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Transfer of Rights Under the Individuals With Disabilities Act: Adulthood with Ability or Disability?

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TRANSFER OF RIGHTS UNDER THE INDIVIDUALS WITH DISABILITIES ACT: ADULTHOOD WITH ABILITY OR DISABILITY?

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I. INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) requires each state to provide a Free Appropriate Public Education (FAPE) to all children with disabilities, ages three to twenty-one, living within its borders.[1] Under the Act, parents[2] are entitled to extensive participation in the planning of their child's education. For example, the student's parent is a required member of the Individualized Education Program (IEP) team.[3] Furthermore, the IDEA provides the student's parent with several procedural safeguards, including the right to initiate a due process hearing for matters arising under the IDEA, such as issues related to eligibility and services.[4] Indeed, a

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1. *See* 20 U.S.C. § 1412 (2)(B) (1997); 34 C.F.R. § 300.13 (1999).

2. *See* 34 C.F.R. § 300.20 (1999). "Parent" includes biological and adoptive parents, guardians, a person acting in the place of a parent, surrogate parents, and if permitted by state law, foster parents.

3. *See* 20 U.S.C. § 1414(a)(1)(C)(iii) (1997); 34 C.F.R. § 300.344(a)(1) (1999).

4. 20 U.S.C. § 1415 (1997). Additionally, parents have the right to examine their child's records under 20 U.S.C. § 1415(b)(1)(A) (1997) and 34 C.F.R. § 300.562(1999), limit disclosure of records under 34 C.F.R. § 300.571 (1999), and to withhold consent for an initial evaluation and initial provision of services under 20 U.S.C. § 1415(b)(1)(c) (1997) and 34 C.F.R. § 300.505(a)(i)-(ii) (1999). As of the 1997 Amendments, parents have the right to participate in all meetings regarding identification, evaluation, placement, and FAPE. *See* 20 U.S.C. § 1415(b)(1) (1997).

parent's involvement in the entire process may significantly influence the type and level of educational services that the student receives.

A potential dilemma regarding a parent's role under the IDEA arises when the student attains the age of majority. Generally, age of majority status entitles a person to various rights, such as the right to vote and to contract.[5] However, attaining the age of majority does not automatically entitle an IDEA-eligible student to adult rights, at least in terms of educational decision-making. Instead, the IDEA appears to presume that these students do not acquire educational rights. Although the Act, as amended in 1997, permits states to transfer rights formerly held by the parent to the age of majority student,[6] the awkward legislation language seems to suggest that a student only obtains such rights if the state has enacted transfer legislation. Further, the general statutory right to have and control access to educational records,[7] which transfers to all students at the age of eighteen,[8] arguably remains with the IDEA-parent unless the state has transferred IDEA rights to the student.[9]

Surprisingly, little has been written on this topic.[10] One commentator has addressed the issue twice, once before and once after the 1997 Amendments. However, both articles are brief and written in question and answer format, lacking an in-depth analysis of issues related to the transfer of rights from parents to age of majority IDEA-eligible students.[11] A third review, written subsequent to the 1997 Amendments, warned of the potential for litigation in the transfer of rights; but again, the article is brief and does not examine interrelated issues.[12]

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5. *See, e.g.*, WASH. REV. CODE ANN. § 26.28.015 (West 1999); WYO. STAT. ANN. § 14-1-101 (Michie 1999). Although educational decision-making is not typically mentioned, it can be inferred as a matter of common law, unless otherwise provided by statute.

6. *See* 34 C.F.R. § 300.517 (1999).

7. *See* 20 U.S.C. § 1232(g) (1997); 34 C.F.R. § 99.5(a) (1999).

8. *See* 34 C.F.R. § 300.574(b) (1999).

9. *See id.* § 300.574(c). On the other hand, the bright-line rule of the FERPA regulations and the IDEA legislative mandate that states act "in accordance" with FERPA arguably suggest a contrary conclusion. 34 C.F.R. § 99.5(a); 20 U.S.C. § 1417(c).

10. A law review search on Lexis revealed no articles specific to this subject.

11. *See* Zvi Greismann, *Q & A: What Would You Do?*, 12 THE SPECIAL EDUCATOR 3 (1996); Zvi Greismann, *Q & A*, 14 THE SPECIAL EDUCATOR 6 (1998).

