

**Transfer Of Rights For Students with Disabilities Upon Reaching The
Age Of Majority In Virginia**

August 2004

Virginia Department of Education
Office of Special Education and Student Services
PO Box 2120
Richmond, Virginia 23218-2120

Table of Contents

1. