

Procedures For Determining The
Inability Of An Adult Student With A
Disability To Provide Informed Consent
When IDEA Rights Are Transferred At
The Age Of Majority (19)

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Alabama Department of Education
Special Education Services

Introduction

This document¹ contains information about the transfer of parental rights in special education that occurs when a student with a disability reaches the age of majority which is 19 in Alabama². The purpose of this document is to provide public agencies, students, parents, and families with useful information about who may make educational decisions once a student has reached the age of 19.

Initially, public agencies are required to provide written notice to the student and parent(s), (beginning not later than the IEP that will be in effect when the student reaches 18 years of age) that the transfer of rights will occur at age 19. In addition, sufficient efforts must be made to provide a full explanation of the applicable procedural safeguards to the student. Public agencies, by law, must consider the educational decisions of every adult student, unless the adult student has been determined to be incompetent, or unable to provide informed consent with respect to his or her educational program.

Students and the Ability to Provide Informed Consent and Make Educational Decisions

From a student's first day of school until the completion of his or her education, hundreds, possibly thousands, of educational decisions will have been made on behalf of or by the student. Until a student reaches the age of 19 (also called the "age of majority"), most of those decisions are made by parents, family members, or guardians as a part of the IEP Team process. The right of a parent, or surrogate parent³, to be involved in the making of educational decisions and to provide informed consent, when required, is a very important part of the special education process.

When a student reaches the age of 19, that adult student is presumed under Alabama law to be capable of making his or her own decisions, including educational decisions. That does not mean; however, that parents cannot continue to be involved in their children's education. It does mean that, by law, the rights granted to parents under the IDEA have transferred to the adult student, unless that adult student has been determined to be incompetent under Alabama law, or has not been determined incompetent but has been determined unable to provide informed consent with respect to his or her educational program.

¹ This document has been modified from "Transfer of Rights for Students with Disabilities Upon Reaching the Age of Majority in Virginia". We wish to thank and acknowledge the Virginia Department of Education, Office of Special Education and Student Services, for permission to adopt and modify their document.

² Alabama Administrative Code Section 26-1-1, 1975.

³ Surrogate parent means a person appointed in accordance with procedures set forth in the *Alabama Administrative Code 290-8-9-.08(1)* to provide children, whose parents are not known or cannot be located, or a child who is a ward of the state with the protection of procedural safeguards.

What happens when a student reaches the age of majority (19)?

Generally, in Alabama it is presumed that all persons who have reached the age of majority (19) are fully capable of making their own decisions, and are responsible for their own actions. This presumption comes from Alabama laws and statutes, not from the Alabama Department of Education, local school boards, or teachers. The right of a student to make individual educational decisions also begins when the adult student reaches the age of 19. However, the presumption that adult students are capable of providing informed consent and making their own educational decisions does not mean that adult students are required to change their educational program, or disregard the advice of family, teachers, or people upon whom they have always relied.

When should an “educational representative” be appointed?

While it is presumed that adult students are capable of making their own educational decisions, the right to make educational decisions may be transferred from an adult student to a parent, or if the parent is not available, another appropriate individual if it is sufficiently proven that the adult student is not capable of providing informed consent when making educational decisions. The parent, or if the parent is not available, another appropriate individual may be appointed as the educational representative in order to represent the educational interests for an incapacitated adult student, or for an adult student who is determined not to have the ability to provide informed consent with respect to their educational program. (Note: An incapacitated person, as defined by Alabama law, is any person who has one or more of the following impairments: mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause [except minority], and lacks the ability to make or communicate responsible decisions.)

Procedures for Appointing an Educational Representative

The Alabama Department of Education recognizes two avenues for a parent of an adult student, or if the parent is not available, another appropriate individual to be appointed to make educational decisions on behalf of the adult student. They are as follows:

1. The adult student is declared legally incapacitated or legally incompetent by a court of competent jurisdiction, and the parent or parent, or, if the parent is not available, another appropriate individual requests that the court appoint himself/herself/them as a guardian for the student, and is given authority to make educational decisions through a formal guardianship hearing before a judge; or
2. The parent(s) or, if the parent is not available, another appropriate individual obtains certification that the adult student with a disability is unable to provide informed consent with respect to educational decisions, and that the parent, or if the parent is not available, another appropriate individual should be appointed by the public agency to be the “educational representative” to make educational decisions for the adult student. (See the procedures set forth and the sample *Certification Form of the Inability of a Student to Provide Informed Consent for Education Decisions*.)

How do I have an “educational representative” appointed?

