

Appendix F
Transfer of Educational Rights

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To: Complex Area Superintendents, District Educational Specialists, Principals, Public Charter School Administrators, Student Services Coordinators and Special Education Department Chairpersons

From: Patricia Hamamoto, Superintendent

Subject: Transfer of Educational Rights for Adult Students – Act 182

Act 182, "Transfer of Educational Rights for Adult Students", was signed by the Governor, and as such, is in effect. Act 182 addresses the following:

- Provides decision-making options to adult students with disabilities, enrolled in a public school;
- Establishes a (limited) power of attorney for special education by appointing an agent to make educational decisions on behalf of the adult student;
- Establishes a process to appoint an educational representative for an adult student who lacks the capacity to make educational decisions for him/herself; and
- Clarifies the authority of a guardian of an adult student.

To help clarify Act 182 a Question and Answer handout with an accompanying flowchart was developed to assist the public schools with the implementation of Act 182 and is attached.

Your continued and dedicated efforts to provide a free appropriate public education for all students with disabilities in Hawaii are appreciated. Should you have any questions, please contact Ms. Patricia Dong, Educational Specialist, Special Education Section, at 733-4404.

DH:PD:nd

Attachment

c: Assistant Superintendents
Superintendent's Office Directors
Public Charter Schools Administrative Office
Ms. Holly Shikada, Deputy Attorney General, Department of the Attorney General,
Education Division
Department of Health Developmental Disabilities Division
Office of Curriculum, Instruction and Student Support

AN AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY EMPLOYER

**TRANSFER OF RIGHTS FOR AN ADULT STUDENT WITH A DISABILITY
ENROLLED IN A PUBLIC SCHOOL
Questions and Answers
Revised August 2011**

AGE OF MAJORITY

What does the phrase “age of majority” or “adult student” mean?

According to Hawaii Revised Statutes (HRS) §577-1, the “age of majority” is when all persons residing in the State, who have attained the age of 18 years, shall be regarded as of legal age and their period of minority to have ceased. An “adult student” is a student who has reached the age of majority.

What is the significance of a student with a disability reaching the age of majority?

When a student with a disability reaches the age of majority, the educational rights to make decisions accorded to the parent, under *Part B of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and HAR Chapter 60*, transfers to the adult student, except for a student with a disability who has been determined to be incompetent/lacking decisional capacity under state law.

ACT 182 – TRANSFER OF RIGHTS

What is the purpose of Act 182, the Transfer of Rights, of the HRS?

Effective July 1, 2008, the purpose of Act 182 is to provide educational decision-making options to an adult student with a disability enrolled in a public school.

What are the educational decision-making options for an adult student mentioned in Act 182?

There are three educational decision-making options available to an adult student:

- Appointment of an agent through a (limited) power of attorney for special education (POA SPED) to make educational decisions on behalf of an adult student;
- Appointment of an educational representative for an adult student who lacks decisional-making capacity to make educational decisions for him/herself; or
- Appointment of a guardian, established through court, for an adult student who lacks decisional capacity to make educational decisions for him/herself.

Presumption: An adult student is presumed to have decisional capacity to make educational decisions for him/herself. No documentation is required.

DECISIONAL CAPACITY

What does having “decisional capacity” mean?

Having decisional capacity refers to an adult student being able to understand, reason, and act on his/her own behalf. An adult student who has decisional capacity is able to provide informed consent with respect to educational decisions or program.

What does “lack of decisional capacity” mean?

As noted in Act 182, the adult student has an inability to:

- Understand the nature, extent, and probable consequences of a proposed educational program or option on a continuing or consistent basis;
- 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
- Communicate such understanding in any meaningful way.

Who determines if an adult student has a lack of decisional capacity to provide informed consent?

The determination that an adult student has a lack of decisional capacity, as noted in Act 182, shall be made by a qualified professional such as the student's primary physician, psychologist, psychiatrist, or the Hawaii Department of Health, Developmental Disabilities Division.

Why is it important to know if an adult student has a lack of decisional capacity?

The decisional capacity of the adult student will help determine which of the three transfer of rights option(s) may be appropriate for consideration. Remember, the adult student is presumed to be capable of making his/her own educational decisions, unless there is documentation supporting otherwise.

Can an adult student, who has decisional capacity, make educational decisions for him/herself?

