



# || Transfer of Special Education Rights

At the age of 18, individuals with or without disabilities are legally responsible for making decisions for themselves. However, if a person lacks the ability to provide informed consent, a parent or other interested person may want to explore options to assist that individual with making decisions. Educators, who work with young adults with disabilities, and parents of individuals with disabilities, shall understand the issues regarding special education rights, guardianship, conservatorship, and power of attorney. This appendix has been prepared to provide an overview of those issues.

## SECTION 1. AGE OF MAJORITY

An adult student is a student with a disability, 18 years of age or older, to whom rights have transferred under the Individuals with Disabilities Education Act (IDEA 2004) and Idaho Code. Special education rights will transfer from the parent to the adult student unless the IEP team determines that the student is unable to provide informed consent with respect to his or her educational program or the parent has obtained legal guardianship including the scope of educational matters.

At least one year before the student turns age 18; the IEP team needs to discuss whether special education rights will transfer to the student on his or her 18th birthday. The student and parent are essential IEP members to be present at this meeting. After reviewing all relevant information related to the student's ability to understand and make informed decisions regarding educational matters, the team determines if there is any reason to prohibit the transfer of rights. If there is no compelling reason to prevent the transfer rights, the student shall be informed of special education rights that will transfer at age 18. The student's IEP will contain a statement that the student has been so informed.

## SECTION 2. SELF-ADVOCACY AND SELF-DETERMINATION

The transfer of rights to a student at age 18 means that the secondary student will need support in understanding all of the special education rights and their implications. Research has shown that to achieve their goals and dreams, successful secondary students make the decision early on to confront their disabilities, learn to be decision-makers, and lead their own lives. Therefore, it is appropriate for educators to take measures in teaching secondary students to actively participate in and even direct their own IEPs by using problem solving, self-determination, and self-advocacy skills to help them become aware of their needs and abilities. There are various curricula and resources available that can be integrated into lesson plans and IEP transition goals so secondary students who reach age 18 know what they want and how to get it. Refer to Appendix 4B for a list of resources.

Before the IEP meeting to discuss the transfer of rights, all evaluation data, test results, education records, teacher observations, student input, and parent input, including whether the parent intends to seek guardianship when the student turns 18 years old, should be reviewed by the IEP team. All of this information is used to decide if there is any reason why rights should not transfer.

Consideration should be given to the information or evidence that helps the IEP team answer the following questions:

1. Is the student capable of understanding his or her rights?
2. Is the student capable of exercising his or her rights?
3. Is the student capable of understanding the consequences of his or her decisions?

If the IEP team can answer yes to the questions stated above, then educators and parents should begin to look at how to assist the student in using the rights afforded to him or her at age 18. The IEP team can develop or revise an IEP to include activities and services that may assist the student. Even though the rights will transfer when the student actually turns age 18, the parent will still be a person very knowledgeable about the student; therefore, he or she can act as a member of the IEP team, invited by the student, the district, or both.

If the IEP team determines that the student lacks the ability to provide informed consent with respect to his or her educational program, the parent retains all special education rights. However, there is nothing in federal or state law that prohibits the IEP team from changing its decision at a later point in time. Of course, a new decision would be based on new information and input.

## **SECTION 3. GUARDIANSHIP**

### **A. Definition**

Guardianship is a court-ordered relationship between a competent adult (the guardian) and an adult with a disability. It is a means by which the law deals with the problems associated with an individual's inability to make decisions and give consent, i.e., how to have someone act (consent) for others who are unable to act for themselves. Both individuals and public and private agencies may serve as guardians.

A parent of a child under the age of 18 is the natural guardian of his or her child, and a court appointment is not necessary to create or validate the status of the parent. However, a parent does not automatically remain the guardian of a son or daughter with a disability when the son or daughter turns 18 years old. Only a court order can appoint the parent as guardian of his or her son or daughter who is 18 years of age or older. Educators who are working with students

who will be turning 18 years of age should assist families in contacting the appropriate agency for assistance.

## B. Scope of Guardianship

The scope of a person's guardianship, whether it is complete or limited, should be tied to the extent of the person's competence. Thus, there are two types of guardianship:

### 1. Complete (or plenary) Guardianship

Plenary means full, complete, and unlimited. A plenary guardianship is one that gives the guardian full, complete, and unlimited authority to consent on the individual's behalf.

### 2. Limited (or partial) Guardianship

A limited guardianship (sometimes called partial guardianship) recognizes that the individual has partial competence in at least some areas of decision-making and therefore is able to give direct consent for some kinds of decisions.

The court order will specify the nature and scope of the guardianship.

## C. Authority of Guardian

After a court appointment, the guardian becomes a substitute decision maker for the person with the disability. In addition, the court gives the guardian the authority to exercise specific rights on behalf of the person with the disability and takes those rights away from the person with the disability.

The powers of the guardian may include the following:

1. authority to determine the individual's residence, care, habilitation, education, and employment;
2. responsibility to assure that the individual's basic needs for food, clothing, and shelter are met;
3. authority to consent to medical care needed by the individual; or
4. responsibility to keep the individual's financial affairs in order.

Neither the Idaho Department of Education (SDE) nor the district has the responsibility or the authority to appoint a guardian for a student with a disability. If the parent or a relative wants to become the guardian of an individual with a disability, the district should direct him or her to contact legal counsel.

## SECTION 4. CONSERVATORS

A conservator is a person appointed by a court to manage or make decisions about the property of a protected person. Appointment of a conservator may be made if the court determines the following:

1. The person is unable to manage his or her property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
2. The person has property that will be wasted or dissipated, unless proper management is provided, or funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her, and that protection is necessary or desirable to obtain or provide funds.

## SECTION 5. POWER OF ATTORNEY

The provision of designating a power of attorney can be used for circumstances involving students with or without disabilities at any age. A power of attorney is the designation by a competent person of another to act in place of or on behalf of the first person. A power of attorney differs from a guardian or conservator in several ways. First, a power of attorney is a voluntary designation by a person of sound mind; whereas the appointment of guardians and conservators is an involuntary process requiring a judicial recognition. Second, the person granting the power of attorney is free to define the scope of authority of the designated person; however, power of attorney is usually given for limited and narrowly defined purposes. For example, a parent who is out of state for an extended period may designate power of attorney to a personal care provider in the areas of medical emergencies or educational decisions for his or her child. Idaho's living will law allows designating a person with power of attorney to make medical care decisions in the event of mental disability.

Normally, the authority of a designated power of attorney ceases on the disability or incapacity of the principal, which in most situations is the parent. A durable power of attorney, however, remains effective even after the disability or incapacity of the principal. To be a durable power of attorney, the written document designating the power of attorney shall clearly state the intent of the principal that the authority conferred is exercisable notwithstanding the principal's subsequent disability or incapacity.

### For Questions Contact

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