Any adult student with a disability who has been certified to be unable or incapable of providing informed consent with regard to his or her educational program, may have an “educational representative” appointed by the public agency to make those decisions. The option of having an educational representative appointed without having to appear in court (as would be required in a formal guardianship or conservatorship case) was developed by the Alabama Department of Education in accordance with the provisions of the *Individuals With Disabilities Act* (IDEA) and the *Alabama Administrative Code* (AAC).

An appointed educational representative may be a parent, or if the parent is not available, another individual. Before an adult student receiving special education services may have an educational representative appointed, the adult student must be evaluated pursuant to the procedures set forth and be determined to be unable or incapable of providing informed consent with respect to educational decisions pursuant to the provisions of the IDEA and the AAC. The process of having an educational representative appointed is less expensive than a formal guardianship proceeding; however, an educational representative is authorized only to provide informed consent for the adult student with respect to educational decisions. The educational representative does not have the authority to make other decisions on behalf of an adult student.

Procedures for Certification and Appointment of an Educational Representative

I. Certification of Adult Student.

Any adult student who has been found eligible for special education services and does not have a representative appointed to make decisions on his/her behalf by a court of competent jurisdiction, may have an educational representative appointed by the public agency if determined to be unable to provide informed consent based on the following certification procedures. If the adult student, through the certification process is determined to be unable to provide informed consent, then a parent, or if the parent is not available, another appropriate individual may pursue appointment as the adult student’s educational representative to act on the student’s behalf for all rights accruing to the adult student under the IDEA and to exercise the rights related to the student’s educational records.

A. An educational representative may be appointed based on the following conditions and procedures:

1. Two professionals (one from List #1 and one from List #2) must, based on a personal examination or interview, certify in writing that the adult student is incapable of providing informed consent and has been informed of this decision:

- a. List #1 - One of the following:
 - (1) A medical doctor licensed in the state where the doctor practices medicine;
 - (2) A physician’s assistant whose certification is countersigned by a supervising physician; or
 - (3) A certified nurse practitioner.

AND:

b. List #2 - One of the following:

- (1) A medical doctor licensed in the state where the doctor practices medicine (*NOTE*: If a medical doctor was selected from List #1, the selection from List #2 must be a different physician from the first selection.);
- (2) A licensed clinical psychologist;
- (3) A licensed clinical social worker;
- (4) An attorney who is qualified to serve as guardian ad litem for adults under the rules of the Supreme Court of Alabama; or
- (5) A court-appointed special advocate for the adult student.

B. The individuals who provide the certification for the adult student may not be an employee of the public agency currently serving the adult student or be related by blood or marriage to the adult student. Costs of services of individuals providing certification or any other costs are not the responsibility of the public agency.

C. Unable to provide informed consent, as used in this procedure, means that the individual is:

1. Unable to understand the nature, extent, and probable consequences of a proposed educational program or option, on a continuing or consistent basis; and/or
2. Unable 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. Unable to communicate such understanding in any meaningful way.

D. The certification that the adult student is unable to provide informed consent may be made as early as ninety (90) calendar days prior to the adult student's nineteenth birthday.

E. Recertification of an adult student as unable to provide informed consent must occur at least annually throughout the period of eligibility of the adult student. Each certification shall state when and how often (not to exceed one year) a review of the adult student's ability to provide informed consent shall be made and state why that time period was chosen. The recertification process shall consist of all requirements as set forth in these procedures for certification.

G. Upon receiving appropriate written certification of the adult student's inability to provide informed consent, the public agency shall appoint the parent(s) (or the spouse if married) of the adult student, or where not available, another individual to act as an educational representative of the adult student.

H. Upon receiving the written certification of the adult student's inability to provide informed consent, if the adult student has been assisted in educational decisions by an appointed surrogate parent immediately prior to the student's 19th birthday, the public agency at its discretion, may appoint the same surrogate parent to serve as the educational representative. However, a surrogate parent may not be appointed as the educational representative over the objection and availability of the parent(s), or the spouse if married.

I. The adult student or anyone with a bona fide interest in and knowledge of the student may challenge the certification of the adult student's inability to provide informed consent, or an appointment of an educational representative at any time.

A challenge made under these procedures must be provided in writing to the public agency's director of special education who then must notify the adult student and the current appointed representative. For an adult student or individual, who makes a verbal challenge because he or she is unable to complete a written challenge, the public agency must obtain the information from the student or individual and complete a written challenge. For a student who uses alternative communication, the public agency must also provide assistance to obtain the challenge in writing. Upon receipt of a written challenge to the certification by the adult student or by another individual, the public agency must transfer all educational rights back to the adult student until the challenge is resolved through a court of competent jurisdiction.

