

# AGE OF MAJORITY



LENORE KNUDTSON  
KNUDTSON LAW, LLC  
UTAH LAW 2011



## SOMEWHERE IN BETWEEN THE FIRST DAY AND THE LAST DAY

### You may need to address issues like:

- Transfer of parental rights
- Competency issues and guardianship
- “Aging out”
- Graduation
- Certificate of completion
- Incarcerated students
- Summary of performance
- Revocation of consent
- Transition and postsecondary plans

## TRANSFER OF PARENTAL RIGHTS

### 34 C.F.R. §300.520 Transfer of parental rights at age of majority.

- **(a) General. A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—**
  - (1)(i) The public agency must provide any notice required by this part to both the child and the parents; **and**
  - (ii) All rights accorded to parents under Part B of the Act transfer to the child;
  - (2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; **and**
  - (3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, **the agency must notify the child and the parents of the transfer of rights.**
- **(b) Special rule. A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.**

## WHAT DOES THIS MEAN?

- **All rights transfer to the 18 year old student UNLESS a judicial decree or order designates some other person.**
- **Notice of the transfer must be provided to the 18 year old student and the parent.**
- **Any future notice required under IDEA must be provided to the 18 year old and the parent.**
- **The parent no longer has the right to request a due process hearing, resolve a dispute through legal settlement, or participate in mediation.**

## WHAT DOES THIS MEAN?

**The 18 year old now has the right to make all education related decisions, including:**

- **Approve his own educational placement and IEP without help from parents, family or special advocates,**
- **Allow parents, family, or special advocates to help if he desires, and**
- **Revoke consent for special education.**

## COMPETENCY ISSUES

- **If you have a student who is NOT competent (in the legal sense) to make his own decision, you should explore options as part of the student's transition planning.**
- **Guardianship may be a very real part of students with severe disabilities transition plans.**
- **Don't leave your team and your district in the position of being unable to obtain informed consent from a profoundly disabled 18 year old student.**

## COMPETENCY ISSUES

### **Utah Uniform Probate Code**

### **Protection of Persons Under Disability and Their Property**

### **75-5-303. Procedure for court appointment of a guardian of an incapacitated person.**

(1) The incapacitated person or any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian.

## AGING OUT

### I.C. APPLICABILITY. (§300.2)

3. Each public agency in the State shall ensure that a free appropriate public education (FAPE) is available to any individual student with a disability, **ages 3 through 21**, who needs special education and related services, including students with disabilities who have been suspended or expelled from school and students who are advancing from grade to grade (§300.101(c)).

## WHAT DOES THIS MEAN?

- **The student is no longer entitled to receive FAPE after turning 22 years of age.**
- **The student is entitled to receive a Summary of Performance of his academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting postsecondary goals. 34 C.F.R. §300.305(e)(3).**
- **The district should describe the changes in a Prior Written Notice a reasonable amount of time prior to the student aging out.**
- **An evaluation is NOT required prior to terminating eligibility based on graduation with a regular diploma. 34 C.F.R. §300.305(e)(3).**

## GRADUATION

- 34 C.F.R. §300.102(a)(3)
- The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:
  - Children with disabilities who have graduated from high school with a regular high school diploma.
- This exception **does not apply** to children who have graduated from high school but have not been awarded a regular high school diploma.
- Graduation from high school with a regular diploma constitutes a change in placement, requiring written prior notice in accordance with §300.503.

## REGULAR MEANS REGULAR

Pursuant to 34 C.F.R. §300.102((a)(3)(iv), the term *regular high school diploma* does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general education development credential (GED).

