

OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

NOTICE OF FINAL RULEMAKING

The State Superintendent of Education (“State Superintendent”), pursuant to the authority set forth in Sections 3(b)(11) and (15) of the State Education Office Establishment Act of 2000, effective October 21, 2000 (D.C. Law 13-176; D.C. Official Code §§ 38-2602(b)(11) and (15) (2012 Repl. & 2015 Supp.)); and Section 301 of the Special Education Procedural Protections Expansion Act of 2014 (the “Act”), effective March 10, 2015 (D.C. Law 20-194, D.C. Official Code § 38-2573.01) (2012 Repl. & 2016 Supp.)), hereby gives notice of intent to amend Chapter 30 (Special Education) in Subtitle E (Original Title 5) of Title 5 (Education) of the District of Columbia Municipal Regulations (“DCMR”).

The purpose of the final rulemaking is to comply with Section 301 of the Act, which requires the Office of the State Superintendent of Education (“OSSE”) to issue rules implementing Section 104(a) of the Act by July 1, 2016. Section 104(a) requires that OSSE establish a procedure to determine when rights accorded to parents under the Individuals with Disabilities Education Act (IDEA) shall not transfer to a child with a disability who has reached the age of majority because the child with a disability does not have the ability to provide informed consent for purposes of educational decision-making, and to appoint another adult to represent the educational interests of the child with a disability.

A Notice of Proposed Rulemaking was published in the *D.C. Register* for a thirty (30) day public comment period on July 24, 2015, at 62 DCR 10013. In addition, OSSE held two public hearings, on August 5, 2015 and on August 20, 2015. The comment period officially closed on August 24, 2015, with OSSE having received numerous comments from advocates and members of the regulated community regarding Section 3023, “Transfer of Rights,” in the Notice of Proposed Rulemaking. OSSE carefully considered all of the comments and made a number of the requested non-substantive and substantive amendments and issued a Notice of Second Proposed Rulemaking, which was published in the *D.C. Register* for a fourteen (14) day public comment period on May 13, 2016, at 63 DCR 7283. In addition, OSSE held two public hearings, on May 20, 2016 and on May 26, 2016 on the Notice of Second Proposed Rulemaking. The comment period official closed on May 27, 2016. Based on the comments filed in response to the Notice of Second Proposed Rulemaking, OSSE made the following technical clarifying amendments: (1) amended the language in Subsections 3034.1 and 3036.1 by striking § 3025.1 and inserting § 3035.1 in its place to correct the cross-cite; (2) amended the language in Subsection 3035.9 by striking “of the required documentation” and inserting “documentation requirements” in its place; and (3) amended the language in Subsection 3034.2 by striking the phrase “another willing adult” and inserting “other willing adults” in its place to clarify the original intent of permitting students to choose multiple adults to help with educational decisions.

The final rules are being adopted in substantially the same form as proposed with clarifications and deletions taking into account suggestions received in public comments. These changes do not substantially alter or change the intent, meaning, or application of the proposed rules or exceed the scope of the rules as published with the Notice of Proposed Rulemaking.

These rules were adopted as final on June 23, 2016 and will be effective upon publication of this notice in the *D.C. Register*.

Chapter 30, SPECIAL EDUCATION, of Title 5-E DCMR, ORIGINAL TITLE 5, is amended as follows:

Section 3001, DEFINITIONS, is amended by adding the following definitions to Subsection 3001.1:

Educational Representative – an adult appointed by OSSE to represent the educational interests of a child with a disability who upon reaching eighteen (18) years of age is determined under this chapter to be unable to provide informed consent for educational purposes.

Incapacitated Individual – shall have the same meaning as the term is defined in D.C. Official Code § 21-2011(11).

Supported Decision-Making - supports, services, and accommodations that help a child with a disability make his or her own decisions, by using adult friends, family members, professionals, and other people he or she trusts to help understand the issues and choices, ask questions, receive explanations in language he or she understands, and communicate his or her own decisions to others.