J. When a challenge occurs, the adult student and the educational representative will be informed by the public agency of the challenge, and that all rights are immediately returned to the adult student. The educational representative's services will be ended upon that notification. If it is believed that the adult student needs assistance, the appropriate parties may pursue the matter through a court of competent jurisdiction.

II. Notification of Rights.

A. The public agency shall notify the parent(s) and the student of the following:

1. That educational rights under the IDEA will transfer from the parent(s) to the student upon the student reaching the age of majority (19). The public agency shall indicate on the Individualized Education Program (IEP) (Beginning not later than the IEP that will be in effect when the student reaches 18 years of age) that the student has been informed of the rights that will transfer to the student on reaching the age of 19.

2. Upon request, the procedures for appointing the parent, or if the parent(s) is not available, another appropriate individual, to represent the educational interests of the adult student throughout the student's eligibility for special education and related services (or other appropriate length of time pursuant to the certification) if adult student is determined unable to provide informed consent with respect to his or her educational program as specified in subsection I.

B. The public agency shall provide any further notices required under the IDEA to both the adult student and the parent(s). The public agency must continue to provide all notices to the parent(s) of the adult student, as a bona fide interested party knowledgeable of the student's abilities, to participate in meetings where decisions are being made regarding their adult student's educational program.

C. The adult student may invite his or her parent(s) to participate in meetings where decisions are being made regarding the student's educational program. Notwithstanding the notice requirements in B., the adult student may choose to exclude his or her parent(s) from participating in IEP Team meetings or any other meeting convened by the public agency concerning his or her educational interests.

D. Notice of a challenge to the certification of the adult student or to the assignment of the educational representative will be provided to the adult student and the educational representative.

**Sample Certification Form of the Inability of a Student to Provide
Informed Consent for Education Decisions Made Under the
*Individuals with Disabilities Education Act***

This is a suggested form developed by the Alabama Department of Education regarding the certification process for the designation of a parent or, if the parent is not available, another appropriate individual, to act on behalf of an adult student with a disability who has reached the age of 19 and who has not been determined to be legally incompetent, but is determined not to have the ability to provide informed consent. This certification is specific to educational rights under the *Individuals with Disabilities Education Act*. Public agencies are not responsible for any costs associated with securing documentation for purposes of this certification.

**Certification Form of the Inability of a Student to Provide
Informed Consent for Educational Decisions Made Under the
*Individuals with Disabilities Education Act***

Unable to provide informed consent, as used in this procedure, means that the individual is:

1. Unable to understand the nature, extent, and probable consequences of a proposed educational program or option, on a continuing or consistent basis; and/or
2. Unable 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. Unable to communicate such understanding in any meaningful way.

Please provide the following information:

1. Name of the adult student being evaluated: _____;
2. Name of the competency evaluator personally evaluating the adult student:

_____;
3. Professional degree or license that entitles the competency evaluator to make this determination:
(Check One)

<input type="checkbox"/> Medical Doctor	<input type="checkbox"/> Physician's Assistant
<input type="checkbox"/> Certified Nurse Practitioner	<input type="checkbox"/> Licensed Clinical Psychologist
<input type="checkbox"/> Licensed Clinical Social Worker	<input type="checkbox"/> Court Appointed Special Advocate
<input type="checkbox"/> An attorney qualified to serve as Guardian Ad Litem for the Adult Student	

4. Have you in the course of your professional duties, personally evaluated the adult student whose capacity is in question ? (Circle One) **YES** **NO**

5. The adult student suffers from the following debilitating illness and/or conditions:

6. Due to the above-stated debilitating illness and/or conditions and related limitations of the adult student, it is my professional opinion that the student (choose one):

IS ABLE

IS NOT ABLE

to provide informed consent with respect to his or her educational program made under the *Individuals With Disabilities Education Act*; and

7. Due to the nature of the adult student's debilitating illness and/or conditions as stated in this document, it is my opinion that the ability of this student to provide informed consent for educational decisions should be reviewed as indicated (Fill in the blank with a date **not to exceed one year** from date of signature.):

On (date) _____.

I have read and understand all parts of this certification document and the accompanying procedures document, *Procedures For Determining The Inability Of An Adult Student With A Disability To Provide Informed Consent When IDEA Rights Are Transferred At The Age Of Majority (19)*.

Signature of Competency Evaluator

Date

Title of Competency Evaluator

Address of Competency Evaluator

Witness

Address of Witness

This is a suggested certification form for use in determining and certifying whether an adult student is unable to provide informed consent with respect to their educational programming after having reached the age of nineteen (19). When changes to this form are necessary or appropriate, they should be made. If this form is not understood, advice should be sought from the appropriate professional(s) before it is completed. Public agency officials are not authorized to give legal or medical advice regarding this form, or the completion of this form.