## WHAT DOES THIS MEAN?

- **Students who graduate with a REGULAR diploma are no longer entitled to receive FAPE, regardless of age.**
- **The student is entitled to receive a Summary of Performance of his academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting postsecondary goals. 34 C.F.R. §300.305(e)(3).**
- **The district should describe the changes in a Prior Written Notice a reasonable amount of time prior to the student's graduation.**
- **An evaluation is NOT required prior to terminating eligibility based on graduation with a regular diploma. 34 C.F.R. §300.305(e)(3).**

## GRADUATION

### **USOE Graduation Guidelines for Students with Disabilities**

- **Amending Graduation Requirements**
  - R2777-705-5-A, consistent with the Utah State Special Education Rules VII.C.2, allows the IEP team to amend graduation requirements. Amendments may include modifications, substitutions, and/or exemptions made to accommodate the needs of the individual student; the nature and extent of any amendments must be documented in the IEP.

## WHAT DOES THIS MEAN?

- I don't know.
- **However, if graduation requirements are “modified, substituted, or exempted,” is the resulting diploma truly “regular” and “fully aligned with the State’s academic standards?”**
- **If the answer is NO, then the student would continue to be eligible to receive FAPE through age 21.**
- **If the answer is YES, then the student is no longer entitled to FAPE.**
- **Thoughts?**

## USOE GUIDANCE

**While the USOE does not define “modifications, substitutions, and/or exemptions,” IEP teams might wish to consider the following guidelines:**

- Documentation of any amendments should be cumulative in nature so that the IEP team is able to accurately discuss the student's progress toward earning a diploma.
- Amendment of graduation requirements through course substitutions should be made in similar content areas whenever possible in order to provide the student a well-rounded education. For example, the team may choose to substitute a Basic Math class for Algebra I. This would be more educationally sound than substituting Ceramics for Algebra I. As always, the team, including the parents, will make the final determination regarding any amendment of graduation requirements.

## USOE GUIDANCE

- When making amendments, the team should consider unintended consequences for the student's post-school activities. Substituting functional courses for math requirements, for example, may require the student to take remedial math courses in higher education (at regular tuition prices, with no credit earned). In addition, exempting a student from world language classes may negatively affect college admission.
- When amending graduation requirements, the IEP team should consider the effect on the student's progress toward achieving his/her measurable postsecondary goals. For example, it may be beneficial to substitute a food and nutrition class for a science credit if a student's career goal is in the culinary arts. The same substitution may not be appropriate for a student who is interested in a career that would require a knowledge base in science, such as nursing.

## USOE GUIDANCE

- Exemptions to graduation requirements may occasionally be determined necessary by the IEP team. The IEP team should be cautious in recommending exemptions, as the outcome may not be beneficial to students.
- Source: USOE Special Education Graduation Guidelines, p. 6.
- <http://www.schools.utah.gov/sars/DOCS/resources/graduation.aspx>

## CERTIFICATE OF COMPLETION

- A student's receipt of a special education diploma, a certificate of mastery, or an IEP diploma does not terminate his right to receive special education and related services under the IDEA.
- A school district's obligation to provide FAPE to a graduating student with a disability continues if that student does not receive a regular high school diploma. 34 C.F.R. §300.102 (a)(3)(ii).

## REGULAR MEANS REGULAR

Pursuant to 34 C.F.R. §300.102((a)(3)(iv), the term *regular high school diploma* does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general education development credential (GED).

## WHAT DOES THIS MEAN?

- **A certificate of completion is NOT a regular diploma. Therefore –**
  - Eligibility for special education does not terminate,
  - The right to FAPE continues until the student is age 22,
  - Prior Written Notice must be given a reasonable amount of time before awarding the certificate, and
  - The district must stand ready to provide FAPE to the student through age 21.

## INCARCERATED STUDENTS

**The obligation to make FAPE available to all children with disabilities does not apply:**

- **to children aged 18 through 21 to the extent that state law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility:**
  - (A) Were not actually identified as being a child with a disability under 34 CFR 300.8 ; **and**
  - (B) Did not have an IEP under Part B.

**34 C.F.R. §300.102(a)(2)(i).**

## INCARCERATED STUDENTS

Pursuant to 34 CFR 300.102 (a)(2)(ii), the exception in 34 C.F.R. §300.102 (a)(2)(i) of this section **does not apply** to children with disabilities, aged 18 through 21, who:

- (A) Had been identified as a child with a disability under 34 C.F.R. §300.8 and had received services in accordance with an IEP, **but who left school prior to their incarceration; or**
- (B) Did not have an IEP in their last educational setting, **but who had actually been identified as a child with a disability** under 34 C.F.R. §300.8.