12. *See Transferring Rights to 18-Year-Olds Under the New IDEA*, 14 THE

This article provides a current and comprehensive analysis of the status of age of majority students under the IDEA. Part I discusses the status of parents, vis-à-vis age of majority students, under the IDEA prior to the 1997 amendments. Part II analyzes the new relevant provisions in the 1997 amendments and the 1999 regulations, which allow states to transfer the procedural rights from parents to age of majority students. Part III outlines various potential problems that states should consider when determining whether and how to implement this transfer of rights.

II. PRE-1997 LAW

Prior to the 1997 amendments, the IDEA was silent with respect to the procedural rights of age of majority students. Consequently, states were left without guidance concerning this perplexing issue. While few states enacted legislation transferring rights to IDEA-eligible students upon their reaching the age of majority,[13] others left the issue unresolved. When disputes concerning the legal status and procedural rights under IDEA of parents vis-à-vis age of majority students arose, hearing officers and judges relied on other relevant language in the Act. Notably, there have only been a handful of published pertinent decisions.

In *John H. v. MacDonald*, the New Hampshire Federal District Court adopted a partial solution for settling such disputes.[14] In this case, the defendant school district did not provide notice of the IEP meeting to either the parents or the surrogate parent.[15] At the IEP meeting an eighteen year-old student signed a form consenting to his educational placement. The school district claimed that because the student had reached the age of majority in New Hampshire, the parents were not entitled to notice or to participate in the meeting.[16] The court held that not only "adult students" but also their parents (including surrogate parents and legal guardians) were

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SPECIAL EDUCATOR 5 (1998).

13. *See, e.g.*, WIS. ADMIN. CODE § 11.16 (1994) (repealed 1999).

14. 1986-87 EHLR DEC. 558:366 (D.N.H. 1987).

15. *See id.* at 369.

16. *See id.* In addition, the district claimed that the parents were not entitled to notice because a surrogate parent had been appointed to represent the student. The surrogate appointment lapsed on the student's 18th birthday.

entitled to the IDEA's procedural safeguards, including the right to participate in IEP meetings and the right to file for a due process hearing.[17]

Although the court did not use the term "transfer" in the opinion, it simultaneously transferred rights to the student and allowed rights to remain with the parents. The court's solution is limited for two reasons. First, the court essentially placed the age of majority student on an equal footing with the parents. The court did not determine which party would prevail in the event of a disagreement between them. Second, in light of the 1997 amendments, the court's decision would not likely be the same today.[18]

A few years later, the Second Circuit addressed a similar situation in *Mrs. C. v. Wheaton*.[19] In *Mrs. C.*, an IDEA-eligible student, J.C., who had attained the age of majority,[20] consented to the termination of his IDEA services. The school district allegedly failed to comply with IDEA's procedural requirements by not providing J.C.'s parents or his surrogate parent with notice of, or opportunity to participate in, the meeting in which he agreed with school officials to terminate his IDEA placement. J.C.'s mother filed suit under the IDEA, challenging the termination decision.[21] The lower court held that since J.C. had attained the age of majority and had not been declared incompetent, his consent was sufficient to terminate the placement, regardless of whether his mother or his surrogate parent played a role in the decision.[22] On appeal, the Second Circuit reversed the lower court's decision. It concluded that Congress intended for school districts to comply with the statute's procedural requirements with regard to parents as a prerequisite to changing an eligible student's educational placement. Initially,

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17. *See id.* at 370. The court clarified that both have this right regardless of whether the other exercised it.

18. *See* 20 U.S.C. § 1415(m) (1997); 34 C.F.R. § 300.517 (1999); 20 U.S.C. § 1232(g) (1997); 34 C.F.R. § 99.5(a) (1999); 34 C.F.R. § 300.574(b)-(c) (1999).

19. 916 F.2d 69 (2nd Cir. 1990).

20. *See id.* at 72. This case arose in Connecticut where the age of majority is eighteen. The student was twenty years old when he consented to the termination of placement.

