requires the school principal to “immediately” report the use of an affidavit to a local law enforcement agency.

The birth certificate requirement also helps ensure that children enrolling for the first time are placed in the appropriate grade.

1. *Does a birth certificate issued by another state or country need to be certified by the West Virginia registrar of vital statistics? If not, will a certified birth certificate that originates from another state or country meet the requirements of W. Va. Code § 18-2-5c?*

A birth certificate issued outside of West Virginia cannot be certified by the West Virginia Registrar, with only a few statutory exceptions. A birth certificate certified by a public authority from another state, a territory or possession of the United States is sufficient.

West Virginia’s “State Registrar of Vital Statistics” and its local offices only issue birth certificates for children born in West Virginia, infants of unknown parentage if the person assuming custody lives in West Virginia and children born in another country who are adopted by West Virginians. There is no mechanism for West Virginia to issue a birth certificate for children born out of state who have moved to West Virginia.

The statute’s goal of locating missing children would not be served if it applied only to those able to provide birth certificates certified by the West Virginia Registrar of Vital Statistics. Missing children may be taken from their

state of residence and brought to West Virginia. On the other hand, a West Virginia public school's refusal to accept a birth certificate certified by a clerk in another state, territory or U.S. possession would violate a federal statute requiring nonjudicial records like a birth certificate to be given full faith and credit by every court and office within the United States. 28 USC § 1739. A brief internet search demonstrates that all states have a registry that provides certified copies of a birth certificate. Most states also have a system whereby the request for a birth certificate of a child whose name is on a missing children's registry triggers a report to law enforcement.

W. Va. Code § 18-2-5c also applies to the enrollment of students who were born outside the United States, its territories or possessions. These include U.S. citizens born outside the United States who have a federally issued Consular Report of Birth Abroad. They may be naturalized citizens, resident aliens or undocumented immigrants.

Application of this statute to such students furthers the State's interest in locating missing children because the United States assists in the return of children who have been abducted to or wrongfully retained in this country.¹

When the enrolling student has a birth certificate certified from a foreign country, should W. Va. Code § 18-2-5c allow a school to accept the certificate

¹The U. S., along with 90 other countries, is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction. It has enacted the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 and the International Parental Kidnapping Crime Act, 18 U.S.C. § 1204. The National Clearinghouse for Missing and Exploited Children acts on behalf of the Central Authority for the United States to assist those whose children have been abducted from other Hague Convention countries.

as authentic as it would for a certificate from another state within the U.S., or is the State's interest in identifying abducted children sufficiently strong to require additional assurances of authenticity of certified foreign birth certificates instead of presuming they are authentic as we do for domestic certified birth certificates.

There is precedent for making a distinction between domestic birth certificates and foreign birth certificates. Under Federal Rule of Evidence 44(a)(2) and West Virginia's Rule of Evidence 902, in order for a foreign official document to be admitted into evidence as an authentic document, it must contain an attestation by an authorized person *and* be accompanied by (a) a final certification of genuineness (from a diplomat of the U.S. assigned to the country where the original record is located or from a diplomat of the originating country assigned to the U.S.); or (b) a certification under a treaty or convention to which the United States and the country where the record is located are both parties. An example of a certification under (b) would be an apostille, which is an international method of verifying foreign documents similar to notarization under the Hague Convention. Another example would be a federally issued Consular Report of Birth Abroad.

However, the U. S. Department of Education advises that the rules for documentation required to enroll a child must be the same for everyone, regardless of race, color, national origin or citizenship status. See Dear Colleague Letter of May 8, 2014 by the Office of the General Counsel, Office for Civil Rights of the U.S. Department of Education and the U.S. Department of Justice Civil Rights Division. This position is premised on the U.S. Department

of Education's belief that a school district's birth certificate requirement should be solely to establish the age of a child; it has not considered a State's interest in locating missing children.

In view of the potential chilling effect on the school enrollment of some foreign born students and the fact that even the rules of evidence cited above permit a court to accept a certified foreign document as authentic without additional certification "for good cause shown," I am of the opinion that West Virginia schools should treat a foreign birth certificate that contains an attestation of accuracy from a public official as authentic without requiring additional proof.

2. *If the person enrolling the student does not present a certified birth certificate, should he/she be allowed an amount of time in which to produce the birth certificate following the student's enrollment or should the person be required to execute an affidavit as a condition of enrollment?*

The statute grants a three week extension of time for a member of the U.S. military who is in transit due to military orders to provide the birth records. It also allows a transferring student without a birth certificate to be enrolled and directs the school's principal to request within fourteen days that the student's previous school transfer his or her certified birth record to the current school. W. Va. Code § 18-25c(a) and (c). By contrast, the statute directs a principal of the school in which the student is being enrolled to "immediately" notify the local law enforcement agency when an affidavit has been submitted in lieu of a certified birth certificate. W. Va. Code § 18-2-5c(b).

It is reasonable to conclude that the Legislature did not intend to allow a grace period for producing a birth certificate under circumstances other than

those specified in the statute, because it would delay the immediate reporting of the lack of a certified birth certificate to local law enforcement.

The lack of a grace period for those individuals who do not have a certified copy of their child's birth certificate does not prevent the child from enrolling. The statute anticipates there will be situations in which a certified copy of a student's birth certificate may be unavailable and permits the person enrolling the student to submit an affidavit. The affidavit is then submitted to a local law enforcement agency to determine whether the student has been reported to be missing.