## WHAT DOES THIS MEAN?

It is the exception to the exception. Simplified:

1. If you have a learner with a disability who had an IEP prior to incarceration and becomes incarcerated after age 18, you must provide FAPE.
2. If you have a learner with a disability who drops out and then is incarcerated, you must provide FAPE.
3. If you have an incarcerated young adult who has never been identified as a learner with a disability prior to incarceration, you have no obligation to provide FAPE.

## INCARCERATED SPECIAL EDUCATION STUDENTS

**34 C.F.R. §300.324(d) Children with disabilities in adult prisons—**

**(1) Requirements that do not apply. The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:**

**(i) The requirements contained in section 612(a)(16) of the Act and Sec. 300.320(a)(6) (relating to participation of children with disabilities in general assessments).**

**(ii) The requirements in Sec. 300.320(b) (relating to transition planning and transition services) do not apply with respect to the children whose eligibility under Part B of the Act will end, because of their age, before they will be eligible to be released from prison based on consideration of their sentence and eligibility for early release.**

**(2) Modifications of IEP or placement. (i) Subject to paragraph (d)(2)(ii) of this section, the IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.**

**(ii) The requirements of Sec. Sec. 300.320 (relating to IEPs), and 300.112 (relating to LRE), do not apply with respect to the modifications described in paragraph (d)(2)(i) of this section.**

## WHAT DOES THIS MEAN?

- The only public school children with disabilities enrolled in public settings who are exempted from participation in state and district-wide assessment programs under IDEA 2004 are children with disabilities convicted as adults under state law and incarcerated in adult prisons. 34 CFR 300.324 (d)(1)(i).
- LRE requirements may not apply.
- Transition service requirements may not apply.
- All children committed to juvenile correctional facilities must be included in statewide and district-wide assessments. *Letter to Anderson, 54 IDELR 200 (OSEP 2009).*

## ADULT CONVICTION = ADULT RIGHTS?

- A state cannot decide that any youth convicted as an adult has "de facto" reached the age of majority.
- *Paul Y. v. Singletary*, 27 IDELR 1 (S.D. Fla. 1997) (if the parents of a minor sentenced to serve time in an adult prison wish to stick by their child, the state cannot cut off their IDEA rights).

## ENTITLEMENT

- The fact that students have been charged with or convicted of a crime does not diminish their substantive rights, procedural safeguards, and remedies provided under the IDEA to students with disabilities and their parents.
- *Unified Sch. Dist. No. 1 v. Connecticut Dept. of Educ.*, 35 IDELR 30 (Conn. Ct. App. 2001); *Nashua Sch. Dist. v. State of New Hampshire*, 23 IDELR 427 (N.H. 1995); *Alexander S. v. Boyd*, 22 IDELR 139 (D.S.C. 1995); *Donnell C. v. Illinois State Bd. of Educ.*, 20 IDELR 514 (N.D. Ill. 1993).

## SUMMARY OF PERFORMANCE

[www.idanatl.org/aboutid/adults/docs/SOP\\_Template.doc](http://www.idanatl.org/aboutid/adults/docs/SOP_Template.doc)

<http://www.nsttac.org/>

## SUMMARY OF PERFORMANCE (SOP) FREQUENTLY ASKED QUESTIONS

### 1. **Should the student receive a copy of the Summary of Performance (SOP)?**

Yes. According to 34 CFR §300.305(e)(3) – “. . . the public agency must provide **the child** with a summary of the child’s academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child’s postsecondary goals.”

### 2. **Should the parent of a student who is 18 years or older receive a copy of the SOP?**

The parent of a student who is 18 years or older should receive a copy of the SOP only if the student has provided written permission for the parents to get a copy of IEP/PPT records. Specify SOP on the release form since it is not a formal part of the IEP. Best practice would suggest that it would be helpful for most students if the parent(s) also received a copy of the SOP.