21. *See id.* at 70-71. Although the court opinion did not address the issue of the mother's standing, J.C. was adopted by his grandparents, and at age four was committed to the Department of Children and Youth Services. Upon J.C.'s return to his mother's home, at age 20, she became his conservator.

22. *See id.* at 72.

the appellate court pointed to the IDEA's procedural safeguard entitling a parent to notice of any proposed change in the student's IEP.[23] The court went on to explain that "the state cannot terminate an 18-to-21 year-old student's educational placement on the latter's 'consent' unless the 'consent' is an informed one, i.e., the [IDEA's] procedural safeguards are followed."[24] Based on these observations, the court held that in the absence of procedural compliance, such as notice to the parents, the student's consent was not informed, and was therefore not legally effective.[25]

This decision offers even less assistance than the earlier New Hampshire case for determining whether IDEA-parent's rights transfer to an age of majority student. The *Mrs. C* court established that school districts must comply with the IDEA's procedural requirements, such as parental notification, before a student may provide informed consent regarding an educational placement. However, the court declined to rule on whether a student's informed consent decision was of any effect. This left open the question of whether the educational rights transferred to the student, and if these rights are only partially transferred, would the student's decision override the parent's?[26]

In addition to court decisions, a Wisconsin hearing officer decision has been cited for the proposition that parents still retain procedural rights after an IDEA-eligible student reaches the age of majority.[27] In *Unified School District of De Pere*,[28] although state law clearly transferred procedural rights to the eighteen-year-old student, a hearing officer ruled that the student's parents had standing to appeal the school district's IEP decision under the IDEA.[29] This decision, however, relied on the fact that the parents "filed their appeal *prior* to [the student's] eighteenth birthday and at that time it was solely their right to do so."[30] In contrast to the judicial decisions, the hearing officer did not address the issue of parental rights after the

23. *See id.* at 73.
24. *Id.* at 74.
25. *See id.* at 73-74.
26. *See id.*
27. *See, e.g.*, Greismann, *supra* note 11.
28. 21 IDELR 1206 (Wis. SEA 1994).
29. *See id.* at 1207.
30. *Id.* (emphasis in original).

student reached the age of majority.

Therefore, the law prior to 1997 offered minimal guidance as to whether the parents' rights transferred to an IDEA-eligible age of majority student. Moreover, the new provision in the IDEA overrides any guidance offered in the limited applicable case law.

III. 1997 AMENDMENTS AND RESULTING REGULATIONS

The 1997 amendments to the IDEA specifically address the issue of whether an older IDEA-eligible student is entitled to rights held by the parent upon reaching the age of majority under state law. Specifically, IDEA 1997 permits states to transfer the parent's rights to the student when the student achieves the age of majority.[31] Further, in states that elect to provide for this transfer, the school district must give notice of it to both the parent and student, via a statement in the IEP, at least one year prior to the student's attaining the age of majority.[32] Additionally, the district must again give notice to the parents and the student when the student reaches the age of majority.[33] The amendments also obligate the district to provide both the parents and the student with other required parental notices, such as notice of IEP meetings, for as long as the student is IDEA eligible.[34] Finally, the U.S. Department of Education's accompanying regulations clarify that although parents are only entitled to notice of IEP meetings, either the student or the district may invite the parents to attend.[35]

While the amendments grant states the discretion to determine whether to transfer procedural rights to age of majority students, they also impose two limitations on a state's authority to do so. First, the amendments categorically exclude IDEA-eligible students who are incompetent under state law, from obtaining such rights.[36] Second, via a "special rule," the amendments similarly exclude students who are otherwise incapable of providing informed consent with respect to educa-

31. *See* 34 C.F.R. § 300.517(a) (1999).
32. *See id.* § 300.347(c).
33. *See id.* § 300.517(a).
34. *See id.* § 300.517(a)(1)(i).
35. *See* 64 Fed. Reg. 12,473 (1999).
36. *See* 34 C.F.R. § 300.517(a) (1999).

tional decisions.[37]

