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## **P&A FACT SHEET**

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### **ADULT STUDENTS WITH DISABILITIES EDUCATIONAL RIGHTS CONSENT ACT (CONSENT ACT)**

#### **BACKGROUND**

Under the Individuals with Disabilities Education Act of 2004 (IDEA), a student who is eligible for special education services is entitled to a free and appropriate public education between the ages of 3 and 21.<sup>1</sup> At the age of 18, all parental rights under IDEA transfer to the student unless the student has been determined incompetent.<sup>2</sup> This gives the adult student many important rights and protections under IDEA that the parents previously held.

However, some students with severe disabilities may not be able to participate in their educational process. The IDEA provides a special rule for those students. The special rule says:

- If there is a procedure under state law for deciding that a student who is over age 18 lacks the ability to provide consent for educational rights and has not been declared incompetent, then,
- The state must establish procedures to appoint the parent (or another appropriate person if the parent is not available) to represent the educational interests of the adult student while he or she is in school.<sup>3</sup>

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<sup>1</sup> 20 USC § 1412(a)(1)(A); 34 CFR § 300.101

<sup>2</sup> 20 USC §1415 (m); 34 CFR § 300.520.

<sup>3</sup> 34 CFR § 300.520(b); *see* 20 USC §1415 (m)(2)

In June of 2016, South Carolina enacted the Adult Students with Disabilities Educational Rights Consent Act (Consent Act). This new law provides procedures for complying with the special rule.<sup>4</sup> This Fact Sheet explains the Consent Act.

## **WITH THE PASSAGE OF THE CONSENT ACT, WHAT OPTIONS DOES A STUDENT HAVE WHEN TURNING 18?**

### Option 1 – All Rights Transfer to the Student

Just like before passage of the Consent Act, most students with disabilities will be able to act independently and consent to their own educational programming.

### Option 2 – Student Makes Decisions with Support and Assistance (Supported Decision Making)

The Consent Act notes that the student has the right to have an adult of his choice support the student in making education decisions. Supported decision making is simply an informal way to seek advice and assistance when making a decision—like asking friends and family what they think about a course of action. More information on Supported Decision Making is available from the SC Bar Association at <http://www.sctbar.org/News/News-Details/ArticleId/2384/Supported-Decision-Making-An-Alternative-to-Surrogate-Decision-Making>

### Option 3 – Delegation of Rights

A student with the capacity to do so may also sign a power of attorney and delegate his or her rights to an agent (such as a parent). The SC Department of Education is required to develop a special form for appointing an agent for making educational decisions. Students may use that form or a power of attorney for education.

### Option 4 - Certification of an Educational Representative

A student who is unable to communicate his wishes, interests, or preferences in respect to his educational program may have an educational representative certified to act on his behalf. The process is outlined in detail below.

### Option 5 – Guardianship of the Student

If a student is incapacitated, the parents or other appropriate person may seek guardianship of the adult child through the Probate Court process. The Consent Act does not apply if the student has a court appointed guardian. For more information on

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<sup>4</sup> S.C. Code §§ 59-33-310 to 59-33-370

guardianship and alternatives to guardianship, see information on the website of the SC Supreme Court:

Guardianship: Frequently Asked Questions from a Caregiver or Potential Guardian:  
<http://www.judicial.state.sc.us/selfHelp/FAQsFromACaregiver.pdf>

Guardianship: Frequently Asked Questions from a Ward:  
<http://www.judicial.state.sc.us/selfHelp/FAQsFromAWard.pdf>

Alternatives to Guardianship in SC:  
<http://www.judicial.state.sc.us/selfHelp/FAQsAlternativesToGuardianshipSC.pdf>

## **WHAT IS THE PROCESS FOR THE APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE?**

### Step 1 – A Medical Examination

The student first needs to have a medical examination. The examination must be done by one of the following medical professionals:

- Physician
- Nurse practitioner
- Physician’s assistant
- Psychologist
- Psychiatrist

The medical professional must examine the student and certify that the student is incapable of communicating, with or without reasonable accommodations, the student’s wishes, interests, or preferences regarding his or her educational program. The licensed medical professional may not be an employee of the school district.

### Step 2 – The Medical Professional Must Certify in Writing that the Student Cannot Communicate

The Certification may be informal, but it must include the following information:

- Date of the examination
- Basis for the determination that the student is not able to communicate his or her wishes
- Whether the inability to communicate is likely to last until age 21

### Step 3 – Send the Letter to the Superintendent of the School District, or Other Designated School Official

It does not matter who mails the certification, but once the school district receives the certification, the district is required to notify the student in writing that a professional has certified that he or she is incapable of communicating and an educational representative will be designated to represent him or her. The student must be informed that he or she may challenge the designation of the educational representative. If the student challenges the certification of an educational representative, then the school district may not rely upon the educational representative for any purpose. A challenge can be made at any time.

### **WHO WILL SERVE AS THE EDUCATIONAL REPRESENTATIVE?**

The Consent Act lists the following priorities for who is to serve as an educational representative:

- Custodial parent/adult spouse
- Adult brother or sister
- Grandparent
- Other adult relative
- Surrogate parent designated by the school district

### **WHAT CAN THE EDUCATIONAL REPRESENTATIVE DO?**

The Educational Representative has the authority to consent to educational services and participate in the development of the educational program, similar to a parent's role prior to a student turning 18. The representative does not have the authority to remove a student from educational services. The decisions made by the Educational Representative must be based upon a determination of the student's preferences to the extent they can be determined. If the preferences cannot be determined, then the decisions must be based upon what is in the student's best interest.

### **HOW CAN THE AUTHORITY OF AN EDUCATIONAL REPRESENTATIVE END?**

The authority of the Educational Representative may end as follows:

- When the school district receives a challenge to the certification
- When the student is no longer eligible for special education services
- When the Probate Court issues a guardianship order which terminates the authority of the Educational Representative

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates. This publication is funded in part by the U.S. Department of Health and Human Services (Administration on Intellectual and Developmental Disabilities and the Substance Abuse and Mental Health Services Administration), and by the U. S. Department of Education (Rehabilitation Services Administration). It does not necessarily represent the official views of the funding authorities.

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**SAMPLE CERTIFICATION LETTER  
FROM A MEDICAL PROFESSIONAL**

[Date]

Superintendent A. B. Jones  
School District #1  
[Street Address]  
Jolly Good, SC

Re: [Student's Name]

Dear Superintendent Jones:

I am a licensed [physician, nurse practitioner, physician's assistant, psychologist, psychiatrist]. On [insert date of examination], I examined [Student's Name]. [Student's Name] is incapable of communicating, with or without reasonable accommodations, [his/her] wishes, interests, or preferences regarding [his/her] educational program. The reason for this determination is based upon [insert relevant diagnosis and conditions like being non-verbal and unable to use a communication device due to palsy or other condition]. [Student's name]'s inability to communicate is likely to last until after age twenty-one.

Sincerely,

[Medical Professional's Signature]

**SAMPLE LETTER  
CHALLENGE OF CERTIFICATION**

[Date]

Superintendent A. B. Jones  
School District #1  
[Street Address]  
Jolly Good, SC

Re: [Student's Name]

Dear Superintendent Jones:

I am challenging the certification by a medical professional that I am unable to communicate, with or without reasonable accommodations, my wishes, interests, or preferences regarding my educational program. I am able to communicate my wishes, interests, and preferences regarding my educational program. Please do not use an educational representative for any purpose.

Sincerely,

[Student's Signature]