## SUMMARY OF PERFORMANCE (SOP) FREQUENTLY ASKED QUESTIONS

**3. If the student is at a level of functioning at which he/she would not readily understand the SOP, could it be given to the parent(s)?** Yes. Although IDEA does not require that a copy of the SOP be given to the parent(s), best practice would indicate that the parent(s) should also receive a copy in addition to the student or instead of the student if he/she would not be able to understand it. However, if the student has reached the age of majority under State law (i.e., 18), he/she would have to give written consent if the parents were not the individual(s) appointed to represent the educational interests of the child.

**4. Should the SOP be reviewed (face-to-face) with the student/parent?**

Best practice indicates that to the extent possible, the SOP should be reviewed with the student (and parents when appropriate) in a face-to-face informal meeting or conversation. A formal PPT meeting does not need to be initiated to review the SOP.

## SUMMARY OF PERFORMANCE (SOP) FREQUENTLY ASKED QUESTIONS

**5. If the student is not available to meet to receive the SOP, can it be mailed to him/her?** (e.g., home bound student, student who was expelled but completed graduation requirements at home with a tutor). Although mailing the SOP to a student meets the requirements of IDEA, it would be preferable that district personnel make every effort to discuss it with a student - preferably in person (in school or home) or at the very least, over the phone with the student looking at a copy.

**6. It is understood that "exiters" consists of graduates and students aging out. What about students who drop out, or who are old enough to "sign themselves out" and transfer directly to finish at Adult Education?** Does an SOP need to be completed for these students?

A student who drops out or signs out before graduation or turning 22 (with or without warning) would not need to have an SOP.

## REVOCATION OF CONSENT

- **2008 Amendments to the Federal Regulations:**
  - §300.9 Consent.
    - \* \* \* \* \*
    - (c) \* \* \*
    - (3) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

## WHAT DOES THIS MEAN?

- For a student who has reached the age of majority, **ONLY** that student has the authority to revoke consent (unless under guardianship).
- The parent has no authority to disagree or alter the revocation process.
- See *Letter to Ward*, 56 IDELR 237 (OSEP 2010). (It only takes one parent to withdraw consent to the continued provision of special education and related services -- even if it was the other parent who gave the original go-ahead.) *and Letter to Cox*, 54 IDELR 60 (OSEP 2009). (One thing is clear -- the fact that only one parent wants to stop special education and related services does not give the agency any discretion. Once a parent authorized to do so revokes consent, the LEA must provide prior written notice in accordance with 34 CFR 300.503, cease providing the services, and treat a subsequent evaluation request by either parent as a request for an initial evaluation.)

## TRANSITION

- USOE provides a wonderful transition planning resource. It can be found at <http://www.schools.utah.gov/sars/DOCS/resources/taguide.aspx>.

## GUIDING PRINCIPLES FOR TRANSITION PLAN DEVELOPMENT

BY T.E. SMITH, B.C.; GARTIN, N.L.; AND  
MURDICK, A. HILTON

1. Transition efforts should start early and continue until transition occurs. Schools should take a proactive approach to transition. Transition efforts should begin at age 14\* and not wait until a student is nearing the end of public school.
2. Planning must be comprehensive. A district must focus on more than just school to post-school environments and services and develop a plan that encompasses transition needs from first grade through high school and provides supports for all students with special needs.

## GUIDING PRINCIPLES FOR TRANSITION PLAN DEVELOPMENT

BY T.E. SMITH, B.C.; GARTIN, N.L.; AND  
MURDICK, A. HILTON

3. The planning process must balance what is ideal with what is possible. Even though it is important for students with special needs, their family members, and school staff to dream about adult opportunities, reality must be a factor in developing and implementing transition plans.
4. Student participation is essential. The one person most affected by transitions is the student with special needs so students and their family members must be involved in the entire process in order to incorporate their dreams, wishes, and ideas.

