

CHAPTER 252
FORMERLY
SENATE BILL NO. 180

AN ACT TO AMEND TITLE 14 OF THE DELAWARE CODE AUTHORIZING THE DEPARTMENT OF EDUCATION TO ESTABLISH AND MAINTAIN PROCEDURES FOR THE APPOINTMENT OF INDIVIDUALS TO REPRESENT THE EDUCATIONAL INTERESTS OF A CHILD WITH A DISABILITY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend §3101, Title 14 of the Delaware Code as follows:

§3101 Definitions.

(7) "Parent" means a biological or natural parent of a child with a disability, or, as appropriate, a stepparent, guardian, educational surrogate parent, appointed educational representative, relative caregiver or custodian. The identity and authority of a person qualifying as a parent is subject to modification by Family Court or Court of Chancery order. Subject to §3132 of this chapter, if a child with a disability has reached that child's own eighteenth birthday, and no guardian of the person has been appointed, all rights and entitlements accorded to parents by this chapter shall be deemed accorded directly to the child with a disability.

Section 2. Amend §3132, Title 14 of the Delaware Code as follows:

§3132 Educational surrogate parents and educational representatives.

(a) Educational surrogate parents.

The Department with the approval of the State Board of Education shall establish and maintain procedures to protect the rights of a child with a disability whenever the parents of the child are not known, unavailable or the child is a ward of the State, or an unaccompanied homeless youth as defined in § 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(6)), including the assignment of an individual, who shall not be an employee of any public agency involved in the education or care of the child, to act as an educational surrogate parent for the child. The educational surrogate parent shall exercise and be accorded all rights of a parent to assure the provision of a free, appropriate, public education to the child.

(b) Educational representatives.

The Department of Education, with the approval of the State Board of Education, shall establish and maintain procedures, by regulation, to assure that children with disabilities who have reached age 18 have an identified decision-maker, which may be the child with a disability, to exercise rights under this chapter. Such regulations shall be developed in consultation with the Governor's Advisory Council for Exceptional Citizens and incorporate the following minimum standards, including a timeline to review the need for an educational representative.

(1) A child with a disability without a court-appointed guardian of the person shall be presumed to have capacity and be accorded the rights of a parent upon attainment of age 18.

(2) A child with a disability with capacity may authorize an agent to exercise rights through execution of a power of attorney or a standard voluntary grant of authority form published by the Department.

(3) The determination of capacity shall be made by the IEP team during an IEP meeting and shall conform to the following standards:

a. In cases where capacity is uncertain, a school psychologist familiar with the child must attend the initial meeting. For purposes of this section, the term "familiar with the child" means the school psychologist has conducted a recent in-person evaluation of the child which conforms to evaluation procedures established by Department regulations.

b. The child with a disability and parent, as defined in §3101(7) of this chapter, must be invited to participate in the meeting regardless of whether the child has already attained the age of 18.

c. The IEP team may consider information from sources apart from school personnel and may authorize evaluation if necessary to inform its deliberations.

d. If information is ambiguous, any benefit of the doubt shall be exercised in

favor of a finding of capacity.

(4) If the IEP team determines that the child lacks capacity, the IEP team shall appoint an individual to serve as an educational representative in the following descending order of priority:

- a. willing and available biological or adoptive parent;
- b. willing and available relative.

If such an individual is not identified, the IEP team shall promptly facilitate a referral to the Department for appointment of an educational surrogate parent. An appointed educational representative shall have the same authority as a parent under §3101(7) of this chapter.

(5) If a child with a disability or parent disagrees with the capacity determination, either may contest the determination by pursuing dispute resolution options described in the procedural safeguards of this chapter or its implementing regulations regardless of the child's attainment of age 18.

(6) The capacity determination is limited to exercise of rights under this chapter and its implementing regulations and shall not affect exercise of rights in any other context. In furtherance of this limitation, any other statute notwithstanding, the capacity determination shall not be admissible as evidence of competency or capacity in any non-educational judicial or administrative proceeding.

Section 3. This bill shall become effective 180 days from the date of enactment.

Approved June 09, 2016