

ACT 182

S.B. NO. 2879

A Bill for an Act Relating to Education.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the partnership between parents, families, professionals, and students is cornerstone to the success of student achievement. From a student's first day of school until the completion of the student's education, hundreds, possibly thousands, of educational decisions have been made for or by that student. Until a student reaches the age of eighteen, most of those decisions are made by parents, family members, or guardians in consultation with teachers or education officials. However, when a student reaches the age of eighteen, that adult student is presumed to be capable of making the adult student's own educational decisions and to have the confidence to participate fully in meetings to make educational decisions, unless determined to be incapable of making decisions. Students at this transition point, regardless of their capacity, may benefit from continued participation, guidance, and advice from the people on whom they have always relied to make educational decisions.

With regard to the numerous decisions and planning activities related to a student with a disability who is receiving special education and related services, parents of adult students can only participate in these activities if they are either invited by the student or obtain legal guardianship over the student. While these options create a vehicle for parental participation, they are not comprehensive enough to meet the diverse needs of the students and families in our State.

The legislature further finds that guardianships are expensive, labor intensive, and involve a time-consuming process that results in the transfer of all decision-making authority from the student to the guardian. Some students may have the capacity and desire to make other life decisions for themselves, but do not feel confident in making educational decisions and may require continued assistance. There are also other families that philosophically strive to maintain the rights of their adult children, regardless of their capacity, and are able to do so because of the array of alternatives to guardianship in the health care, welfare, housing, and financial systems. In these instances, guardianship would not be an appropriate option.

The purpose of this Act is to provide a comprehensive array of options for adult students with a disability to ensure their ability to make educational decisions that are consistent with the needs of the student in a manner that is respectful to the values of the student and family by:

- (1) Establishing a power of attorney for special education;
- (2) Establishing the process to appoint an educational representative for an adult student who lacks capacity; and

- (3) Clarifying the authority of a guardian of an adult student.

SECTION 2. Chapter 302A, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

**“PART . ADULT SPECIAL EDUCATION TRANSFER
OF RIGHTS FOR STUDENTS WITH DISABILITIES
UPON REACHING THE AGE OF MAJORITY**

§302A- Power of attorney for special education. (a) When a student with disabilities reaches the age of majority all rights are presumed to transfer to the adult student. The adult student is authorized to make any and all decisions related to the adult student’s education, including but not limited to individualized education programs.

(b) An adult student may give an individual instruction to assist in the development and implementation of the adult student’s educational programs. An adult student may execute a power of attorney for special education. Unless related to the student by blood, marriage, or adoption, an agent shall not be an owner, operator, or employee of the educational institution at which the adult student is receiving special education services. The power of attorney for special education shall be:

- (1) A written document;
- (2) Executed in the State of Hawaii;
- (3) Notated with the date of execution;
- (4) Specific in identifying the agent by first and last name and relationship to the adult student;
- (5) Indicative of whether the adult student retains the power to make educational decisions while the power is in effect;
- (6) Revocable, with the method of revocation stated in the document;
- (7) Signed by the adult student; and
- (8) Witnessed by one of the following methods:
 - (A) Signed by two individuals who either witnessed the signing of the instrument by the adult student or received the adult student’s acknowledgment of the veracity of the signature on the instrument;
 - or
 - (B) Acknowledged before a notary public in the State of Hawaii.

(c) If the power of attorney for special education document does not include the provisions listed above, the power of attorney is invalid and fails to authorize an agent to make decisions for the adult student.

(d) Unless otherwise specified in the power of attorney for special education, the authority of an agent shall be effective throughout the adult student’s eligibility for special education, and shall cease to be effective upon revocation by the adult student.

§302A- Revocation of the power of attorney for special education.

(a) An adult student may revoke the designation of an agent in writing to the supervising teacher.

(b) A teacher, agent, or guardian who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising teacher and to any educational institution at which the student is receiving special education services.

(c) A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for special education.

(d) A power of attorney for special education that conflicts with an earlier power of attorney for special education revokes the earlier power of attorney for special education to the extent of the conflict.

§302A- Appointment of an educational representative; conditions.

(a) An educational representative may be appointed if a student lacks decisional capacity to provide informed consent. A determination that the adult student lacks capacity, or that another condition exists that affects the adult student's instruction shall be made by a qualified licensed professional, such as the student's primary physician, psychologist, psychiatrist, or the department of health developmental disabilities division.

(b) The transfer of rights for an adult student who lacks capacity to an educational representative shall be valid throughout the adult student's eligibility for special education. Determinants of the lack of decisional capacity may include the following:

- (1) The student's inability to understand the nature, extent, and probable consequences of a proposed educational program or option, on a continuing or consistent basis;
- (2) The student's inability to make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program as compared with the benefits or disadvantages of another proposed educational decision or program, on a continuing or consistent basis; or
- (3) The student's inability to communicate such understanding in any meaningful way.

Upon a determination that an adult student lacks decisional capacity to provide informed consent, the qualified professional shall document appropriately and make reasonable efforts to inform the adult student of the adult student's lack of capacity. The parent(s) of the adult student may act as the educational representative (unless the adult student is married, in which event the adult student's adult spouse shall be designated as the educational representative). If the parent or adult spouse is not available or competent to give informed consent, the department shall appoint the educational representative from among the following: a competent adult brother or sister, adult aunt or uncle, or grandparent. If these relatives are not willing and able to serve as the adult student's educational representative, then a surrogate parent (who is not an employee of the department of education) shall be designated to serve in this capacity by the department.

§302A- Reconsideration of the need for an educational representative.

(a) If the adult student, educational representative, or qualified professional believes the adult student has regained decisional capacity, the adult student shall be assessed for capacity by a qualified professional who shall determine whether or not the adult student has regained decisional capacity and shall document the decision and the basis for the decision and provide the findings of the reconsideration in writing to be entered into the adult student's educational record. The qualified professional shall notify the adult student and the educational representative of any changes in the adult student's educational program.

(b) A special education decision made by an educational representative for an adult student shall be effective without judicial approval.

§302A- Decisions by guardian. Absent a court order to the contrary, a special education decision of a guardian appointed pursuant to chapter 560 takes precedence over that of an agent or educational representative.

§302A- Duties and roles of the agent and educational representative. (a) The agent and educational representative shall have the same duties and responsibilities.

(b) The agent and the educational representative shall be afforded the opportunity to participate in meetings with respect to:

- (1) The identification, evaluation, and educational placement of the student;
- (2) The provision of free, appropriate public education to the student; and
- (3) The provision of input in accordance with the adult student's individual instructions or other wishes, if any, to the extent known.

Otherwise, the agent and the educational representative shall participate in accordance with the determination of the student's best interest. In determining the student's best interest, the student's personal values, to the extent known, shall be taken into consideration.

§302A- Educational information. The agent for the power of attorney for special education or educational representative is authorized to make educational decisions for a student and has the same rights as the student to request, receive, examine, copy, and consent to the disclosure of the individualized education plan or any other educational records.

§302A- Effect of copy. A copy of a transfer of student's rights, revocation of the power of attorney for special education, the finding of lack of capacity, or the reconsideration of the appointment of an educational representative has the same effect as the original."

SECTION 3. This Act shall take effect on July 1, 2008.

(Approved June 17, 2008.)