COMMITTEE REPORT

May 25, 2016

**H. 5021**

Introduced by Reps. Collins, Clary and Felder

S. Printed 5/25/16--S.

Read the first time April 28, 2016.

**THE COMMITTEE ON EDUCATION**

To whom was referred a Bill (H. 5021) to amend the Code of Laws of South Carolina, 1976, to enact the “Adult Students with Disabilities Educational Rights Consent Act” by adding Article 3 to Chapter 33, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by deleting all after the enacting words and inserting:

/ SECTION 1. Chapter 59 of the 1976 Code is amended by adding:

“Article 3

Adult Students with Disabilities Educational Rights Consent Act

Section 59‑33‑310. This chapter may be cited as the ‘Adult Students with Disabilities Educational Rights Consent Act’.

Section 59‑33‑320. When a student who is eligible for special education under the Individuals with Disabilities Education Act ‘IDEA’, 20 U.S.C. Section 1411 et seq., reaches age eighteen or is emancipated by a court of competent jurisdiction, all rights accorded to the student’s parents under this article transfer to the student except as provided in Sections 59‑33‑330 and 59‑33‑340. Nothing in this article may be construed to deny an adult student eligible for special education the right to have an adult of his choice support the student in making decisions regarding the student’s individualized education program.

Section 59‑33‑330. An adult student who is eligible for special education, who has not been determined to be incapacitated pursuant to Chapter 5, Title 62, may delegate his right to make educational decisions to another adult. An adult student may delegate educational rights by naming an agent through a duly executed power of attorney or by using a form that the State Department of Education shall develop and provide.

Section 59‑33‑340. An adult student who is eligible for special education and has not been determined to be incapacitated pursuant to Chapter 5, Title 62, may be identified as incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program as early as sixty calendar days before his eighteenth birthday or sixty‑five business days before an eligibility meeting, if he is undergoing initial eligibility for special education services, and also may have an educational representative designated pursuant to the following procedures:

(1)(a) The student’s physician, nurse practitioner, physician’s assistant, psychologist, or psychiatrist must certify in writing to the local education agency in which the adult student is enrolled that he has examined or interviewed the student and, based upon this exam, finds the student incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences regarding his educational program. The licensed professional’s certification must include the date of the examination, the basis for the determination, and whether the student’s incapability of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program is likely to last until after age twenty‑one. The licensed professional’s certification must remain in effect during the period the student receives educational services as an adult, regardless of whether the student transfers to another school or local education agency, if the student’s subsequent local education agency is promptly provided with the documentation that the prior local education agency relied on in allowing an educational representative to participate on the student’s behalf. The licensed professional referenced in this item may not be an employee of the local education agency or state education agency serving the student.

(b) For the purposes of this section, a person is considered incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences if he is unable to:

(i) express, either verbally, through an interpreter, or through augmented communication devices, his wishes, interests, or preferences for his education program; or

(ii) understand, even with the support from family, administrators, and experts in the field, what choices are available in a proposed education decision or program. ‘Support’ in this context includes a wide range of disability supports, including explaining options in plain language, using interpreters, providing visual aids, providing the information more slowly, or in similar chunks, or any other method that is effective in communicating with the student with a disability.

(2) Upon receiving the certification, the superintendent of the local education agency or his designee shall, within ten days, provide a copy of the designation to the student and notify him in writing that a professional has certified that he is incapable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences with respect to his educational program and that an educational representative will be designated to make such decisions for him. The superintendent also shall notify the student in writing that he has a right to challenge the designation of the educational representative.

(3) A challenge to the designation of an educational representative must be made in writing and may be made by the student or by another person with a bona fide interest and knowledge of the student, except that challenges may not be made by an employee of a local education agency or state education agency. A challenge by an adult student must assert that he is capable of communicating, with or without reasonable accommodations, his wishes, interests, or preferences concerning his educational program as provided in this section.

(a) A challenge may be made at any time during which an educational representative is designated to act on the adult student’s behalf. A challenge must be provided in writing to the superintendent of the local school district or his designee, who shall within ten business days notify the student and current‑appointed representative in writing.

(b) Upon receipt of a written challenge in accordance with this section, the local education agency may not rely on an educational representative for any purpose.

(4) If the adult student does not object to the designation, his custodial parent or adult spouse may act as the educational representative. If the custodial parent or the adult spouse are unavailable to act on behalf of the student, the educational representative may be an adult sibling, grandparent, or other adult relative, in that order of priority. If these relatives are not willing and able to serve as the educational representative of the adult student, then the local education agency providing services to the student shall designate a surrogate parent, as defined in 34 C.F.R. Section 300.519 to serve in this capacity.