Section 3023, TRANSFER OF RIGHTS, is deleted in its entirety and is amended to read:

3023 [RESERVED]

A new Section 3034, TRANSFER OF RIGHTS: GENERAL PROVISIONS AND SUPPORTED DECISION-MAKING, is added to read as follows:

3034 **TRANSFER OF RIGHTS: GENERAL PROVISIONS AND SUPPORTED DECISION-MAKING**

3034.1 In accordance with D.C. Official Code § 46–101 and IDEA, a child with a disability (“student”) who has reached the age of eighteen (18) shall be presumed to be competent, and all rights under IDEA and local law governing the delivery of special education and related services shall transfer to the child with a disability (“student”), unless one of the exceptions in Subsection 3035.1 is met.

3034.2 Any student who has reached eighteen (18) years of age and to whom all rights afforded parents under IDEA have transferred, may voluntarily choose to receive support from his or her parents, family members, or other willing adults to aid the student with educational decision-making. The student’s decisional choice shall prevail any time that a disagreement exists between the student and the other adult providing support in this manner and the student may withdraw his or her decision to receive support at any time.

3034.3 Supported decision-making arrangements shall be documented in writing and include the name, contact information, relationship to the student, and the extent to which the student grants the identified adult access to his or her education records pursuant to District and federal law. The student may change this arrangement and/or revoke access to education records at any time.

A new Section 3035, TRANSFER OF RIGHTS: EXCEPTIONS, is added to read as follows:

3035 TRANSFER OF RIGHTS: EXCEPTIONS

3035.1 In accordance with D.C. Official Code § 46–101 and IDEA, all rights accorded to parents under IDEA and local law governing the delivery of special education and related services shall transfer to the child with a disability (“student”) at the age of eighteen (18), unless one of the following exceptions is met:

- (a) The student is declared a legally incapacitated individual, as defined in this chapter, by a court of competent jurisdiction and a legal guardian or representative has been appointed by the court to make decisions for the student, including educational decisions.
- (b) The student has designated by power of attorney or similar legal document another adult to be the student’s agent to:
 - (1) Make educational decisions;
 - (2) Receive notices; and
 - (3) Participate in meetings and all other procedures related to the student’s educational program.
- (c) The student has been determined, in accordance with Subsection 3035.9, to not have the ability to provide informed consent regarding educational decisions and another adult has been appointed by OSSE to represent the educational interests of the student.

3035.2 An adult student who has executed a power of attorney or similar legal document transferring his or her right to make educational decisions to another to be his or her agent in accordance with Subsection 3035.1(b) may terminate the power of attorney at any time and assume the right to make decisions regarding his or her education. An LEA or responsible public agency shall keep a copy of any written power of attorney in the student’s special education record and shall rely on it until the power of attorney has been revoked by the student in writing or the power of attorney has been superseded by a court order.

- 3035.3 OSSE shall appoint an educational representative for a student who has reached the age of eighteen (18) only after the following documents have been submitted:
- (a) A written request for the appointment of an educational representative signed by the parent, legal guardian, or other interested adult, and made on an OSSE-issued form available on the OSSE website or, upon request, in hard copy; and
 - (b) Two signed professional certifications that meet all of the requirements of this section.
- 3035.4 Appointment of an educational representative should be sought only where necessary and where supported decision-making is not appropriate.
- 3035.5 OSSE will provide written confirmation that all submission requirements have been met and, absent extenuating circumstances, will appoint an educational representative within ten (10) business days of OSSE's receipt of a complete written request with all required information and certifications. A written request shall not be considered complete unless all requested information has been provided in the required manner.
- 3035.6 The professional certifications shall be completed by two different licensed professionals, one (1) meeting the requirements of (a) and one (1) meeting the requirements of (b):
- (a) A licensed professional who is any of the following:
 - (1) Licensed medical doctor;
 - (2) Physician assistant, if authorized by a supervising licensed medical doctor; or
 - (3) Certified nurse practitioner.
 - (b) A licensed professional who is any of the following:
 - (1) Licensed medical doctor;
 - (2) Licensed psychiatrist;
 - (3) Clinical psychologist; or
 - (4) Licensed independent clinical social worker.
- 3035.7 The professional certifications shall meet the following requirements:

- (a) The professional has conducted a personal examination of or interview with the student within one (1) calendar year of the certification;
- (b) Based on the professional's knowledge and expertise and upon clear evidence, the professional determined that the student is unable to provide informed consent regarding educational decisions as described in this section provided, however, that a finding that the student is unable to make educational decisions shall not be based solely on the fact that the student has been voluntarily or involuntarily hospitalized for a mental illness or has a diagnosis of an intellectual disability;
- (c) The professional has informed the student in writing of the determination; and
- (d) Confirmation that the professional is not employed by the LEA or responsible public agency currently serving the student and does not have a personal conflict of interest with the student or the adult seeking appointment as the student's educational representative. A personal conflict of interest includes, without limitation, being related by blood or marriage to the student or adult seeking appointment as the educational representative.