3. *What information should the affidavit contain? Should the person submit documents in addition to the affidavit?*

Attached to this memorandum is a form affidavit that county school systems may use to facilitate the process. The statute states that a school notifying local law enforcement should provide the "submitted proof" of the student's identity and age along with the affidavit explaining the inability to produce a certified birth certificate. To assist law enforcement in determining if the child has been abducted, it is appropriate to request some type of documentation be produced to establish a student's identity and age, such as a passport or social security card. Alternatively, a religious record, doctor, clinic or hospital record, daycare center or school record, preferably certified by the issuing agency, would also be helpful. Even an uncertified copy of a birth certificate would be useful.

The affidavit form may not request information concerning citizenship or immigration status of the child or parents, because undocumented school-aged children cannot be denied a free public education offered to other children unless the denial furthers some substantial state interest under the Equal Protection Clause. *Plyler v. Doe*, 457 U.S. 202 (1982). The form may properly ask for the student's place of birth, whatever the location, for the purpose of identifying children who have been reported missing.

4. *What law enforcement agency should receive notice that a student has been enrolled without a certified copy of the birth record?*

The statute directs schools to give notice to the "local" law enforcement agency. If the school in question is located in a municipality, the city police would receive the notice. In unincorporated areas, the county sheriff's office would receive the notice. The state police would not be considered local law enforcement, as made evident by a related statutory section in Chapter 49 of the West Virginia Code.²

Disclosure of this information is permissible without parental consent under the Family Education Rights and Privacy Act, 20 U.S.C. 1232g(b)(1)(E)(ii), which permits disclosure to local authorities pursuant to a State statute concerning the juvenile justice system. However, the local law enforcement agencies receiving this information may not disclose to another agency for any

² The Legislature, in 1993, created the West Virginia Missing Children Information Clearinghouse, which is administered by the State Police. In W. Va. Code § 49-916(a), the Legislature directed a study to be made on ways to improve the effectiveness of the Clearinghouse. Among other possible changes, the Legislature suggested that county boards of education be required to notify the Clearinghouse, i.e., the State Police, in addition to the local law enforcement agencies if an affidavit is submitted.

purpose other than one which will assist in determining if the student is an abducted or missing child.

5. *Should the failure and/or refusal of the individual to produce a child's certified birth certificate or complete an affidavit prevent the child from being enrolled in school?*

No. The circumstances under which a student may be denied the right to enroll in a public school are limited. The Supreme Court has held that lack of academic records or proof of guardianship is not grounds to refuse admittance. *White v. Linkinoggor*, 176 W. Va. 410, 344 S.E.2d 633 (1986). Only a parent's outright refusal to immunize his or her child justifies a county school system excluding the student from enrollment, due to the health risks to other students and staff. *Workman v. Mingo County Bd. of Education*, 419 Fed. Appx. 348 (4th Cir. 2011).

By contrast, a student's enrollment without a birth certificate or even an affidavit poses no health or safety risk to the students or staff. If the accompanying adult refuses to complete an affidavit or submit any documentation as to age or proof of identity, the school should promptly enroll the student and make a report to the local law enforcement agency as it would if an affidavit had been submitted.

6. *Does the operation of this statute have the effect of discouraging those for whom English is a second language and who may be illegal immigrants from enrolling their children?*

The State has a substantial interest in locating missing or abducted children. All students residing in West Virginia have a constitutional right to a

thorough and efficient education, regardless of national origin or immigration status. The statute's requirement that the individual enrolling a student complete an affidavit form in lieu of providing a certified birth certificate balances these two interests. Still, we as educators must be sensitive to the possibility that parents for whom English is a second language or who may be illegal immigrants will be discouraged from enrolling their children by the specter of completing an affidavit and having it turned over to local law enforcement authorities.

To allay these concerns, the county's attendance director should be available to help explain the purpose of the birth certificate requirement and the process for completing the affidavit to persons who are confused by the process. The attendance director may assist in finding a notary public to notarize the affidavit if there is no notary at the school. The affidavit form should contain language for law enforcement agencies specifying the purpose of the school's report.

TO LOCAL LAW ENFORCEMENT AGENCY: THIS AFFIDAVIT AND ANY ACCOMPANYING DOCUMENTATION IS BEING SUBMITTED PURSUANT TO W. Va. CODE § 18-2-5c SOLELY TO DETERMINE WHETHER THE NAMED STUDENT HAS BEEN REPORTED AS A MISSING OR ABDUCTED CHILD. THIS INFORMATION WILL NOT BE DISCLOSED TO ANY OTHER PARTY EXCEPT AS PROVIDED UNDER STATE LAW WITHOUT THE PRIOR WRITTEN CONSENT OF THE PARENT OR GUARDIAN OF THE STUDENT.

AFFIDAVIT IN LIEU OF BIRTH CERTIFICATE

I, _____, am the _____ [relationship to student] to _____ [full name of student], who is being enrolled in _____

County Schools without having furnished a certified copy of the student's birth record.

I would like the school to use the following, accurate information:

1. Name of student as listed on birth certificate, if any: _____
2. Date of Birth _____ Current Age: _____ Sex: M or F
3. Student's Social Security Number, if any: _____
4. Place of Birth: City: _____ State or Province: _____
Country if not U.S. _____
5. Race: _____; Height: _____; Weight: _____ Eye Color: _____; Hair Color: _____
6. Name of mother on birth record: _____
7. Name of father on birth record: _____
8. Explanation of inability to produce a certified copy of birth record [attach extra pages if necessary]:

9. I have provided the following documents as proof of identity or age of student:

a. _____

b. _____

c. _____

By signing below, I attest to the above information as being both accurate and truthful.

Signature:

State of West Virginia

County of _____:

I, _____, a Notary Public in the State of West Virginia, do certify that _____, whose name is signed to the writing above, has signed and acknowledged the same before me this _____ day of _____, 20____.

My commission expires:

Notary Public

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