Additionally, for the "special rule" category, the amendments require states that enact transfer statutes to establish formal procedures for appointing the parent, or another adult, to represent the student for IDEA purposes.[38] However, by only cryptically requiring appointment "procedures,"[39] IDEA 1997 does not provide any guidance regarding the criteria and methods to use in deciding whether the student has the "ability to provide informed consent with respect to [her/his] educational program."[40] The resulting regulations provide some assistance by clarifying that before a state uses the special rule, it must have some "mechanism"[41] in place for determining whether a student is capable of providing informed consent.[42] Further, the official comments to the regulations provide even greater specificity by explaining that the type of "mechanism" used to determine whether a student can provide informed consent is limited to proceedings for determining "lesser competency."[43]

IV. POSSIBLE PROBLEMS

States need to consider certain policy issues regarding the student's legal status before deciding whether, and how, to transfer procedural rights to the student. First, a state must examine its own surrogate parent law, which supplements the surrogate parent provision in the IDEA, to see if it conforms with the IDEA transfer provision. Second, a state must determine whether it wants to amend its age of majority definition to include students who are younger than the established chronological age but who might be included for other reasons, like emancipation. Third, states need to be aware of the laws and procedures regarding incompetence. Fourth, states must determine whether a mechanism exists for declaring a person incapable of providing informed consent for a limited purpose

37. *See id.* § 300.517(b).

38. *See id.*

39. *See id.*

40. *Id.*

41. The regulations do not define the type of mechanism needed in order to utilize the special rule. *See* 34 C.F.R. § 300.517(b).

42. *See id.*

43. For a discussion of the meaning of "lesser competency," see infra notes 66-70 and accompanying text.

like educational decision making, and if not, whether to create such a mechanism.

Before grappling with these issues, the initial step is to ascertain whether the age of majority, under state law that applies to all children, is below the age of twenty-one. If the age of majority in the state is twenty-one,[44] the student will reach the age of majority when that student's IDEA eligibility ends. Consequently, in such states parents retain their rights under the IDEA for as long as the child is eligible for FAPE. However, in the vast majority of states, the age of majority is eighteen.[45] In these states, lawmakers will have to decide whether to transfer parental rights to IDEA-eligible age of majority students. The following subsections address these four specified policy issues in states where the age of majority is below twenty-one.

A. Students with a Surrogate Parent

Emphasizing the importance of parental involvement in the student's educational planning,[46] the IDEA defines "parent" to include a surrogate parent.[47] A surrogate parent is responsible for representing the student in matters related to the student's education, which may include identification, evaluation, placement, and FAPE.[48] The Act requires the agency responsible for the student's education[49] to appoint a surrogate parent to participate on behalf of the student in the educational planning where 1) the parents are unknown, 2) the district is unable, after reasonable efforts, to locate the parents, or 3) the child is a ward of the State.[50]

Although the IDEA only specifies three situations where a surrogate parent must be appointed, presumably state law may add to the list. Indeed, some states require the appointment of a surrogate parent in specified additional circumstances.[51] For

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44. *See, e.g.*, 1 PA. CONS. STAT. § 1991 (1998).

45. *See, e.g.*, ALASKA ADMIN. CODE tit. 15, § 23.993(a)(2) (1999); N.M. STAT. ANN. § 12-2A-3(B) (Michie 1998); WYO. STAT. ANN. § 8-1-102(a) (Michie 1999).

46. *See supra* note 2 and accompanying text.

47. *See supra* note 3 and accompanying text.

48. *See* 20 U.S.C. § 1415(1)(2) (1997); 34 C.F.R. § 300.515(e)(1)-(2) (1999).

49. The responsible agency varies from state to state. *See, e.g.*, CAL. GOV'T CODE § 7579.5(b) (Deering 1999) (stating that the LEA is responsible for assigning surrogate parents); NEB. REV. STAT. § 79-1161(1) (1999) (stating that the school district is responsible for assigning surrogate parents).

50. *See* 34 C.F.R. § 300.515(a)(1)-(3).

