



Decision-Making After Attainment of Age 18

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December 14, 2016



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Age of Majority & the 2006 IDEA Regulations

- The 2006 IDEA regulations required states to establish procedures to allow parents, or other appropriate individual, to continue to exercise educational rights for students who lack the ability to provide informed consent regarding educational programming. See 34 C.F.R. § 300.520.
- The comments to the IDEA regulations encourage consideration of allowing students to sign a Power of Attorney or similar grant of authority.

Delaware – Transfer of Rights

- Previously in Delaware, special education rights automatically transferred to the student upon reaching age 18.
- This left schools, students and parents in difficult positions.
- Examples of ways this has been addressed:
 - Guardianship (overbroad solution)
 - Power of attorney (not all students are competent to sign, can be cumbersome, a hassle for students/parents, difficult to read/understand for schools)
 - Hand over hand signing of IEPs in some instances (uncomfortable for school staff, possible conflict)
 - Continuing the status quo

2016 Age of Majority Legislation

- In June 2016 Governor Markell signed S.B. 180 into law.
- This new legislation takes effect in December 2016.
- It provides a procedure and options for the appointment of Educational Representatives for student with disabilities who are turning 18.

Educational representatives

- S.B. 180 created “Educational Representatives” who act as a parent would as defined in Delaware Special Education laws and regulations.
- Educational representatives can be authorized through multiple ways.
 - Student voluntarily authorizes
 - IEP team appoints (when student lacks capacity)
- Students with capacity can continue to act as their own representatives!

Voluntary Grant of Authority by Student

- A student with capacity may choose to
 - Exercise the student's educational rights OR
 - Voluntarily authorize an Educational Representative via a Power of Attorney or a DOE developed Voluntary Grant of Authority form.
- Important: there is a PRESUMPTION in the law that a student has capacity!

Capacity Determination

- The IEP team makes the capacity determination during an IEP meeting.
- If capacity is UNCERTAIN, a school psychologist familiar with the child must attend the INITIAL meeting.
 - School psychologist must have conducted a recent in-person evaluation of the child.
- Child and parent must both be invited to the meeting even if child is already over 18.

Capacity Determination Continued

- IEP team may consider sources apart from school personnel (e.g., an evaluation by an outside medical professional).
- IEP team may authorize an evaluation if necessary to inform the capacity determination.
- If information is ambiguous any benefit of the doubt must be exercised in a finding of capacity.

Finding of Lack of Capacity

- If the finding is that the student lacks capacity, the IEP team appoints an adult to serve as an Educational Representative.
- The statute provides for a descending order of priority:
 - Willing and available biological or adoptive parent.
 - Willing and available relative.
 - When no such individual is available the IEP team refers the case for the DOE for appointment of an Educational Surrogate Parent.

When there is Disagreement

- If either the student or the parent disagree with the capacity determination, either may contest it using the dispute resolution procedures described in the special education procedural safeguards.
- For schools - any time the capacity determination is ambiguous any benefit of the doubt must be exercised in a finding of capacity.

Capacity Determination Limited to Education

- This capacity determination is limited to the educational context.
- It should not be admissible as evidence of competency or capacity in any non-educational judicial or administrative proceeding.

Next Steps

- DOE will be publishing regulations implementing S.B. 180
- DOE will be publishing the following model forms:
 - Educational Representative: Voluntary Grant of Authority
 - Educational Decision Making After Attainment of Age 18 IEP Discussion Form
 - Includes a sequential review and guidance to determine if the student can provide informed consent in connection to the student's educational decision-making (i.e. capacity).

Thank You!
