

Date of Hearing: March 31, 2008

Committee: House Finance

Department: Education

Person Testifying: Patricia Hamamoto, Superintendent

Title: S.B. No. 2879, S.D. 2 (SSCR 2753), Relating to Education

Purpose: Amends section 302A for advance special education directives; to provide an array of options for when a student reaches the age of 18, regarding the transfer of rights, with respect to the student's education.

Department's Position: The Department does not support S.B. No. 2879, S.D. 2 (SSCR 2753) in its current form. The bill does not reflect the implementation requirements of the Individuals with Disabilities Education Act (IDEA) which incorporates a team approach towards the development of the student's Individualized Education Program. Furthermore, the Department recognizes a need for options for parents and students and the transfer of rights. The Department, therefore, has collaborated with key stakeholders to revise a proposed S.B. No. 2879, S.D. 2 (SSCR 2753) to align the bill with IDEA. However, until the revision is formally heard and accepted, the Department is unable to support S.B. No. 2879, S.D. 2 (SSCR 2753).



STATE OF HAWAII
STATE COUNCIL
ON DEVELOPMENTAL DISABILITIES
919 ALA MOANA BOULEVARD, ROOM 113
HONOLULU, HAWAII 96814
TELEPHONE: (808) 586-8100 FAX: (808) 586-7543
March 31, 2008

The Honorable Marcus R. Oshiro, Chair
House Committee on Finance
Twenty-Fourth Legislature
State Capitol
State of Hawaii
Honolulu, Hawaii 96813

Dear Representative Oshiro and Members of the Committee:

SUBJECT: SB 2879 SD2 – RELATING TO EDUCATION

The position and views expressed in this testimony do not represent nor reflect the position and views of the Department of Education (DOE).

The State Council on Developmental Disabilities **SUPPORTS SB 2879 SD2 with amendments**. The purpose of SB 2879 SD2 is to establish a power of attorney for special education; a process to appoint a surrogate decision maker for an adult student that lacks capacity; and clarify the authority of a guardian of an adult student.

The Council respectfully asks for your consideration to amend the bill with SB 2879 SD2 Proposed HD1. The proposed HD1 is attached to the Special Education Advisory Council's testimony. It reflects the work and concurrence of DOE and their Deputy Attorney General, and representatives from the Community Workgroup who assisted DOE with the Individuals with Disabilities Education Act's (IDEA) administrative rules for Chapter 56/60.

In summary, the amendments include:

1. Deleting reference to "a surrogate decision maker" and replacing it with educational representative.
2. Deleting "emancipated minor" and replacing it with adult student.
3. Clarifying the section, Adult Special Education Transfer of Rights for Students with Disabilities Upon Reaching the Age of Majority, that when a student reaches the age of majority all rights are presumed to transfer to the adult student and the adult student may execute a power of attorney.

4. Clarifying the section that provides the process for designating a power of attorney.
5. Clarifying the section, Duties and Roles of the Agent and Educational Representative, that both the agent and educational representative shall have the same duties and responsibilities.

The Council is a member of the Chapter 56/60 Community Workgroup that was convened by DOE in June 2007 to provide DOE with input and recommendations to establish administrative rules to implement IDEA of 2004. One of the recommendations of the Workgroup was to offer alternatives to guardianship for adult students with a disability receiving special education and related services from DOE.

We endorse SB 2879 SD2 Proposed HD1 as it provides options other than guardianship for an adult student with a disability to make decisions about his/her education endeavors. In Hawaii, when a student reaches age 18 years, it is a given assumption that the student can provide informed consent and make educational decisions. Parents who were involved with their son's/daughter's education no longer have the right to participate or intervene in their son's/daughter's educational matters. In order to continue to be involved, the only alternative is to pursue guardianship.

SB 2879 SD2 Proposed HD1 provides less restrictive alternatives (power of attorney and educational representative) for parents to remain involved if their son/daughter is not capable of making educational decisions.

Thank you for the opportunity to provide testimony in support of SB 2879 SD2 with the Proposed HD1.

Sincerely,



Waynette K.Y. Cabral
Executive Administrator

UNIVERSITY OF HAWAII AT MĀNOA

Center on Disability Studies

MCH Leadership Education in Neurodevelopmental Disabilities and Related Disorders Program

DATE: March 31, 2008

TO: COMMITTEE ON FINANCE
Marcus Oshiro, Chair
Marilyn Lee, Vice Chair

FR: Louise Kido Iwaishi, MD, Director Hawai'i MCH LEND Program

RE: SB 2879 SD2 –RELATING TO EDUCATION: Establishes a power of attorney for special education; establishes the process to appoint a surrogate decision maker for an adult student that lacks capacity; and clarifies the authority of a guardian an adult student. – **Strong Support of the bill and Community Work Group Amendments**

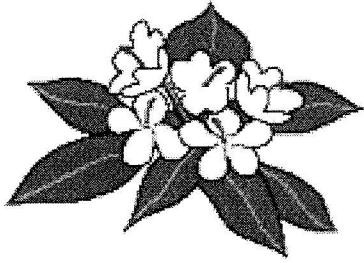
I am testifying in strong support of SB 2879 SD2 and the amendments proposed by the Community Work Group on behalf of our Hawai'i Maternal Child Health Leadership Education in Neurodevelopmental Disabilities and Related Disorders Program, also known as the MCH LEND Program. The MCH LEND is a leadership education program, similar to a fellowship, for young health care professionals with a concentration on special health care needs. Part of our curriculum mandates that trainees be provided opportunities to conduct applied research and become immersed in public policy.

In the last four months, our law trainees have worked with the Chapter 60 Community Work Group reviewing the statutes and rules of other states as it relates to the transfer of rights. What has become apparent is that there are other states that are taking a more progressive stance in offering alternatives to guardianship for adult students who are unable to provide informed consent.

In our health care service system, a mechanism already exists, in this particular scenario for 1) the determination that an individual is unable to give informed consent and 2) the process to appoint a surrogate decision maker. This mechanism has served our state well in the past for the thousands of individuals who have had to invoke this mechanism in making health care decisions. I am very confident that this model will serve adult students with disabilities just as well.

If this measure is passed, the MCH LEND program also intends to support and provide assistance to the DOE in its implementation.

Thank you for this opportunity to serve the Community Work Group and to provide testimony in support of SB 2879 SD2.



S E A C
Special Education Advisory Council

919 Ala Moana Blvd., Room 101

Honolulu, HI 96814

Phone: 586-8126 Fax: 586-8129

email: spin@doh.hawaii.gov

March 31, 2008

TESTIMONY TO THE HOUSE COMMITTEE ON FINANCE
RE: SB 2879, SD 2 - Relating to Education

**Special Education
Advisory Council**

Ms. Ivalee Sinclair, *Chair*
Mr. Steve Laracuente, *Vice
Chair*

Ms. Janet Bamford
Dr. Paul Ban, *Liaison
to the Superintendent*

Ms. Sue Brown
Ms. Deborah Cheeseman
Ms. Phyllis DeKok
Mr. Lee Dean
Ms. Mary Ellis
Ms. Debra Farmer
Ms. Gabriele Finn
Ms. Martha Guinan
Mr. Henry Hashimoto

Ms. Tami Ho
Ms. Barbara Ioli
Ms. Valerie Johnson
Ms. Shanelle Lum
Ms. Rachel Matsunobu
Ms. June Motokawa

Ms. Barbara Pretty
Ms. Susan Rocco, *Ex-officio*

Dr. Patricia Sheehey
Mr. August Suehiro

Ms. Jan Tateishi, *Ex-officio*
Ms. Judy Tonda

Dr. John Viesselman

Ms. Cari White

Ms. Jasmine Williams

Mr. Duane Yee

Mr. Wilfred Young

The Special Education Advisory Council (SEAC), Hawaii's State Advisory Panel under the Individuals with Disabilities Education Act (IDEA), is in **strong support** of the above legislation which provides expanded transfer of right options for students with disabilities upon reaching the age of majority. This bill establishes a Power of Attorney for special education, as well as a process for appointing an educational representative (surrogate decision maker) for adult students who lack the capacity to make informed educational decisions on their own behalf.