51. *See, e.g.*, N.H. REV. STAT. ANN. § 186-c:14(II)(e) (1999) (stating that a surro-

example, New Hampshire protectively provides for the appointment of a surrogate in situations where the parents of an IDEA-eligible student are "unable to act as the child's advocate in the educational decision-making process."[52] Other states permit the appointment of a surrogate parent in certain situations.[53] For example, Connecticut allows for the appointment of a surrogate if the student is under the supervision of the state child protection agency.[54] Finally, some states have included restrictions. Although it is permissive to appoint a surrogate parent in Pennsylvania for "good reason," a surrogate parent will not be appointed in cases where a parent is "simply uncooperative or unresponsive."[55]

Since a surrogate parent assumes the role of parent for IDEA purposes, in a state that has chosen to transfer rights to the student, the assignment of a surrogate parent terminates upon reaching the age of majority, unless one of the two IDEA exceptions apply.[56] Some states already require the termination of a surrogate parent assignment on the student's eighteenth birthday.[57] Other states require that the surrogate parent assignment continue beyond the student reaching the age of majority but only in an advisory capacity.[58] States in this latter category may need to amend their surrogate appointment procedures in order to conform to the IDEA. Specifically,

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gate parent shall be appointed where the parent is otherwise unable to act as the child's advocate); P.R. LAWS ANN. tit, 18 § 1356(I)(v) (1995) (stating that a surrogate parent shall be appointed when the parents are disabled); R.I. GEN. LAWS § 03-050-600(I) (1999) (stating that a surrogate parent shall be appointed where the parent is unwilling to ensure that the student's educational needs are being met); 19 TEX. ADMIN. CODE § 89.1115(g)(1)(C) (West 1998) (stating that a surrogate parent must be appointed when a student is committed to the temporary custody of the state).

52. N.H. REV. STAT. ANN. § 186-c:14(II)(c).

53. *See, e.g.*, CONN. GEN. STAT. § 10-94g(a) (1999) (stating that a surrogate parent may be appointed with the parent's consent, where the student is committed to the temporary custody of the state); 43 S.C. CODE ANN. REGS. 243(k)(B)(4) (1998) (stating that a surrogate may be appointed where the parent is unresponsive, lives a far distance from the school, or is in jail, with written authorization from the parent).

54. *See* CONN. GEN. STAT. § 10-94g(a) (1997).

55. 22 PA. CODE § 342.66(a)(II)(A)(2) (1999).

56. For IDEA transfer exceptions see *supra* notes 31-32 and accompanying text.

57. *See, e.g.*, CAL. GOV'T CODE § 7579.5(a) (Deering 1999) (a surrogate parent shall not be appointed for a child who has reached the age of majority, unless declared incompetent by a court of law); 18 VA. CODE ANN. § 20-80-80(B)(4)(a) (1998) (assignment of a surrogate terminates when the child attains the age of majority); WYO. STAT. ANN. § 41(c)(iv) (Michie 1999) (appointment of a surrogate parent terminates upon the child attaining the age of majority).

58. *See, e.g.*, IND. ADMIN. CODE tit. 511, r.7-9-1(j) (1998).

since the IDEA's transfer provision limits the rights of the parent to notice, a parent is not entitled to greater rights, such as serving in an advisory capacity.

Some states still allow a surrogate parent to continue to represent the student beyond the age of majority. In these states the appointment of the surrogate parent will continue if it appears that the student needs parental assistance beyond reaching the age of eighteen.[59] In Connecticut, a state where rights transfer to the student at eighteen, the surrogate parent remains assigned to the student unless the student objects in writing. If the student does object, the commissioner of education is required to hold a hearing to determine whether the surrogate assignment will continue.[60]

It appears that state laws that require or permit the surrogate parent assignment to continue beyond the student's eighteenth birthday would be in contravention of IDEA 1997 in states, such as Connecticut, which have transferred rights to the student. In addition, such laws treat age of majority students with surrogate parents differently than those without surrogate parents who will obtain IDEA rights unless incompetent or incapable of providing informed consent. Thus, states should examine their surrogate parent law in tandem with any proposed transfer of rights legislation to make sure that they are compatible.

B. Students Who Are Younger than Eighteen But Legally Independent

The transfer of IDEA rights is permissible when the student attains the age of majority. The Act's requirement that a statement of the transfer be included in the student's IEP one year prior to reaching the age of majority presumes that age of majority status is achieved upon reaching a certain age. However, in some states a child who is younger than the chronological age defined as the age of majority may still be considered to have reached it. For example, in Alaska a person who

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59. *See, e.g.*, N.H. REV. STAT. ANN. § 186-C:14(IV) (1999) (stating that the appointment of a surrogate may be extended by the commissioner until child graduates or reaches 21); 19 TEX. ADMIN. CODE § 89.1115(g)(1)(E) (West 1998) (stating that appointment of a surrogate can continue up until the student turns 22 if necessary to ensure FAPE).