3035.8 A student shall be deemed unable to provide informed consent regarding educational decisions if two (2) qualified professionals each independently determine at least one (1) of the following:

- (a) The student is unable to understand, on a continuing or consistent basis, the nature, extent, and probable consequences of an educational decision or proposed educational program;
- (b) The student is unable to evaluate the benefits or disadvantages of an educational decision or a proposed educational program as compared with alternative options on a continuing or consistent basis; or
- (c) The student is unable to communicate understanding verbally, in writing, or in the mode of communication used by the student to communicate his or her decisions, an understanding of or an evaluation of the benefits or disadvantages of an educational decision or proposed educational program.

3035.9 Professional certifications may be submitted as early as ninety (90) calendar days prior to the student's eighteenth (18th) birthday but shall not be reviewed by OSSE until all documentation requirements have been met, and shall not take effect prior to the student's eighteenth (18th) birthday.

3035.10 Upon confirming receipt of the required professional certifications, OSSE shall appoint the parent of the student to act as the student's educational representative.

For a student who has already reached the age of eighteen (18), parent means the individual who acted as the parent for purposes of special education before the student reached age eighteen (18). If the parent is unavailable or does not wish to serve as the student's educational representative, OSSE, with notice to the parent or legal guardian seeking the certification, shall appoint another adult relative willing to act as the student's educational representative. If no adult relative is available to serve as the student's educational representative, OSSE, with notice to the parent or legal guardian seeking the certification, shall appoint a person trained as an educational surrogate parent to serve as the student's educational representative.

- 3035.11 The term of appointment for an educational representative shall expire when the student is no longer eligible for special education services, or graduates with a regular high school diploma, whichever occurs first.
- 3035.12 A determination that a student is unable to provide informed consent for educational purposes shall not be construed as a finding of incompetence or incapacity for any other purpose or as relevant or precedential evidence in any future court or legal action seeking to remove decision-making authority for the student.
- 3035.13 OSSE shall provide notice of the appointment to the educational representative, parent, student, and LEA or responsible public agency. The notice shall include the steps a student may take to challenge the appointment of an educational representative and shall direct the student's LEA or responsible public agency to deliver a hard copy of the appointment to the student and to inform the student of the appointment verbally, or in the manner of communication with which the student is most comfortable.
- 3035.14 The student may challenge the certification of the student as unable to provide informed consent for educational purposes or appointment of an educational representative in accordance with this section at any time, in accordance with the following requirements:
- (a) A challenge made under this section shall be made in writing to OSSE, except that OSSE shall assist a student who is unable to provide a written challenge to document a verbal challenge in writing and may refer the student to a community organization for assistance.
 - (b) OSSE shall notify the student, the responsible LEA or public agency, any current appointed educational representative, and the person who submitted the request for the appointment of an educational representative (if different), of any such challenge in writing no later than two (2) business days from the receipt of the challenge.

3035.15 If the certification of a student is challenged by the student, the existing certification is invalidated, and all educational rights transfer back to the student.

A new Section 3036, TRANSFER OF RIGHTS: NOTICE, is added to read as follows:

3036 TRANSFER OF RIGHTS: NOTICE

3036.1 No later than one (1) year before a child with a disability (“student”) reaches eighteen (18) years of age, the LEA or responsible public agency shall notify the parents and student, in writing, that adult students with disabilities are presumed competent, and that all rights under IDEA will transfer to the student when he or she reaches eighteen (18) years of age, unless the student or parent pursues one of the exceptions described in Subsection 3035.1. The notice shall also describe the supported decision-making provisions of this section and the necessary procedures to pursue the exceptions described in Section 3035 related to educational decisions.