Since SB 2879, SD 2 was heard in the Senate, representatives from the Council, the Chapter 56/60 Community Work Group, the Department of Education and the Attorney General's Office have drafted new proposed language (see attached SB 2879, SD2, HD1) which addresses earlier concerns of the Department and provides more concise language to make the legislation easily understood. This latest draft offers the following improved language:

- use of the term "Power of Attorney for Special Education" rather than "Advance Special Education Directive";
- use of the term "educational representative" rather than "surrogate decision maker";
- clear options for revocation of a Power of Attorney or reconsideration of the need for an educational representative, when appropriate;
- delineation of the authority for an agent under Power of Attorney or an educational representative to the period that the student remains eligible for special education;
- clear duties and roles for the agent (under Power of Attorney) and the educational representative; and
- an effective date for the legislation as July 1, 2008.

Given that the major stakeholders in this legislation agree on the importance and the language of this proposed draft, we urge your support of SB2879, SD 2, HD1. Thank you for this opportunity to provide testimony.

Sincerely,

Ivalee Sinclair, Chair

Report Title:

DOE; SPED; Transfer of Rights; Appropriation

Description:

Establishes a power of attorney for special education.

Establishes the process to appoint an educational representative for an adult student who lacks capacity.

Clarifies the authority of a guardian of an adult student.

(SB2879 SD2 HD1)

Deleted: a surrogate decision maker

Deleted: or emancipated minor

Deleted: or emancipated minor

THE SENATE
TWENTY-FOURTH LEGISLATURE,
2008
STATE OF HAWAII

S.B. NO. 2879
S.D. 2
H.D. 1

Formatted: Font: 12 pt

A BILL FOR AN ACT

RELATING TO EDUCATION.

Formatted: Font: 12 pt

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the partnership between parents, families, professionals, and students is cornerstone to the success of student achievement. From a student's first day of school until the completion of the student's education, hundreds, possibly thousands, of educational decisions have been made for or by that student.

Until a student reaches the age of eighteen, most of those decisions are made by parents, family members, or guardians in

Formatted: Font: 20 pt

consultation with teachers or education officials. However, when a student reaches the age of eighteen, that adult student is presumed to be capable of making the adult student's own educational decisions and to have the confidence to participate fully in meetings to make educational decisions, unless determined to be incapable of making decisions. Students at this transition point, regardless of their capacity, may benefit from continued participation, guidance, and advice from the people on whom they have always relied to make educational decisions.

With regard to the numerous decisions and planning activities related to a student with a disability who is receiving special education and related services, parents of adult students can only participate in these activities if they are either invited by the student or obtain legal guardianship over the student. While these options create a vehicle for parental participation, they are not comprehensive enough to meet the diverse needs of the students and families in our State.

The legislature further finds that guardianships are expensive, labor intensive, and involve a time consuming process that relinquishes all decision making authority from the student

to the guardian. Some students may have the capacity and desire to make other life decisions for themselves, but do not feel confident in making educational decisions and may require continued assistance. There are also other families that philosophically strive to maintain the rights of their adult children, regardless of their capacity, and are able to do so because of the array of alternatives to guardianship in the health care, welfare, housing, and financial systems. In these instances, guardianship would not be an appropriate option.

The purpose of this Act is to provide a comprehensive array of options for adult students, to ensure their ability to make educational decisions that are consistent with the needs of the student in a manner that is respectful to the values of the student and family by:

- (1) Establishing a power of attorney for special education;
- (2) Establishing the process to appoint an educational representative for an adult student who lacks capacity; and
- (3) Clarifying the authority of a guardian of an adult student.

Deleted: or emancipated minors

Deleted: a surrogate decision maker

Deleted: or emancipated minor student

Deleted: or emancipated minor

Formatted: Font: 20 pt

SECTION 2. Chapter 302A, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

"PART . ADULT SPECIAL EDUCATION TRANSFER OF RIGHTS FOR STUDENTS WITH DISABILITIES UPON REACHING THE AGE OF MAJORITY

§302A- Power of attorney for special education. (a)

When a student with disabilities reaches the age of majority all rights are presumed to transfer to the adult student. The adult student is authorized to make any and all decisions related to their education, including, but not limited to individualized education programs.

(b) An adult student may give an individual instruction to assist in the development and implementation of such programs.

This adult student may execute a power of attorney for special education. Unless related to the student by blood, marriage, or adoption, an agent shall not be an owner, operator, or employee of the educational institution at which the adult student is receiving special education services. The power of attorney for special education shall be:

- (1) A written document;
- (2) Executed in the state of Hawaii;
- (3) Notated with the date of execution;

Formatted: Left

Deleted: Advance special education directives

Deleted: An adult or emancipated minor may give an individual instruction to assist in the development and implementation of individualized education plans for special education. The instruction may be oral or written. The instruction may be limited to the purpose of participating in the adult's or emancipated minor's individualized education plan processes.

Formatted: Font: 12 pt

Deleted: An

Deleted: or emancipated minor

Formatted: Highlight

Deleted: to authorize an agent to receive notice and to participate in meetings and all procedures related to the adult's or emancipated minor's educational program. The power of attorney for special education shall remain in effect notwithstanding the adult's or emancipated minor's later incapacity and may include individual instructions.

Formatted: Highlight

Formatted: Highlight

Deleted: or emancipated minor

Deleted: In writing

Deleted: Contain the date of its execution

Formatted: Highlight

Formatted: Font: 20 pt

(4) Specific in identifying the agent by first and last name and relationship to the adult student;

Deleted: (3) Signed by the adult or emancipated minor, as the case may be;
Formatted: Indent: Hanging: 0.5"
Formatted: Highlight

(5) Indicative of whether the adult student retains the power to make educational decisions while the power is in effect;

Formatted: Highlight

(6) Revocable, with the method of revocation stated in the document;

Formatted: Highlight

Deleted: and

(7) Signed by the adult student ; and

(8) Witnessed by one of the following methods:

Deleted: §
Deleted: 4

(A) Signed by two individuals who either witnessed the signing of the instrument by the adult student or received the adult student's acknowledgment of the veracity of the signature on the instrument; or

Deleted: or emancipated minor
Deleted: 's
Deleted: or emancipated minor

(B) Acknowledged before a notary public in the State of Hawaii.

(c) If the power of attorney for special education document does not include the provisions listed above, the power of attorney is invalid and fails to authorize an agent to make decisions for the adult student.

Formatted: Indent: First line: 0.5"
Deleted: A witness to a power of attorney for special education shall not be:
(1) A teacher; §
(2) An employee of a teacher or school; or §
(3) The agent. §
(d) At least one of the witnesses to the power of attorney for special education shall be someone who is unrelated to the student by blood, marriage, or adoption.
Formatted: Font: 20 pt

(e) Unless otherwise specified in ~~the power of attorney~~ for special education, the authority of an agent shall be effective ~~throughout the adult student's eligibility for special education,~~ and shall cease to be effective upon ~~revocation by the adult student.~~

~~§302A- Revocation of the power of attorney for special education.~~ (a) An ~~adult student may~~ revoke the designation of an agent in writing ~~to the supervising teacher.~~

(b) A teacher, agent, ~~or guardian,~~ who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising teacher and to any educational institution at which the student is receiving special education services.