(5) The authority of an educational representative is limited to the authority to consent to educational services, and specifically does not include the authority to remove an adult student from educational services. The authority of an educational representative continues until he challenges the designation, he is no longer eligible for special education, or an order is issued pursuant to Chapter 5, Title 62, which terminates the authority of the educational representative.

Section 59‑33‑350. The educational agent or educational representative is authorized to make educational decisions for a student and has the same rights as the student to participate in the individualized educational program and to request, receive, examine, copy, and consent to the disclosure of the plan or another educational record. The educational agent or the educational representative shall participate based upon a determination of the student’s preferences to the extent they can be determined. If the student’s preferences cannot be determined, then the decisions must be based upon the student’s best interest as determined by the educational agent or educational representative. An educational agent or educational representative who in good faith makes a decision about educational services is not subject to civil or criminal liability because of the substance of the decision.

Section 59‑33‑360. As part of the student’s transition plan, starting at age thirteen, local education agencies shall assist students eligible for special education with the transition to adulthood, including the need to make educational decisions.

Section 59‑33‑370. The South Carolina Department of Education shall promulgate regulations, policies, and guidelines to implement this article.”

SECTION 2. Sections 59‑33‑10 through 59‑33‑110 of the 1976 Code are designated as Article 1, Chapter 33, Title 59 entitled “General Provisions”. The Code Commissioner accordingly is directed to change references from “chapter” to “article” as appropriate.

SECTION 3. This act takes effect upon approval by the Governor. /

Renumber sections to conform.

Amend title to conform.

JOHN E. COURSON for Committee.

**STATEMENT OF ESTIMATED FISCAL IMPACT**

**Fiscal Impact Summary**

This bill would have no expenditure impact to the general fund, federal funds, or other funds.

**Explanation of Fiscal Impact**

**State Expenditure**

This bill creates the Adult Student with Disabilities Educational Rights Consent Act and establishes policies and procedures for allowing adult students under the Individuals with Disabilities Education Act (IDEA) to delegate authority over his or her educational program to an agent or representative.  Under this bill, an adult student who is eligible for special education under IDEA and who is not determined to be incapacitated under Chapter 5 of Title 62 can delegate his or her right to make educational decisions to an agent or representative on a form prescribed by the Department of Education.  An adult student under IDEA who has not been determined to be incapacitated under Chapter 5 of Title, but may be identified as unable to provide informed consent may have an educational representative designated as provided for in the bill. The Department of Education is authorized to promulgate regulations and policies needed for implementation.

The State Department of Education indicates there is no expenditure impact to the general fund, federal funds, or other funds for implementing the provisions of this bill.

Frank A. Rainwater, Executive Director

Revenue and Fiscal Affairs Office

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, TO ENACT THE “ADULT STUDENTS WITH DISABILITIES EDUCATIONAL RIGHTS CONSENT ACT” BY ADDING ARTICLE 3 TO CHAPTER 33, TITLE 59 SO AS TO PROVIDE PROCEDURES AND POLICIES THROUGH WHICH STUDENTS WHO ARE ELIGIBLE FOR SPECIAL EDUCATION UNDER THE INDIVIDUALS WITH DISABILITIES ACT AND WHO HAVE NOT BEEN DETERMINED TO BE INCAPACITATED IN PROBATE COURT MAY BE IDENTIFIED AS UNABLE TO PROVIDE INFORMED CONSENT WITH RESPECT TO HIS EDUCATIONAL PROGRAM AND DELEGATE THE AUTHORITY TO MAKE SUCH DECISIONS TO AN AGENT OR REPRESENTATIVE; AND TO DESIGNATE THE EXISTING SECTIONS OF CHAPTER 33, TITLE 59 AS ARTICLE 1 ENTITLED “GENERAL PROVISIONS”.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 59 of the 1976 Code is amended by adding:

“Article 3

Adult Students with Disabilities Educational Rights Consent Act

Section 59‑33‑310. This chapter may be cited as the ‘Adult Students with Disabilities Educational Rights Consent Act’.

Section 59‑33‑320. When a student who is eligible for special education under the Individuals with Disabilities Education Act ‘IDEA’, 20 U.S.C. Section 1411 et seq., reaches age eighteen or is emancipated by a court of competent jurisdiction, all rights accorded to the student’s parents under this article transfer to the student except as provided in Sections 59‑33‑330 and 59‑33‑340. Nothing in this article may be construed to deny an adult student eligible for special education the right to have an adult of his choice support the student in making decisions regarding the student’s individualized education program.