## GUIDING PRINCIPLES FOR TRANSITION PLAN DEVELOPMENT

BY T.E. SMITH, B.C.; GARTIN, N.L.; AND  
MURDICK, A. HILTON

5. Family involvement is crucial. Family involvement in the transition planning and implementation process is vitally important because family members have information to contribute related to the future of their child.
6. The transition planning process must be sensitive to diversity. Diversity among students and their families must be taken into consideration when developing a transition plan because different cultures expect and desire different outcomes from school.

## GUIDING PRINCIPLES FOR TRANSITION PLAN DEVELOPMENT

BY T.E. SMITH, B.C.; GARTIN, N.L.; AND  
MURDICK, A. HILTON

7. Everyone uses supports and services. All individuals who make changes need supports during transitions but students with special needs may need more extensive supports.

8. Community-based activities are important. Including community-based teaching and training opportunities is an excellent means of easing transition difficulties.

9. Interagency commitment, cooperation, and coordination must be improved. Without the active involvement of all agencies involved in providing services to children and their families, important transition efforts may be overlooked.

## GUIDING PRINCIPLES FOR TRANSITION PLAN DEVELOPMENT

BY T.E. SMITH, B.C.; GARTIN, N.L.; AND  
MURDICK, A. HILTON

10. Timing is crucial if linkages are to be made and a seamless transition to life after high school is to be achieved. Waiting until students have difficulties is too late to provide appropriate support services.

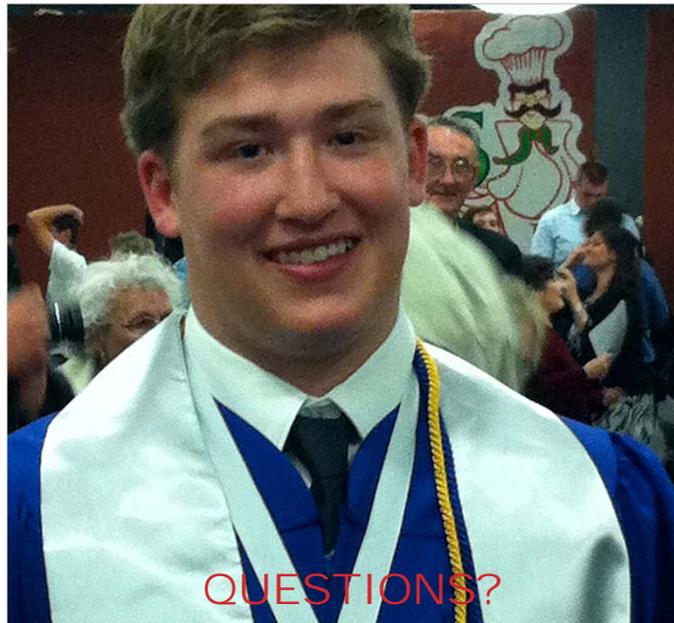
11. The transition planning process should be considered a capacity-building activity.

12. Ranking of transition needs must occur. Part of the transition planning process should be to rank order the transition needs of students.

13. Transition planning is beneficial to all students. Preparing for change is a good way of avoiding pitfalls that often occur when there are changes.

## WHAT IF TRANSITION SERVICES ARE DEFICIENT?

- If a student has not received adequate transition services prior to graduation, case law clearly supports the view that the district would be vulnerable to a compensatory education award for the student, or even rescission of the diploma. See *Lessard v. Wilton-Lyndeborough Cooperative School District*, 49 IDELR 180 (1<sup>st</sup> Cir. 2008) and *East Hartford Board of Education*, 50 IDELR 240 (SEA Conn. 2008). The burden is on an individual parent to challenge a student's graduation or denial of FAPE in individual cases.
- If a student has not received adequate transition services prior to graduation, but receives a regular diploma, the appropriate remedy would likely be compensatory education. See *Dracut Sch. Committee v. Bureau of Sp. Ed. Appeals*, 55 IDELR 66 (D. Mass. 2010).



QUESTIONS?

Thank you!