(c) A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for special education.

~~(d) A power of attorney for special education that conflicts with an earlier power of attorney for special education, revokes the earlier power of attorney for special education, to the extent of the conflict.~~

~~§302A- Appointment of an educational representative; conditions.~~ (a) An educational representative may be appointed

Deleted: a

Deleted: only upon a determination by the adult or emancipated minor to extend decision making authority to the agent

Deleted: a determination that the adult or emancipated minor has the capacity to make special education decisions and has discharged the agent from doing so

Formatted: Highlight

Formatted: Highlight

Deleted: (f) Unless otherwise specified in a written advance special education directive, a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an adult's or emancipated minor's instruction or the authority of an agent, shall be made by a qualified administrator, such as the student's primary physician, psychologist, psychiatrist or the medical director of the department of health developmental disability... [1]

Deleted: advance special education directive

Deleted: individual

Formatted: Highlight

Deleted: shall

Deleted: or by personally informing

Deleted: or surrogate

Formatted: Highlight

Deleted: n advance special education directive

Deleted: advance special education directive

Deleted: directive

Deleted: Educational decisions;

Deleted: surrogates

Formatted: Font: 20 pt

if a student lacks decisional capacity to provide informed consent. A determination that the adult student lacks capacity, or that another condition exists that affects the adult student's instruction shall be made by a qualified licensed professional, such as the student's primary physician, psychologist, psychiatrist or the department of health developmental disabilities division.

(b)The transfer of rights for an adult student who lacks capacity to an educational representative shall be valid throughout the adult student's eligibility for special education.

Determinants to lack capacity may include the following:

- (1) The student's inability to understand the nature, extent, and probable consequences of a proposed educational program or option, on a continuing or consistent basis;
- (2) The student's inability to make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program as compared with the benefits or disadvantages of another proposed

Deleted: (a) An adult or emancipated minor may designate or disqualify any individual to act as a surrogate by personally informing the supervising teacher. In the absence of a designation, or if the designee is not reasonably available, a surrogate may be appointed to make a special education decision for the adult or emancipated minor.†

(b) A surrogate may make a special education decision for a student who is an adult or emancipated minor if the student has been determined by the qualified administrator to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

Formatted: Font: 20 pt

educational decision or program, on a continuing or consistent basis; or

- (3) The student's inability to communicate such understanding in any meaningful way.

Upon a determination that an adult student lacks decisional capacity to provide informed consent, the qualified professional shall document appropriately and make reasonable efforts to inform the adult student of the adult student's lack of capacity.

The parent(s) of the adult student may act as the educational representative (unless the adult student is married, in which event the adult student's adult spouse shall be designated as the educational representative). If the parent or adult spouse is not available or competent to give informed consent, the department shall appoint the educational representative from among the following: a competent adult brother or sister, adult aunt or uncle, or grandparent. If these relatives are not willing and able to serve as the adult student's educational representative, then a surrogate parent (who is not an employee of the department of education) shall be designated to serve in this capacity by the department.

§302A- Reconsideration for the need of an educational representative.

Deleted: or emancipated minor

Deleted: administrator

Deleted: or the qualified administrator's designee

Deleted: notify

Deleted: or emancipated minor

Deleted: 's or emancipated minor

Deleted: The qualified administrator, or the qualified administrator's designee, shall designate t

Deleted: parent or

Deleted: or emancipated minor

Deleted: to

Deleted: surrogate

Deleted: or emancipated minor

Deleted: 's or emancipated minor

Deleted: administrator

Deleted: designate

Deleted: 's or emancipated minor

Deleted: n individual

Deleted: ; provided that the individual is not an employee of the department

Formatted: Font: 20 pt

(a) If the adult student, educational representative, or qualified professional believes the adult student has regained decisional capacity, the adult student shall be assessed for capacity by a qualified professional to determine whether or not the adult student has regained decisional capacity and shall document the decision and the basis for the decision and provide the findings of the reconsideration in writing to be entered into the adult student's educational record. The qualified professional shall notify the adult student, and the educational representative.

(b) A special education decision made by an educational representative for an adult student shall be effective without judicial approval.

§302A- Decisions by guardian. Absent a court order to the contrary, a special education decision of a guardian appointed pursuant to chapter 560 takes precedence over that of an agent or educational representative.

§302A- Duties and roles of the agent and educational representative; (a) Both the agent and educational representative shall have the same duties and responsibilities.

(b) Both the agent and the educational representative shall be afforded the opportunity to participate in meetings with

- Deleted: (c
- Deleted:)
- Deleted: any interested person
- Deleted: , the guardian,
- Deleted: administrator
- Deleted: or emancipated minor
- Deleted: the
- Deleted: administrator shall reexamine the adult or emancipated
- Deleted: minor and
- Deleted: or emancipated minor
- Deleted: enter
- Deleted: a
- Deleted: or emancipated minor
- Deleted: and shall
- Deleted: or emancipated minor
- Deleted: the
- Deleted: surrogate decision maker
- Deleted: , and the person who initiated the redetermination of decisional capacity
- Deleted: (d) A surrogate who has been designated by the adult or emancipated minor may make educational decisions for the adult or emancipated minor. §
- (e) A surrogate who has not been designated by the adult or emancipate ... [2]
- Deleted: f
- Deleted: a surrogate
- Deleted: or emancipated minor
- Deleted: (g) A ... [3]
- Deleted: (a)
- Deleted: (b) A spe ... [4]
- Formatted: Highlight
- Formatted: Highlight
- Formatted: Font: 20 pt

respect to: 1) the identification, evaluation, and educational placement of the student; 2) the provision of free, appropriate public education to the student and 3) provide input with accordance with the adult student's individual instructions or other wishes, if any, to the extent known. Otherwise, both the agent and the educational representative, shall participate in accordance with the the determination of the student's best interest. In determining the student's best interest, the student's personal values to the extent known shall be taken into consideration.

§302A- Educational information. The agent for the power of attorney for special education or education representative is authorized to make educational decisions for a student and has the same rights as the student to request, receive, examine, copy, and consent to the disclosure of the individualized education plan or any other educational records.

§302A- Effect of copy. A copy of a transfer of student's rights, revocation of the power of attorney for special education, the finding of lack of capacity or the reconsideration of appointment of an educational representative has the same effect as the original.

SECTION 3. This Act shall take effect on July 1, 2008.

Formatted: Highlight

Deleted:

Deleted: Unless otherwise specified in an advance special education directive, a person then

Formatted: Highlight

Deleted: §302A-

Immunities. (a) A teacher or institution acting in good faith and in accordance with generally accepted educational standards applicable to the teacher or institution shall not be subject to civil or criminal liability or to discipline for unprofessional conduct for:¶

(1) Complying with a special education decision of a person apparently having authority to make a special education decision for an adult or emancipated minor, including a decision to withhold or withdraw special education or related services;¶

(2) Declining to comply with a special education decision of a person based upon a belief that the person then lacked authority; or¶

(3) Complying with an advance special education directive and assuming that the directive was valid when made and has not been ... [5]

Deleted: written advance special education directive

Deleted: an advance

Deleted: directive,

Formatted: Highlight

Deleted: designation

Deleted: or disqualification of a surrogate

Deleted: §302A- Effect of this part. (a) This part shall not cr ... [6]

Formatted: Highlight

Deleted: 2050

Formatted: Font: 20 pt

Formatted: Font: 12 pt

Formatted: Font: 20 pt

(f) Unless otherwise specified in a written advance special education directive, a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an adult's or emancipated minor's instruction or the authority of an agent, shall be made by a qualified administrator, such as the student's primary physician, psychologist, psychiatrist or the medical director of the department of health developmental disabilities division.