60. *See* CONN. GEN. STAT. § 10-94g(b) (1997).

has married has attained the age of majority.[61] As a result, IDEA-eligible married students in Alaska would be included in the group of eligible age of majority students, regardless of their chronological age.

Another group of students that are below the age of majority but have greater rights than other children are emancipated minors.[62] Although the definition of emancipated minor varies from state to state, a child is generally considered to be emancipated based on circumstances such as being married or in the armed services, maintaining a separate residence with no intention of returning to the parental home, or achieving financial independence.[63] Under state law, emancipated minors may be considered to have reached the age of majority in order to consent to medical treatment, to enter into a contract, or to enroll in school.[64] However, emancipated minors are not entitled to all of the rights granted to an age of majority person. Some rights, like the right to vote, are based exclusively on chronological age. An emancipated minor will not be permitted to exercise such chronologically based rights until reaching the statutory age. The procedures used to determine whether a child is an emancipated minor also vary from state to state. In some states a child must be declared an emancipated minor via a court proceeding.[65] In other states, no such proceeding exists. Instead, public agencies determine whether a child should be considered an emancipated minor for a specific purpose, like receiving public assistance.[66]

Whether through a legal determination or otherwise, states should ascertain whether their age of majority definition includes "independent" children who are married or otherwise emancipated minors. If the definition does not include such

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61. *See* ALASKA ADMIN. CODE tit. 15, § 23.993(a)(2) (1999).

62. For an in-depth discussion of various issues regarding emancipation of minors, see, for example, William E. Dean, *Ireland v. Ireland: Judicial Emancipation of Minors in Idaho: Protecting the Best Interest of the Child or Conferring a Windfall Upon Parents?* 31 IDAHO L. REV. 205 (1994); Gregory A. Loken, *"Throwaway" Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715 (1995); Carol Sanger & Elanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239 (1992).

63. *See, e.g.*, 55 PA. CODE § 145.62 (1999); JAMES M. MORRISSEY, RIGHTS AND RESPONSIBILITIES OF YOUNG PEOPLE IN NEW YORK: A GUIDE FOR EDUCATORS & HUMAN SERVICE PROVIDERS 18-19 (3d ed. 1997).

64. *See, e.g.*, S.D. CODIFIED LAWS § 25-5-25 (Michie 1999).

65. *See, id.* § 25-5-26.

66. *See, e.g.*, MORRISSEY, *supra* note 63, at 18-19.

children, states should consider whether to amend their existing definitions. In the event that an "independent" minor has not attained the age of majority, states should consult their surrogate parent law to determine whether a surrogate parent must be appointed to represent the student for IDEA purposes.

C. Students Who are Determined to Be Incompetent

Even when a state has established the procedural rights will transfer to an age of majority student, the IDEA prohibits transfer to students who are declared incompetent under state law.[67] Legal incompetence is defined by state law and varies from state to state. Typically, the definition includes the incapacity to make responsible decisions due to mental or physical disabilities or illnesses, or due to drug addiction or inebriety.[68]

Regardless of any state differences in defining incompetence, an elevated standard of clear and convincing proof of incompetence is generally required since fundamental liberty interests are at stake.[69] Thus, petitioning parents or petitioning school districts should be prepared to present persuasive evidence of the student's incompetence in various aspects of life. If the student is found to be incompetent, then either a parent or a surrogate parent must represent the student for as long as the student remains IDEA-eligible.

D. Students Who are Unable to Provide Informed Consent

IDEA's special rule requires the appointment of a "parent" to represent an age of majority student when the student is determined incapable of providing informed consent.[70] The regulations also require that a mechanism for determining informed consent be in place in order for a state to use the special rule.[71] The type of mechanism is a matter of state law. Arguably, a state may require a court to make a legal determination of "lesser" competency or, may permit a less formal procedure where an IEP team or hearing examiner makes the determina-

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67. *See supra* note 36 and accompanying text.