Section 59‑33‑330. An adult student who is eligible for special education, who has not been determined to be incapacitated pursuant to Chapter 5, Title 62, may delegate his right to make educational decisions to another adult. An adult student may delegate educational rights by naming an agent through a duly executed power of attorney or by using a form that the State Department of Education shall develop and provide.

Section 59‑33‑340. An adult student who is eligible for special education and has not been determined to be incapacitated pursuant to Chapter 5, Title 62, may be identified as unable to provide informed consent with respect to his educational program as early as sixty calendar days before his eighteenth birthday or sixty‑five business days before an eligibility meeting, if he is undergoing initial eligibility for special education services, and also may have an educational representative designated pursuant to the following procedures:

(1)(a) The student’s physician, nurse practitioner, physician’s assistant, psychologist, or psychiatrist must certify in writing to the local education agency in which the adult student is enrolled that he has examined or interviewed the student and, based upon this exam, finds the student incapable of providing informed consent regarding his educational program. The licensed professional’s certification must include the date of the examination, the basis for the determination, and whether the inability of the student to provide informed consent with respect to his educational program is likely to last until after age twenty‑one. The licensed professional’s certification must remain in effect during the period the student receives educational services as an adult, regardless of whether the student transfers to another school or local education agency, if the student’s subsequent local education agency is promptly provided with the documentation that the prior local education agency relied on in allowing an educational representative to participate on the student’s behalf. The licensed professional referenced in this item may not be an employee of the local education agency or state education agency serving the student.

(b) For the purposes of this section, ‘incapable of providing informed consent’ means an individual is unable to:

(i) understand the nature, extent, and probable consequences of a proposed educational program or option on a continuing or consistent basis;

(ii) make a rational evaluation of the benefits or disadvantages of a proposed educational decision or program compared with the benefits or disadvantages of another proposed educational decision or program on a continuing or consistent basis; or

(iii) communicate this understanding in a meaningful way.

(2) Upon receiving the certification, the superintendent of the local education agency or his designee shall, within ten days, provide a copy of the designation to the student and notify him in writing that a professional has certified that he is unable to provide informed consent with respect to his educational program and that an educational representative will be designated to make such decisions for him. The superintendent also shall notify the student in writing that he has a right to challenge the designation of the educational representative.

(3) A challenge to the designation of an educational representative must be made in writing and may be made by the student or by another person with a bona fide interest and knowledge of the student, except that challenges may not be made by an employee of a local education agency or state education agency. A challenge by an adult student must assert that he is capable of providing informed consent concerning his educational program as provided in this section.

(a) A challenge may be made at any time during which an educational representative is designated to act on the adult student’s behalf. A challenge must be provided in writing to the superintendent of the local school district or his designee, who shall within ten business days notify the student and current‑appointed representative in writing.

(b) Upon receipt of a written challenge in accordance with this section, the local education agency may not rely on an educational representative for any purpose.

(4) If the adult student does not object to the designation, his custodial parent or adult spouse may act as the educational representative. If the custodial parent or the adult spouse are unavailable to give informed consent, the educational representative may be an adult sibling, grandparent, or other adult relative, in that order of priority. If these relatives are not willing and able to serve as the educational representative of the adult student, then the local education agency providing services to the student shall designate a surrogate parent, as defined in 34 C.F.R. Section 300.519, must be designated to serve in this capacity.

(5) The authority of an educational representative is limited to the authority to consent to educational services, and specifically does not include the authority to remove an adult student from educational services. The authority of an educational representative continues until he challenges the designation, he is no longer eligible for special education, or an order is issued pursuant to Chapter 5, Title 62, which terminates the authority of the educational representative.

Section 59‑33‑350. The educational agent or educational representative is authorized to make educational decisions for a student and has the same rights as the student to participate in the individualized educational program and to request, receive, examine, copy, and consent to the disclosure of the plan or another educational record. The educational agent or the educational representative shall participate based upon a determination of the student’s preferences to the extent they can be determined. If the student’s preferences cannot be determined, then the decisions must be based upon the student’s best interest as determined by the educational agent or educational representative. An educational agent or educational representative who in good faith makes a decision about educational services is not subject to civil or criminal liability because of the substance of the decision.

Section 59‑33‑360. As part of the student’s transition plan, starting at age thirteen, local education agencies shall assist students eligible for special education with the transition to adulthood, including the need to make educational decisions.

Section 59‑33‑370. The South Carolina Department of Education shall promulgate regulations, policies, and guidelines to implement this article.”

SECTION 2. Sections 59‑33‑10 through 59‑33‑110 of the 1976 Code are designated as Article 1, Chapter 33, Title 59 entitled “General Provisions”. The Code Commissioner accordingly is directed to change references from “chapter” to “article” as appropriate.

SECTION 3. This act takes effect upon approval by the Governor.

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