(g) An agent shall make a special education decision in accordance with the adult's or emancipated minor's instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the adult's or emancipated minor's best interest. In determining the adult's or emancipated minor's best interest, the agent shall consider the adult's or emancipated minor's personal values to the extent known to the agent.

(h) A special education decision made by an agent for an adult or emancipated minor shall be effective without judicial approval.

(i) An advance special education directive shall be valid for purposes of this part if it complies with this

part, or if it was executed in compliance with the laws of the state where it was executed.

Page 9: [2] Deleted

Leolinda L. K. Parlin

3/8/2008 7:27:00 PM

(d) A surrogate who has been designated by the adult or emancipated minor may make educational decisions for the adult or emancipated minor.

(e) A surrogate who has not been designated by the adult or emancipated minor shall make educational decisions for the adult or emancipated minor based on the wishes of the adult or emancipated minor, or, if the wishes of the adult or emancipated minor are unknown or unclear, on the adult's or emancipated minor's best interest.

Page 9: [3] Deleted

Leolinda L. K. Parlin

3/8/2008 7:28:00 PM

(g) A supervising teacher shall require a surrogate to provide a written declaration under the penalty of false swearing stating facts and circumstances reasonably sufficient to establish the claimed authority.

Page 9: [4] Deleted

Leolinda L. K. Parlin

3/8/2008 7:29:00 PM

(b) A special education decision made by a guardian for the ward shall be effective without judicial approval; provided that a guardian shall comply with the ward's individual instructions and shall not revoke a ward's pre-incapacity advance special education directive unless expressly authorized by a court.

§302A- Obligations of teacher. (a) Before

implementing a special education decision made for an adult or emancipated minor, a supervising teacher, if possible, shall promptly communicate to the adult or emancipated minor the decision made and the identity of the person making the decision.

(b) A supervising teacher who knows of the existence of an advance special education directive, a revocation of an advance special education directive, or a designation or disqualification of a surrogate shall promptly record its existence in the adult's or emancipated minor's education record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the education record.

(c) A supervising teacher who makes or is informed of a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, guardian, or surrogate, shall promptly record the determination in the adult's or emancipated minor's educational record and communicate the determination to the adult or emancipated minor, if possible, and to any person then authorized to make educational decisions for the adult or emancipated minor.

(d) A teacher or institution providing special education and or related services to an adult or emancipated minor shall:

- (1) Comply with an individual instruction of the adult or emancipated minor and with a reasonable interpretation of that instruction made by a person then authorized to make educational decisions for the adult or emancipated minor; and
- (2) Comply with a special education decision for the adult or emancipated minor made by a person then authorized to make educational decisions for the adult or emancipated minor to the same extent as if the decision had been made by the adult or emancipated minor while the adult or emancipated minor had capacity.

(e) A teacher or institution that declines to comply with the special education decision for the adult or emancipated minor made by a person then authorized to make educational decisions for the adult or emancipated minor shall:

- (1) Promptly so inform the adult or emancipated minor, if possible, and any person then authorized to make educational decisions for the adult or emancipated minor; and

(2) Provide continuing special education or related services as defined by the individualized education plan to the adult or emancipated minor until a transfer can be effected.

(f) A teacher or institution shall not require or prohibit the execution or revocation of an advance special education directive as a condition for providing special education or related services.

acting in good faith and in accordance with generally accepted educational standards applicable to the teacher or institution shall not be subject to civil or criminal liability or to discipline for unprofessional conduct for:

- (1) Complying with a special education decision of a person apparently having authority to make a special education decision for an adult or emancipated minor, including a decision to withhold or withdraw special education or related services;
- (2) Declining to comply with a special education decision of a person based upon a belief that the person then lacked authority; or

(3) Complying with an advance special education directive and assuming that the directive was valid when made and has not been revoked or terminated.

(b) An individual acting as agent, guardian, or surrogate under this part shall not be subject to civil or criminal liability or to discipline for unprofessional conduct for educational decisions made in good faith.

§302A- Effect of this part. (a) This part shall not create a presumption concerning the intention of an individual who has not made or who has revoked an advance special education directive.

(b) This part shall not authorize or require a teacher or institution to provide special education or related services contrary to generally accepted educational standards applicable to the teacher or institution.

(c) This part shall not affect other statutes of this State governing treatment for mental illness of an individual involuntarily committed to a psychiatric facility.

§302A- Judicial relief. On petition of an adult or emancipated minor, the adult's or emancipated minor's agent, guardian, or surrogate, or a teacher or institution

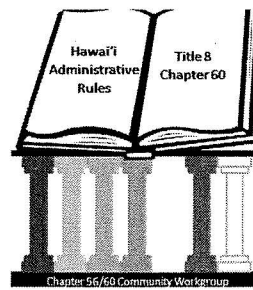
involved with the adult's or emancipated minor's education,
any court of competent jurisdiction may enjoin or direct a
special education decision or order other equitable relief.

A proceeding under this section shall be governed by

§302A- Uniformity of application and construction.

This part shall be applied and construed to effectuate its
general purpose to make uniform the law with respect to the
subject of this part among states enacting it."

The Community Workgroup



Date: March 31, 2008

To: COMMITTEE ON FINANCE
Representative Marcus Oshiro, Chair
Representative Marilyn Lee, Vice Chair

Fr: Ivalee Sinclair, Community Workgroup Leader

Re: SB 2879 SD2- **Support** to RELATING TO EDUCATION: Establishes a power of attorney for special education; establishes the process to appoint a surrogate decision maker for an adult student that lacks capacity; and clarifies the authority of a guardian an adult student.

On behalf of the Chapter 56/60 Community Workgroup, I **support** SB 2879 SD2 and offer amendments and ask that you consider our amendments and pass them out as SB 2879 SD2 **HD1**.

The Chapter 56/60 Community Workgroup was convened last summer to provide input and feedback to the Department of Education (DOE) to align the Hawai'i Administrative Rules with the Reauthorization of IDEA 2004. With over 300 changes to the Hawai'i rules, there was only one area of concern which could not be remedied through the Administrative Rules process, but would require a new law. With encouragement from the DOE, the Community Workgroup drafted the proposed legislation, which is before you now as SB 2879. We have worked very closely with the DOE and refined the language and have come to consensus on some new language which strengthens and makes clear this landmark legislation.

The impetus for initiating SB 2879 is as such: when a student turns 18 in our state, it is presumed the student is capable of making decisions and providing informed consent. The schools will respect the decisions of the student, unless the student is found to be incapable of making decisions or providing consent. If the student does not have the ability to provide informed consent as it relates to their educational program, the federal law requires that each state "*shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.*" Currently, our state guidelines are restrictive, and provides for the single remedy of guardianship, which is the antithesis of self-determination. As you will hear from other testimony; families are being forced into guardianship which can be extremely costly - just for the sake of participating in their adult student's educational program. More so, this has become an ethical dilemma for many families who philosophically do not believe in guardianship and would never seek guardianship as in every other scenario, the alternatives to guardianship are adequate.

