

VIA EMAIL

September 17, 2012

Grace Chien, Policy Director  
Division of Specialized Instruction  
Office of the State Superintendent of Education  
810 1<sup>st</sup> Street, NE, 5<sup>th</sup> Floor  
Washington, D.C. 20002

**Re: Policy Needed Regarding Powers of Attorney and IDEA Rights**

Dear Ms. Chien:

We are writing to request policy guidance from the Office of the State Superintendent of Education (OSSE) regarding the ability of students with disabilities who have reached the age of majority and remain enrolled in special education to delegate their legal rights under the Individuals with Disabilities Education Act (IDEA) to another individual. In addition, we are suggesting improvements to the current D.C. transfer-of-rights regulation in order to recognize the right of students, under current District law, to validly execute educational powers of attorney.

**Background on the Problem**

We have heard from special education advocates that some schools in the District are refusing to accept educational powers of attorney, which have been validly executed under D.C. law by students who have reached the age of 18 years<sup>1</sup> and want to delegate their IDEA rights to another person. For example, some schools are refusing to inform parents about IEP meetings or allow them to continue to make IEP decisions for their adult children unless they get a guardianship order – even when a student has executed an educational power of attorney delegating educational authority to his or her parent.

Further, the District of Columbia Public Schools (DCPS) “Transfer of Rights Guidelines”<sup>2</sup> fail to inform parents and students about educational powers of attorney, instead presenting the issue as a dichotomous choice between the students exercising their IDEA rights themselves or their parents seeking to have the students declared incompetent by court guardianship order. The guidelines do not present any less restrictive alternatives to guardianship, including a student’s

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<sup>1</sup> Under IDEA and the implementing D.C. Municipal Regulations, parental rights under IDEA automatically transfer to a student with a disability when that student reaches the age of eighteen unless a court has found him or her incompetent. *See* 20 U.S.C. § 1415(m); D.C. MUN. REGS. tit. 5, § E3023.1

<sup>2</sup> D.C. Public Schools, Office of Special Education, *Transfer of Rights Guidelines* (March 26, 2010).

ability to execute an educational power of attorney, which would preserve the student's capacity for decision-making upon leaving school.

These guidelines and school practices present the most restrictive form of decision-making intervention – guardianship – as the only alternative for families. The fundamental nature of a guardianship is to deny an adult the significant liberty interest of self-determination. The D.C. Court of Appeals has recognized that the appointment of a guardian is “an extraordinary intervention in a person’s life and affairs.”<sup>3</sup> The person can lose, among other things, the right to decide where and how to live, how and whether to spend his or her own money, with whom to spend time, and whether to accept or reject health care. A U.S. Congressional committee described guardianship as “the most severe form of civil deprivation that can be imposed on a citizen of the United States.”<sup>4</sup> As legal scholars have recognized:

Guardianship is a serious step, not to be undertaken lightly or simply because the person turns 18 and legally is no longer a child or because an adult makes unpopular or eccentric decisions.<sup>5</sup>

Assistance in decision making should offer the least restrictive intervention, and for the shortest possible time, to maintain the principles of autonomy and self-governance.<sup>6</sup>

Accordingly, guardianship should be the last resort for families, not the first. That is especially true when working with students with disabilities who have just reached adulthood. They should be surrounded by adults who are helping them build their capacity for decision-making, not stripping it away.

Not only does the current policy and practice contain a blanket promotion of guardianship, it also effectively denies students with disabilities certain important civil rights that they have under D.C. law, simply because they receive special education services. As we describe further below, D.C. law allows a person to share or delegate almost any right or authority that they have – including those relating to education – through a validly executed power of attorney. For people with disabilities there is a continuum of decision-making capacity and supports that the current policy and practice do not recognize. Many students with disabilities have the capacity to exercise their educational rights themselves, to exercise those rights with support, and/or to select who they want to make their educational decisions for them. We strongly advocate that adult students with disabilities be empowered to make their own decisions and have their own choices recognized and respected, including the decision to authorize an agent of their own choosing to act on their behalf.