Yes, an adult student is presumed to make educational decisions for him/herself. An adult student can also opt to appoint an agent to make educational decisions on his/her behalf by completing a POA SPED.

If an adult student lacks decisional capacity, as determined by a qualified professional, who would make educational decisions on the adult student's behalf?

An adult acknowledged by the Department of Education (DOE) as an educational representative or a guardian assigned by the court can make educational decisions on the adult student's behalf.

NOTIFICATION AND DOCUMENTATION

Does the public school notify the student and his/her parent(s) of Act 182 (Adult Special Education Transfer of Rights for Students with Disabilities Upon Reaching the Age of Majority) in Hawaii?

Yes. Beginning at least one year before the student reaches the age of majority, the student and his/her parent(s) are to be informed that the rights under IDEA, 34 CFR §300.520(a)(1)(ii) and HAR §8-60-74 will transfer to the student on reaching 18 years old. The school is to additionally inform the student and his/her parent(s) that upon the student reaching 18 years old, the adult student has options relating to the transfer of educational rights in accordance with Act 182. To facilitate this, schools may share this Questions and Answers document with interested individuals.

Does the public school only invite the adult student to Individualized Education Program (IEP) meetings?

No. The public school, in accordance with 34 CFR §300.520(a)(1)(i) and HAR §8-60-74, must provide notice to the parents, which includes parents of an adult student. If the public school has received documentation noting educational decisions will be made by another individual (i.e., POA SPED, educational representative, or court appointed guardian), then the school is to also invite that individual who can make educational decisions on behalf of the adult student.

Where should transfer of rights documentation be placed?

All documentation relating to the transfer of rights, such as a copy of a POA SPED, etc., is to be kept in the student's confidential file and notated in the electronic Comprehensive Student Support System.

Does a copy of documentation relating to the revocation of a POA SPED have the same effect as the original?

Yes. A copy of the POA SPED revocation document has the same effect as the original.

Can the agent or the educational representative have access to student records?

Yes. The agent or the educational representative has the same rights as the adult student to request, receive, examine, copy, and consent to the disclosure of the IEP or any other educational records.

APPOINTMENT OF AN AGENT – POWER OF ATTORNEY FOR SPECIAL EDUCATION

What is a POA SPED?

A POA SPED is a written document executed in the State of Hawaii by an adult student, which appoints an agent to make educational decisions on behalf of the adult student.

Is there a restriction on who the adult student can appoint as an agent in the POA SPED?

Yes. Unless related to the adult student by blood, marriage, or adoption, the (adult) agent cannot be an owner, operator, or employee of the public school/institution at which the adult student is receiving special education services.

What are the duties and responsibilities of an agent?

The agent shall have the opportunity to participate in meetings with respect to:

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

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

Can the POA SPED be revoked by the adult student?

Yes. The adult student can revoke the appointed agent by submitting written documentation to his/her supervising teacher (i.e., care coordinator, IEP teacher). Educational rights revert back to the adult student. A teacher (i.e., general education teacher, student services coordinator), agent, or guardian who is notified of the revocation shall promptly communicate the fact of revocation to the supervising teacher and to any educational institution (i.e., public school) at which the student is receiving special education services.

Are there any other circumstances when the appointed agent may be revoked?

Yes. A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke the previous designation of a spouse as an agent, unless otherwise specified in the POA SPED.

The school has a POA SPED. At a meeting, a POA SPED with a later effective date and with different instructions is presented. Which POA SPED is to be followed?

A POA SPED that conflicts with an earlier dated POA SPED revokes the earlier power of attorney to the extent of the conflict. The method of revocation must be specified in the document.

What information is required in the POA SPED?

The POA SPED is to include the following information to be valid. The POA SPED will not be in effect if the required information is missing.

Statement of Conditions & Acknowledgement

- Date of execution in the State of Hawaii.
- A statement indicating whether the adult student retains the power to make educational decisions while the POA SPED is in effect.
- A statement with the method of revocation.
- Adult student's signature.

Agent Information

- Printed first and last name of the individual to be the agent.
- Relationship to the adult student.

Witness Information or Notary Public Information

Witness Information

- Document is to be either signed by two individuals who witnessed the signing of the POA SPED or received the adult student's acknowledgement of the authenticity of the adult student's signature.