SB2879 maintains the option for guardianship, while it expands choice to include a special education power of attorney and a process to appoint an education representative. This proposed statute was modeled after our Hawai'i Uniform Health Care Decision Act (HUHCDA). The rationale being, the HUHCDA has the strongest protection for our most vulnerable population, therefore its structure would be quite appropriate for our students.

Attached to our testimony today is a draft of changes and additions to SB 2879 SD2. We have 2 types of proposed changes 1) global and 2) specific. Therefore, when you look at our attachment, you will see the magnitude. Instead of going through each word or phrase we are asking you consider for clarity, we offer our the conceptual changes in the narrative and oral presentation of our testimony. The attachment will serve as are specific changes. Our conceptual amendments to the bill are as follows:

The Community Workgroup

2.

1. Target population: Revert language back from "Adult and Emancipated Minor" to "Adult Student".

During the interim between hearings, the Community Workgroup and the DOE worked very closely in revising the bill to insure the language used was precise. As this law would serve a targeted population, we wanted to insure that it was clear for whom this law was designed to protect. Therefore, use of the word "Adult Student" is much more specific. Emancipated minors by definition would not necessarily be a part of this group. In the event an emancipated minor would need assistance, there are other remedies within the operations of the department to meet their needs.

2. Replace the term Surrogate Decision Maker with "Educational Representative"

Again, this change is for clarity and an attempt to thwart any confusion in the future. The word surrogate has many connotations and there is a surrogate parent program that currently exists within the department. It could become very confusing rather quickly to the schools and families. Therefore, we ask to give a new name to this role. We have found the term "Educational Representative" is specific enough and meets our needs to distinguish it from other entities within the DOE.

3. Restructure the language from a global description of an Advanced Special Education Directive to distinctive, stand alone sections

The HUHEDA uses the Advanced Health Care Directive as an umbrella for the medical power of attorney and the appointment of surrogate decision maker. Likewise, at the inception of the draft of this bill as explained earlier, we created a mirror model but for education. With further discussion with the DOE and Workgroup we have unbundled the activities of the bill and offer them as distinctive paths for adult students.

4. Other revisions for clarity and specificity

There are other parts of the bill we ask that you consider our alternate language as we have sought terminology that would refine the language. These changes include:

- a. The Section Heading for the Part – change to "ADULT SPECIAL EDUCATION TRANSFER OF RIGHTS FOR STUDENTS WITH DISABILITIES UPON REACHING THE AGE OF MAJORITY"
- b. The detailed components of the Power of Attorney for Special Education
- c. The description of a professional who can appoint an Educational Representative be licensed
- d. The involvement of the DOE in facilitating the appointment of an Education Representative if the adult student's parents are unable to serve in that capacity
- e. The definition of the documentation required to support the process of the need and appointment of an Educational Representative
- f. The removal of the obligations of the teacher

The Community Workgroup

3.

- g. The inclusion of the responsibilities and roles of the Power of Attorney and the Educational Representative to include specific language to support their ability to represent the adult student
- h. The effect of copy is consistent with the other changes that are being proposed
- i. The effect date is changed to implementation of July 1, 2008.

The refinement of SB 2879 SD2 as proposed to you today has been a collaborative effort of the DOE, the Workgroup and the Attorney General. We would not be here today with a product we are proud of and worthy of enactment if it was for this family professional partnership. We thank the DOE and the Attorney General for supporting our efforts. It is with honor that we submit to you our testimony, amendments and we ask for support in accepting our amendments and passing SB 2879.

Thank you for time and consideration. The Community Workgroup is available for questions and further discussion.

Report Title:

DOE; SPED; Transfer of Rights; Appropriation

Formatted: Do not suppress endnotes, Header distance from edge: 0.5", Footer distance from edge: 0.19", Different first page

Description:

Establishes a power of attorney for special education.

Establishes the process to appoint ~~an educational representative~~ for an adult student who lacks capacity.

Deleted: a surrogate decision maker

Clarifies the authority of a guardian of an adult student.

Deleted: or emancipated minor

(SB2879 SD2 HD1)

Deleted: or emancipated minor

THE SENATE
TWENTY-FOURTH LEGISLATURE,
2008
STATE OF HAWAII

S.B. NO. 2879
S.D. 2
H.D. 1

Formatted: Font: 12 pt

A BILL FOR AN ACT

RELATING TO EDUCATION.

Formatted: Font: 12 pt

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the partnership between parents, families, professionals, and students is cornerstone to the success of student achievement. From a student's first day of school until the completion of the student's education, hundreds, possibly thousands, of educational decisions have been made for or by that student.

Until a student reaches the age of eighteen, most of those decisions are made by parents, family members, or guardians in consultation with teachers or education officials. However, when a student reaches the age of eighteen, that adult student is presumed to be capable of making the adult student's own

educational decisions and to have the confidence to participate fully in meetings to make educational decisions, unless determined to be incapable of making decisions. Students at this transition point, regardless of their capacity, may benefit from continued participation, guidance, and advice from the people on whom they have always relied to make educational decisions.

With regard to the numerous decisions and planning activities related to a student with a disability who is receiving special education and related services, parents of adult students can only participate in these activities if they are either invited by the student or obtain legal guardianship over the student. While these options create a vehicle for parental participation, they are not comprehensive enough to meet the diverse needs of the students and families in our State.

The legislature further finds that guardianships are expensive, labor intensive, and involve a time consuming process that relinquishes all decision making authority from the student to the guardian. Some students may have the capacity and desire to make other life decisions for themselves, but do not feel confident in making educational decisions and may require continued assistance. There are also other families that philosophically strive to maintain the rights of their adult

children, regardless of their capacity, and are able to do so because of the array of alternatives to guardianship in the health care, welfare, housing, and financial systems. In these instances, guardianship would not be an appropriate option.

The purpose of this Act is to provide a comprehensive array of options for adult students, to ensure their ability to make educational decisions that are consistent with the needs of the student in a manner that is respectful to the values of the student and family by:

Deleted: or emancipated minors

- (1) Establishing a power of attorney for special education;
- (2) Establishing the process to appoint an educational representative for an adult student who lacks capacity; and
- (3) Clarifying the authority of a guardian of an adult student.

Deleted: a surrogate decision maker

Deleted: or emancipated minor student

Deleted: or emancipated minor

SECTION 2. Chapter 302A, Hawaii Revised Statutes, is amended by adding a new part to be appropriately designated and to read as follows:

Formatted: Left

Deleted: Advance special education directives

"PART . ADULT SPECIAL EDUCATION TRANSFER OF RIGHTS FOR STUDENTS WITH DISABILITIES UPON REACHING THE AGE OF MAJORITY

Deleted: An adult or emancipated minor may give an individual instruction to assist in the development and implementation of individualized education plans for special education. The instruction may be oral or written. The instruction may be limited to the purpose of participating in the adult's or emancipated minor's individualized education plan processes.

§302A- Power of attorney for special education. (a)

When a student with disabilities reaches the age of majority all rights are presumed to transfer to the adult student. The adult

student is authorized to make any and all decisions related to their education, including, but not limited to individualized education programs.

Formatted: Font: 12 pt

(b) An adult student may give an individual instruction to assist in the development and implementation of such programs.

Formatted: Not Highlight

This adult student may execute a power of attorney for special education. Unless related to the student by blood, marriage, or adoption, an agent shall not be an owner, operator, or employee of the educational institution at which the adult student is receiving special education services. The power of attorney for special education shall be:

Deleted: An

Deleted: or emancipated minor

Deleted: to authorize an agent to receive notice and to participate in meetings and all procedures related to the adult's or emancipated minor's educational program. The power of attorney for special education shall remain in effect notwithstanding the adult's or emancipated minor's later incapacity and may include individual instructions.