68. *See, e.g.*, MONT. CODE ANN. § 72-5-305(3) (1998); N.D. CENT. CODE § 30.1-26-01(2) (1999); 20 PA. CONS. STAT. ANN. § 342.66(II) (West 1998).

69. *See, e.g.*, CAL. PROB. CODE § 1801.3(e) (Deering 1999).

70. *See* 34 C.F.R. § 300.517 (1999).

71. *See id.* § 300.517(b).

tion.[72]

In the event that a state requires a court to make a legal determination of lesser competency, the student is most likely entitled to the same rights as a person in a full competency proceeding.[73] Court proceedings which permit a finding of "lesser" competence already exist in most states.[74] In such proceedings, the court makes a finding limited to a specific area like education. In addition, the court typically not only determines incompetence but also appoints a "limited" guardian or conservator.[75]

However, a state may chose to institute a less formal procedure for determining whether a student can provide informed consent regarding educational decisions. Presently, at least one state, Idaho, allows for a less formal procedure than a legal lesser-competency proceeding to determine whether a student is capable of providing informed consent. In Idaho, rights transfer to the student at age eighteen unless the student is incompetent or "an individualized education program team determines the student lacks the ability to provide informed consent with respect to his educational program."[76]

Although Congress probably intended a less formal procedure than a court proceeding to determine whether a student is capable of providing informed consent with regard to educational decisions, an IEP team determination may be too informal. One possible compromise may be to define the mechanism to be used for the special rule as a due process hearing. However, as with most issues relating to transfer of rights, this policy matter is left to state control.

V. CONCLUSION

In practice, states may be more concerned with an array of other special education topics,[77] including discipline[78] and re-

72. Generally, the word competency implies a judicial proceeding. However, assuming that Congress did not intend for parents to obtain a court order to use the "special rule," a less formal procedure may be appropriate.

73. *See, e.g.*, CAL. PROB. CODE § 1801.3(d).

74. *See id.*; FLA. STAT. ch. 744.102(8)(a) (1998); MONT. CODE ANN. § 72-5-305(3) (1998).

75. *See* ARK. CODE ANN. § 28-65-101(3) (Michie 1997); CAL. PROB. CODE § 1801.3(d). FLA. STAT. ch. 744.102(8)(a); MONT. CODE ANN. § 72-5-305(3).

76. IDAHO CODE § 33-2002(4) (1998).

77. *See, e.g.*, Perry A. Zirkel, *Special Education Law Update VI*, 133 ED. LAW REP.

imbursement disputes.[79] As a result some states neglect to address the issue of whether to transfer rights to IDEA-eligible age-of- majority students. Although the transfer provision may only impact a small number of students, its effect may be significant to all parties involved. Specifically, a state's silence is likely to cause confusion and friction for school districts, parents, and students as to the rights of parents vis-à-vis age of majority students. Parents in support of the claim that they retain their IDEA-rights will point to the IDEA, which arguably preserves their rights unless state law transfers such rights to student. Conversely, student advocates will assert that legally competent adult students are entitled to make their own educational decisions independent of their parents. The existing case law does not lend any further assistance regarding this matter. In the absence of state legislation, tension and disagreement over each party's role will continue, which is not in anyone's best interest, including that of the so-called "child".

323 (1999). The previous five updates appeared at 116 ED. LAW REP. 1 (1997), 98 ED. LAW REP. 1 (1995), 83 ED. LAW REP. 543 (1993), 66 ED. LAW REP. 901 (1991), 56 ED. LAW REP. 20 (1990).

78. *See, e.g.*, Joseph R. McKinney, *Disciplining Children With(Out) Disabilities: Schools Behind the Eight Ball*, 130 ED. LAW REP. [365] (1999); Perry A. Zirkel, *The IDEA's Suspension/Expulsion Requirements*, 134 ED.LAW REP. 19 (1999).

79. *See, e.g.*, Cindy L. Skaruppa et al., *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?* 114 ED. .LAW REP. 353 (1997). Perry A. Zirkel, *Tuition Reimbursement for Special Education Students*, 7 FUTURE OF CHILDREN 122 (1997).