Notary Public Information

- Printed name of the notary public, accompanied with a signature and the date signed.
- Printed address of the notary public.
- Seal from the notary public.

Although not stated in Act 182, the following information is needed:

Adult Student Information

- Printed first and last name of the adult student.
- Contact information (i.e., address, phone number).

Agent Information

- Contact information (i.e., address, phone number).

What are the differences between a “power of attorney” and a “power of attorney for special education”?

According to HRS §560:5-105, a “power of attorney” may delegate to another person for a period not exceeding one year, any power regarding the care, custody, or property of a minor or ward. Care of a minor or ward may include educational matters, even if not explicitly specified. A power of attorney, under HRS §560:5-105, is used solely to delegate an individual to make decisions for a minor, an individual who has not attained 18 years of age.

In Act 182, the “power of attorney for special education” specifically applies to adult students with a disability who choose to delegate another individual to make educational decisions on the adult student's behalf; it is valid for the length of time the adult student remains eligible for special education in a public school, unless otherwise specified in the POA SPED or upon revocation by the adult student.

It is important to remember that securing a power of attorney is a family matter. Families who do not have an attorney and are in need of assistance may contact the Legal Aid Society of Hawaii at (808) 536-4302 or the Hawaii State Bar Association at (808) 537-1868.

APPOINTMENT OF AN EDUCATIONAL REPRESENTATIVE

Who appoints the educational representative?

The public school may appoint an educational representative upon receipt of the educational representative information, adult student's information, and a statement from a qualified professional noting the student's lack of decisional capacity.

By means of Act 182, the law allows for the parent(s) or the adult spouse of an adult student with a disability who lacks capacity, to act as the educational representative on behalf of the adult student. If the parent(s) or adult spouse is not available or able, the public school shall appoint an educational representative from the following: a competent brother or sister, adult aunt or uncle, or grandparent. If these relatives are not willing or able to serve as the adult student's educational representative, the public school must then submit a request for a surrogate parent to serve in this capacity.

What are the duties and responsibilities of the educational representative?

The educational representative shall have the opportunity to participate in meetings with respect to:

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

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

What documentation is required to be an educational representative?

While there is no specific form to be completed for an individual to be designated as an educational representative, written documentation by a qualified professional (i.e., student's primary physician, psychologist, psychiatrist, or the Hawaii Department of Health, Developmental Disabilities Division) acknowledging the adult student lacks decisional capacity is required.

What information is required to be an educational representative?

The following information is required:

Certification Statement

- Statement of determination of the adult student's lack of capacity by a qualified professional (student's primary physician, psychologist, psychiatrist, or the Hawaii Department of Health, Developmental Disabilities Division).

Although not stated in Act 182, the following information is needed:

Adult Student Information

- Printed first and last name of the adult student.
- Contact information (i.e., address, phone number).

Educational Representative Information

- Printed first and last name of the individual to be educational representative.
- Contact information (i.e., address, phone number).
- Relationship to the adult student.

What is the length of time an educational representative can represent a student?

The educational representative can represent the adult student for the length of time the adult student remains eligible for special education in the DOE, except when the adult student has been reassessed by qualified personnel and found to have regained decisional capacity. For additional information see the next question.

Does the educational representative continue to represent an adult student if the adult student has regained capacity?

No. Should an adult student be reassessed by a qualified professional and found to have regained decisional capacity, the findings of the decision by the qualified professional is to be in writing and entered into the student's educational record. The adult student, now having decisional capacity, regains his/her educational rights to make educational decisions. No additional documentation is required.

GUARDIAN

What is guardianship?

Guardianship, according to HRS §560:5-301, is when a person becomes a guardian of an incapacitated person by an appointment by a parent, spouse, reciprocal beneficiary, or upon appointment by the court. The guardianship continues until terminated without regard to the location of the guardian or ward. The appointment, powers, etc., of the guardian is to be in accordance with HRS §560:5-301 through §560:5-318.

An adult student who lacks capacity has an educational representative. The courts have now appointed a guardian. Who makes the educational decisions for the adult student?

Decisions made by a court appointed guardian takes precedence over that of an agent or educational representative, unless a court order states otherwise.

Transfer of Rights for Adult Students with Disabilities upon Reaching the Age of Majority