Formatted: Not Highlight

Deleted: or emancipated minor

Deleted: In writing

Deleted: Contain the date of its execution

- (1) A written document;
- (2) Executed in the state of Hawaii;
- (3) Notated with the date of execution;

Formatted: Indent: Hanging: 0.5"

Deleted: (3) Signed by the adult or emancipated minor, as the case may be;

(4) Specific in identifying the agent by first and last name and relationship to the adult student;

(5) Indicative of whether the adult student retains the power to make educational decisions while the power is in effect;

(6) Revocable, with the method of revocation stated in the document;

Deleted: and

(7) Signed by the adult student ; and

Deleted: 9

(8) Witnessed by one of the following methods:

Deleted: 4

(A) Signed by two individuals who either witnessed the signing of the instrument by the adult

~~student or received the adult student's~~

acknowledgment of the veracity of the signature on the instrument; or

(B) Acknowledged before a notary public in the State of Hawaii.

(c) ~~If the power of attorney for special education document does not include the provisions listed above, the power of attorney is invalid and fails to authorize an agent to make decisions for the adult student.~~

(e) Unless otherwise specified in the power of attorney for special education, the authority of an agent shall be effective throughout the adult student's eligibility for special education, and shall cease to be effective upon revocation by the adult student.

~~§302A- Revocation of the power of attorney for special education.~~ (a) An adult student may revoke the designation of an agent in writing to the supervising teacher.

(b) A teacher, agent, or guardian, who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising teacher and to any educational institution at which the student is receiving special education services.

~~Deleted:~~ or emancipated minor

~~Deleted:~~ 's

~~Deleted:~~ or emancipated minor

~~Formatted:~~ Indent: First line: 0.5"

~~Deleted:~~ A witness to a power of attorney for special education shall not be:
(1) A teacher;
(2) An employee of a teacher or school; or
(3) The agent.
(d) At least one of the witnesses to the power of attorney for special education shall be someone who is unrelated to the student by blood, marriage, or adoption.

~~Deleted:~~ a

~~Deleted:~~ only upon a determination by the adult or emancipated minor to extend decision making authority to the agent

~~Deleted:~~ a determination that the adult or emancipated minor has the capacity to make special education decisions and has discharged the agent from doing so

~~Deleted:~~ (f) Unless otherwise specified in a written advance special education directive, a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an adult's or emancipated minor's instruction or the authority of an agent, shall be made by a qualified administrator, such as the student's primary physician, psychologist, psychiatrist or the medical director of the department of health developmental disabilities division.

(g) An agent shall make a special education decision in accordance with the adult's or emancipa... [1]

~~Deleted:~~ advance special education directive

~~Deleted:~~ individual

~~Deleted:~~ shall

~~Deleted:~~ or by personally informing

~~Deleted:~~ or surrogate

(c) A decree of annulment, divorce, dissolution of marriage, or legal separation shall revoke a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for special education.

(d) A power of attorney for special education that conflicts with an earlier power of attorney for special education revokes the earlier power of attorney for special education to the extent of the conflict.

Deleted: n advance special education directive

Deleted: advance special education directive

Deleted: directive

§302A- Appointment of an educational representative;

Deleted: Educational decisions;

Deleted: surrogates

conditions. (a) An educational representative may be appointed if a student lacks decisional capacity to provide informed consent. A determination that the adult student lacks capacity, or that another condition exists that affects the adult student's instruction shall be made by a qualified licensed professional, such as the student's primary physician, psychologist, psychiatrist or the department of health developmental disabilities division.

(b) The transfer of rights for an adult student who lacks capacity to an educational representative shall be valid throughout the adult student's eligibility for special education.

Deleted: (a) An adult or emancipated minor may designate or disqualify any individual to act as a surrogate by personally informing the supervising teacher. In the absence of a designation, or if the designee is not reasonably available, a surrogate may be appointed to make a special education decision for the adult or emancipated minor.¶

(b) A surrogate may make a special education decision for a student who is an adult or emancipated minor if the student has been determined by the qualified administrator to lack capacity and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

Determinants to lack capacity may include the following:

- (1) The student's inability to understand the nature, extent, and probable consequences of a proposed educational program or option, on a continuing or consistent basis;
- (2) The student's inability to make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program as compared with the benefits or disadvantages of another proposed educational decision or program, on a continuing or consistent basis; or
- (3) The student's inability to communicate such understanding in any meaningful way.

Upon a determination that an adult ~~student~~ lacks decisional capacity to provide informed consent, the qualified ~~professional~~ shall document appropriately and make reasonable efforts to inform the adult ~~student~~ of the adult~~student's~~ lack of capacity.

~~The parent(s) of the adult student may act as the educational representative (unless the adult student is married, in which event the adultstudent's adult spouse shall be designated as the educational representative).~~ If the parent or adult spouse is not available or competent to give informed consent, the ~~department shall appoint the educational representative from among the following:~~ a competent adult brother or sister, adult aunt or uncle, or grandparent. If these relatives are not

Deleted: or emancipated minor

Deleted: administrator

Deleted: or the qualified administrator's designee

Deleted: notify

Deleted: or emancipated minor

Deleted: 's or emancipated minor

Deleted: The qualified administrator, or the qualified administrator's designee, shall designate t

Deleted: parent or

Deleted: or emancipated minor

Deleted: to

Deleted: surrogate

Deleted: or emancipated minor

Deleted: 's or emancipated minor

Deleted: administrator

Deleted: designate

willing and able to serve as the adult student's educational representative, then a surrogate parent (who is not an employee of the department of education), shall be designated to serve in this capacity by the department.

Deleted: 's or emancipated minor

§302A- Reconsideration for the need of an educational representative.

Deleted: n individual

Deleted: ; provided that the individual is not an employee of the department

Deleted: (c

Deleted:)

Deleted: any interested person

Deleted: , the guardian,

Deleted: administrator

Deleted: or emancipated minor

Deleted: the

Deleted: administrator shall reexamine the adult or emancipated

Deleted: minor and

Deleted: or emancipated minor

Deleted: enter

Deleted: a

Deleted: or emancipated minor

Deleted: and shall

Deleted: or emancipated minor

Deleted: the

Deleted: surrogate decision maker

Deleted: , and the person who initiated the redetermination of decisional capacity

(a) If the adult student, educational representative, or qualified professional believes the adult student has regained decisional capacity, the adult student shall be assessed for capacity by a qualified professional to determine whether or not the adult student has regained decisional capacity and shall document the decision and the basis for the decision and provide the findings of the reconsideration in writing to be entered into the adult student's educational record. The qualified professional shall notify the adult student, and the educational representative.

Deleted: (d) A surrogate who has been designated by the adult or emancipated minor may make educational decisions for the adult or emancipated minor. §

(e) A surrogate who has not been designated by the adult or emancipated minor shall make educational decisions for the adult or emancipated minor based on the wishes of the adult or emancipated minor, or, ... [2]

(b) A special education decision made by an educational representative for an adult student shall be effective without judicial approval.

Deleted: f

Deleted: a surrogate

Deleted: or emancipated minor

Deleted: (g) A ... [3]

§302A- Decisions by guardian. Absent a court order to the contrary, a special education decision of a guardian appointed pursuant to chapter 560 takes precedence over that of an agent or educational representative.

Deleted: (a)

§302A- Duties and roles of the agent and educational representative; (a)Both the agent and educational representative shall have the same duties and responsibilities.