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<sup>3</sup> *In re Orshansky*, 804 A.2d 1077, 1082 (D.C. 2002).

<sup>4</sup> H.R. Rpt. 100-641 (Sept. 25, 1987).

<sup>5</sup> *A Guide to Consent 7* (Robert D. Dinerstein *et al.* eds., American Assoc. on Mental Retardation 1999).

<sup>6</sup> *Id.* at 2.

## **Need for Policy Guidance Formally Recognizing Educational Powers of Attorney Authorized Under IDEA and D.C. Law**

We ask that OSSE issue policy guidance to all D.C. schools and school districts to ensure that they are respecting the civil rights of adult students to execute educational powers of attorney. In its comments to the 2006 IDEA regulations, the U.S. Department of Education specifically recognized that a student with a disability that reaches the age of majority “may be able to grant the parent a power of attorney or similar grant of authority to act on the [adult] child’s behalf under applicable State law.”<sup>7</sup> As described below, D.C.’s Uniform General Power of Attorney statute offers an already-existing vehicle by which to grant such a delegation of powers.

The District of Columbia’s Uniform General Power of Attorney statute<sup>8</sup> is expansively written and can be used by adult students to appoint an agent to exercise their IDEA and other educational rights. The suggested statutory form specifically states that the “powers granted by this document are broad and sweeping,” includes a list of broadly defined powers, and then allows the principal to include further “special instructions limiting or extending the powers granted to [his or her] agent.”<sup>9</sup> The other sections of the statute illustrate how broadly each category of power is defined. Educational and IDEA-related decision-making could easily fit under “claims and litigation,” “personal and family maintenance,” and/or “benefits from . . . other governmental programs.”<sup>10</sup> The “personal and family maintenance” category specifically includes “appropriate education,” as a power that can be delegated.<sup>11</sup>

Further, D.C. law explicitly allows a parent to create a “custodial power of attorney” that grants someone else any of their parental rights and responsibilities, including “consent to all school-related matters regarding the child.”<sup>12</sup> Since parents can clearly appoint an agent to exercise their child’s educational rights in their stead, so too should students with disabilities when those educational rights transfer to them at the age of 18, provided they have the capacity to select an agent knowingly and voluntarily.

### **Recommended Changes to D.C. Mun. Regs. Title 5, Chapter E30**

After issuing the policy guidance above regarding existing laws in the District on powers of attorney, you should also change the transfer of rights section in D.C. Municipal Regulations Title 5, Section E3023 to explicitly recognize the power of attorney option in the educational context – *i.e.*, that students who have reached age 18 in the District have the ability to execute educational powers of attorney, should they choose to do so.

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<sup>7</sup> See 71 Fed. Reg. 46,540, 46,713 (Aug. 14, 2006) (U.S. Dept. of Education comments on 34 C.F.R. § 300.520(b)). For more information generally on the use of educational powers of attorney, see also Judith C. Saltzman & Barbara S. Hughes, *Planning with Special Needs Youth upon Reaching Majority: Education and Other Powers of Attorney*, 1 NAELA Journal 42 (2005)

<sup>8</sup> D.C. CODE §§ 21-2101 *et seq.*

<sup>9</sup> *Id.* at § 21-2101.

<sup>10</sup> *Id.* at §§ 21-2112 - 2114.

<sup>11</sup> *Id.* at § 21-2113(a)(2).

<sup>12</sup> *Id.* at §§ 21-2301 *et seq.*

In researching how other states handle powers of attorney in the educational context, we found a few states that explicitly regulate the ability of adult students who have reached the age of majority to execute educational powers of attorney. For example, Arizona, Illinois, Massachusetts, New Hampshire, New Mexico, Virginia, and Washington, all have statutes or regulations addressing the ability of students who have reached the age of majority to execute powers of attorney regarding their rights under the IDEA.<sup>13</sup> Some states simply state that a student who has not been found incompetent or incapacitated by a court can execute an educational power of attorney, and other states provide more detail about how and when a student may execute an educational power of attorney, including providing a sample form.