(b)Both the agent and the educational representative shall be afforded the opportunity to participate in meetings with respect to: 1) the identification, evaluation, and educational placement of the student; 2) the provision of free, appropriate public education to the student and 3) provide input with accordance with the adult student's individual instructions or other wishes, if any, to the extent known. Otherwise, both the agent and the educational representative, shall participate in accordance with the the determination of the student's best interest. In determining the student's best interest, the student's personal values to the extent known shall be taken into consideration.

§302A- Educational information. The agent for the power of attorney for special education or education representative is authorized to make educational decisions for a student and has the same rights as the student to request, receive, examine, copy, and consent to the disclosure of the individualized education plan or any other educational records.

§302A- Effect of copy. A copy of a transfer of student's rights, revocation of the power of attorney for special education, the finding of lack of capacity or the

Deleted: (b) A special education decision made by a guardian for the ward shall be effective without judicial approval; provided that a guardian shall comply with the ward's individual instructions and shall not revoke a ward's pre-incapacity advance special education directive unless expressly authorized by a court.¶

§302A- Obligations of teacher. (a) Before implementing a special education decision made for an adult or emancipated minor, a supervising teacher, if possible, shall promptly communicate to the adult or emancipated minor the decision made and the identity of the person making the decision.¶

(b) A supervising teacher who knows of the existence of an advance special education directive, a revocation of an advance special education directive, or a designation or disqualification of a surrogate shall promptly record its existence in the adult's or emancipated minor's education record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the education record.¶

(c) A supervising teacher who makes or is informed of a determination that an adult or emancipated minor lacks or has recovered capacity, or that another

Deleted:

Deleted: Unless otherwise specified in an advance special education directive, a person then

Deleted: §302A- Immunities. (a) A teacher or institution acting in good faith and in accordance with generally accepted educational standards applicable to the teacher or institution shall not be

Deleted: written advance special education directive

Deleted: an advance

Deleted: directive,

Deleted: designation

reconsideration of appointment of an educational representative
has the same effect as the original.

SECTION 3. This Act shall take effect on July 1, 2008.

Deleted: or disqualification of a surrogate

Deleted: §302A-
Effect of this part. (a)
This part shall not create a presumption concerning the intention of an individual who has not made or who has revoked an advance special education directive.¶

(b) This part shall not authorize or require a teacher or institution to provide special education or related services contrary to generally accepted educational standards applicable to the teacher or institution.¶

(c) This part shall not affect other statutes of this State governing treatment for mental illness of an individual involuntarily committed to a psychiatric facility.¶

§302A- Judicial relief. On petition of an adult or emancipated minor, the adult's or emancipated minor's agent, guardian, or surrogate, or a teacher or institution involved with the adult's or emancipated minor's education, any court of competent jurisdiction may enjoin or direct a special education decision or order other equitable relief. A proceeding under this section shall be governed by .¶

§302A- Uniformity of application and construction. This part shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it."¶

Deleted: 2050

(f) Unless otherwise specified in a written advance special education directive, a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an adult's or emancipated minor's instruction or the authority of an agent, shall be made by a qualified administrator, such as the student's primary physician, psychologist, psychiatrist or the medical director of the department of health developmental disabilities division.

(g) An agent shall make a special education decision in accordance with the adult's or emancipated minor's instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the adult's or emancipated minor's best interest. In determining the adult's or emancipated minor's best interest, the agent shall consider the adult's or emancipated minor's personal values to the extent known to the agent.

(h) A special education decision made by an agent for an adult or emancipated minor shall be effective without judicial approval.

(i) An advance special education directive shall be valid for purposes of this part if it complies with this

part, or if it was executed in compliance with the laws of the state where it was executed.

Page 11: [2] Deleted

Leolinda L. K. Parlin

3/8/2008 7:27:00 PM

(d) A surrogate who has been designated by the adult or emancipated minor may make educational decisions for the adult or emancipated minor.

(e) A surrogate who has not been designated by the adult or emancipated minor shall make educational decisions for the adult or emancipated minor based on the wishes of the adult or emancipated minor, or, if the wishes of the adult or emancipated minor are unknown or unclear, on the adult's or emancipated minor's best interest.

Page 11: [3] Deleted

Leolinda L. K. Parlin

3/8/2008 7:28:00 PM

(g) A supervising teacher shall require a surrogate to provide a written declaration under the penalty of false swearing stating facts and circumstances reasonably sufficient to establish the claimed authority.

Page 12: [4] Deleted

Leolinda L. K. Parlin

3/8/2008 7:29:00 PM

(b) A special education decision made by a guardian for the ward shall be effective without judicial approval; provided that a guardian shall comply with the ward's individual instructions and shall not revoke a ward's pre-incapacity advance special education directive unless expressly authorized by a court.

§302A- Obligations of teacher. (a) Before

implementing a special education decision made for an adult or emancipated minor, a supervising teacher, if possible, shall promptly communicate to the adult or emancipated minor the decision made and the identity of the person making the decision.

(b) A supervising teacher who knows of the existence of an advance special education directive, a revocation of an advance special education directive, or a designation or disqualification of a surrogate shall promptly record its existence in the adult's or emancipated minor's education record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the education record.

(c) A supervising teacher who makes or is informed of a determination that an adult or emancipated minor lacks or has recovered capacity, or that another condition exists that affects an individual instruction or the authority of an agent, guardian, or surrogate, shall promptly record the determination in the adult's or emancipated minor's educational record and communicate the determination to the adult or emancipated minor, if possible, and to any person then authorized to make educational decisions for the adult or emancipated minor.

(d) A teacher or institution providing special education and or related services to an adult or emancipated minor shall:

- (1) Comply with an individual instruction of the adult or emancipated minor and with a reasonable interpretation of that instruction made by a person then authorized to make educational decisions for the adult or emancipated minor; and
- (2) Comply with a special education decision for the adult or emancipated minor made by a person then authorized to make educational decisions for the adult or emancipated minor to the same extent as if the decision had been made by the adult or emancipated minor while the adult or emancipated minor had capacity.

(e) A teacher or institution that declines to comply with the special education decision for the adult or emancipated minor made by a person then authorized to make educational decisions for the adult or emancipated minor shall:

- (1) Promptly so inform the adult or emancipated minor, if possible, and any person then authorized to make educational decisions for the adult or emancipated minor; and

(2) Provide continuing special education or related services as defined by the individualized education plan to the adult or emancipated minor until a transfer can be effected.

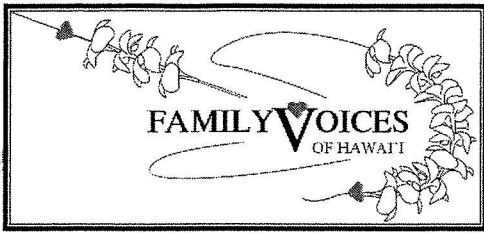
(f) A teacher or institution shall not require or prohibit the execution or revocation of an advance special education directive as a condition for providing special education or related services.

acting in good faith and in accordance with generally accepted educational standards applicable to the teacher or institution shall not be subject to civil or criminal liability or to discipline for unprofessional conduct for:

- (1) Complying with a special education decision of a person apparently having authority to make a special education decision for an adult or emancipated minor, including a decision to withhold or withdraw special education or related services;
- (2) Declining to comply with a special education decision of a person based upon a belief that the person then lacked authority; or

(3) Complying with an advance special education directive and assuming that the directive was valid when made and has not been revoked or terminated.

(b) An individual acting as agent, guardian, or surrogate under this part shall not be subject to civil or criminal liability or to discipline for unprofessional conduct for educational decisions made in good faith.



HILOPA'A

Family to Family Health Information Center

Date: March 30, 2008

To: COMMITTEE ON FINANCE

Representative Marcus Oshiro, Chair

Representative Marilyn Lee, Vice Chair

Fr: Leolinda Parlin, State Coordinator for Family Voices of Hawai'i

Re: SB 2879 SD 2 - Strong Support & Request AMENDMENT to RELATING TO EDUCATION: Establishes a power of attorney for special education; establishes the process to appoint a surrogate decision maker for an adult student that lacks capacity; and clarifies the authority of a guardian an adult student.

On behalf of Family Voices of Hawai'i, I submit this testimony in support of SB 2879 SD2 and request that the bill be amended per the testimony of the Chapter 56/60 Community Workgroup. Our workgroup of community stakeholders, has worked very closely with the Department of Education (DOE) on this bill and have submitted through the workgroup's testimony amendments in which we have agreed upon and have really brought the law alive in specific language that conveys the intent and the operationalization of the law.

As an organization, Family Voices is national grass roots organization of family of friends of child with special health care needs. In Hawai'i, we operate the federally funded Hilopa'a Family to Family Health Information Center. The Center was launched at the end of October of last year. Since then, we have already received calls from families seeking assistance in dealing with the dilemma of being forced into guardianship for the sole purpose of participating in special education planning meetings. While the guidelines for special education may suggest families employ a power of attorney for their adult child, this guideline is inconsistently applied and lacks the full weight and mandate of a law.

For many, guardianship is a costly, time consuming, and permanent endeavor. For others, entertaining guardianship can prompt an ethical crisis. For these reasons, and many others, the issue of the "correctness" of the imposition of guardianship is being played out in court. Alaska requires individuals to exhaust all of the alternatives to guardianship before it will grant it. In Iowa, the court must consider the availability of third party assistance to meet a proposed ward's need for such necessities. Similarly, in the state of Pennsylvania, the courts have determined, "Persons cannot be deemed incapacitated if their impairments are counter-balanced by friends, family or other support."

It is the intent of the proponents of this bill to utilize our legislative system to insure the choices and options for our families are codified into state law. SB 2879 SD2 is in alignment with the cultural change and civil rights movement occurring across our country. There is no need for us to wait for a court decision to do the right thing. This bill provides a continuum of choices and options that will meet the needs of Hawai'i's adult students in special education and their families.

Thank you for time and consideration in supporting the amendments to SB 2879 SD2.

**TESTIMONY TO THE TWENTY-FOURTH STATE LEGISLATURE, 2008
SESSION**

To: House Committee on Finance

From: Gary L. Smith, President
Hawaii Disability Rights Center

Re: Senate Bill 2879, SD2
Relating to Education

Hearing: Monday, March 31, 2008 3:30 PM
Conference Room 308, State Capitol

Members of the Committee on Finance:

Thank you for the opportunity to provide testimony supporting Senate Bill 2879,SD2, Relating to Education.

I am Gary L. Smith, President of the Hawaii Disability Rights Center, formerly known as the Protection and Advocacy Agency of Hawaii (P&A). As you may know, we are the agency mandated by federal law and designated by Executive Order to protect and advocate for the human, civil and legal rights of Hawaii's estimated 180,000 people with disabilities.

We support this bill. We represent a lot of parents and their children with special educational needs. Needless to say, many of these parents are quite involved with the efforts to protect their children and to provide them with the best possible educational opportunities. As long as the children are under the age of eighteen, there are no legal obstacles presented to their participation, However, once the student does attain the age of eighteen, then there are legal ramifications whereby the parent may not have the same set of rights in terms of remaining involved and being able to participate in the proceedings relative to the educational needs of the child.

This bill remedies the current situation where the parent may be forced to apply for guardianship in order to continue to participate. It creates alternative remedies such as a power of attorney for special education or the appointment of an educational surrogate. These are both less restrictive methods than guardianship and are very useful tools and we support these efforts. We urge the Committees to act favorably upon this measure.

Thank you for the opportunity to testify in support of this bill.

Monday, March 31, 2008

The Honorable Marcus Oshiro, Chair
The Honorable Marilyn Lee, Vice Chair

House Finance Committee

Re: SB 2879, SD 2, HD 2

Representative Oshiro,
Representative Lee,

The members of the Community Children's Council Legislative committee strongly urge passage of SB 2879,SD 2, HD 1 in its refined language. Our brochure is attached.

Some of our members have actively participated with other members of the Community Work Group, The Department of Education and the Attorney Generals' Office in refining the Bill. Briefly, the revised bill authorizes two new options that are available for students and their families when the student reaches age of majority affecting between 400-500 students annually.

These options are applicable for educational decision making purposes only and are:

1. Power of Attorney either by notary or by two witnesses
2. Appointment of an Educational Representative and

This draft additionally clarifies the authority of a guardian to take precedence over the above options

We are pleased with the great collaboration that has enabled us to revise this bill.

We strongly urge passage of SB 2879, SD 2, HD 1.

Thank you for this opportunity to provide testimony.

Sincerely,

Tom Smith
Professional Co-chair

Charlotte Kamauoha
Parent Co-chair

Signatures on file

Susan Rocco
1716 Piikea Street
Honolulu, HI 96818
(808) 422-5759
Piikea@earthlink.net

March 31, 2008

Representative Marcus Oshiro, Chair
Representative Marilyn Lee, Vice Chair
House Finance Committee

Support of SB 2879, S.D. 2 – Relating to Education

As the parent of a young adult with developmental disabilities, I am in strong support of the above bill that expands the options for protecting a student's rights when that student reaches the age of 18 and is unable to make informed decisions regarding his/her educational program due to a disability.

When Jason approached his 18th birthday, his special education teacher informed me of the option of securing guardianship through a petition to the court, in order for me to speak legally on his behalf once he became an adult. While I seriously considered this option, given that Jason has a significant intellectual disability and is non-verbal, I chose not to do so based on two compelling and competing choices.

First was the discovery that surrogate decision making is built into Hawaii's Uniform Health Care Act, and therefore, I could continue to speak up for him whenever medical decisions were needed. Second was the education and encouragement I received from the Developmental Disabilities Division of the Department of Health regarding less restrictive alternatives to guardianship. Based on the principles of self-determination which support the preferences of the individual with a disability, families are assisted to utilize mechanisms such as a Power of Attorney or Representative Payee to avoid stripping their son or daughter with a disability of the ability to make legal decisions while still protecting them from harm.

I have talked with other parents whose newly adult children lack the capacity to make informed decisions about their educational programming and who are torn between honoring these self-determination principles and the Department of Education's relatively recent insistence that they must get legal guardianship in order to continue to advocate for their young adult in the IEP process. There is a financial and paperwork burden to be born, as well, when a parent must first pay an attorney to obtain guardianship and then must routinely report to the Court regarding actions taken on behalf of their adult child.

Clearly these burdens were not the intent of the Individuals with Disabilities Education Act which promises students a free and appropriate public education and provides student and family rights to challenge the decisions of the Department. Indeed, in the comments to the most recent amendments to IDEA, the U.S.DOE declares that if a State has a mechanism to determine a

student's inability to make informed decisions, even though the student has not been determined incompetent under State law, it must establish procedures for appointing the parent or another appropriate individual to represent the educational interests of the student throughout his or her eligibility under IDEA.

SB 2879 provides that mechanism, and we owe it to students and their families to see that it becomes law.

Sincerely,

Susan Rocco