So, for D.C., the regulatory change could be as simple as Washington’s regulation, which states that:

Nothing within this section shall prevent a student, who has reached the age of majority, from authorizing another adult to make educational decisions on that student’s behalf using a power of attorney consistent with the requirements in [state law].<sup>14</sup>

On the other hand, the change could be more substantive and allow students the opportunity to either share or delegate their educational decision-making authority, as in Massachusetts’ regulation:

(b) The student, upon reaching 18 years of age and in the absence of any court actions to the contrary, may choose to share decision-making with his or her parent (or other willing adult), including allowing the parent to co-sign the IEP. Such choice shall be made in the presence of the Team and shall be documented in written form. The student's choice shall prevail at any time that a disagreement occurs between the adult student and the parent or other adult with whom the student has shared decision-making.

(c) The student, upon reaching 18 years of age and in the absence of any court actions to the contrary, may choose to delegate continued decision-making to his or her parent, or other willing adult. Such choice shall be made in the presence of at least one representative of the school district and one other witness and shall be documented in written form and maintained in the student record.<sup>15</sup>

Finally, we also recommend that you change the phrase “incompetent under District law” in D.C. Municipal Regulations Title 5, Section E3023.1 to “*incapacitated* under District law” (emphasis added) to align with the District’s rules about seeking guardianship of an adult. “Incompetence” is a term of art used exclusively in the District to reference one’s ability to face criminal charges.

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<sup>13</sup> ARIZ. REV. STAT. ANN. § 15-773; 105 ILL. COMP. STAT. 5/14-6.10; 603 MASS. CODE REGS. 28.07(5); N.H. CODE AMIN. R. ANN. Ed. 1120.01, N.M. CODE R. § 6.31.2.13(K); 8 VA. ADMIN. CODE § 20-81-180(C); WASH. ADMIN. CODE 392-172A-05135(6).

<sup>14</sup> WASH. ADMIN. CODE 392-172A-05135(6).

<sup>15</sup> 603 MASS. CODE REGS. 28.07(5).

The District’s guardianship statute, which would be applicable to an adult student’s ability to make educational decisions, uses the word “incapacitated.”<sup>16</sup>

## **Conclusion**

The District’s existing power of attorney statute provides a clear avenue for adult students with disabilities to utilize a power of attorney to delegate educational decision-making authority to another willing adult. However, an OSSE policy to all local educational agencies (LEAs) that clearly reaffirms this right would facilitate adult students’ ability to use educational powers of attorney until OSSE is able to propose corresponding changes to the current D.C. transfer-of-rights regulations.

We would like to meet with you to discuss the issues raised in this letter. Please contact Shawn Ullman, Staff Attorney at University Legal Services (at [sullman@uls-dc.org](mailto:sullman@uls-dc.org) or 202-547-0198, ext. 141), or Morgan Whitlatch, Senior Attorney at Quality Trust for Individuals with Disabilities (at [mwhitlatch@dcqualitytrust.org](mailto:mwhitlatch@dcqualitytrust.org) or 202-459-4004). Thank you for your consideration.

Sincerely,

Advocates for Justice and Education  
Children’s Law Center  
D.C. Developmental Disabilities Council  
Robert D. Dinerstein, Director, Disability Rights Law Clinic, American University,  
Washington College of Law  
Georgetown University Center for Child and Human Development, University Center for  
Excellence in Developmental Disabilities  
Parent Advocate Leaders Support (PALS) Group  
Project ACTION!  
Quality Trust for Individuals with Disabilities  
The Arc of the District of Columbia, Inc.  
Joseph B. Tulman, Director, Took Crowell Institute for At-Risk Youth,  
University of the District of Columbia, David A. Clarke School of Law  
University Legal Services Protection and Advocacy Program

cc: Amy Maisterra

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<sup>16</sup> D.C. CODE §§ 21-2001 *et seq.*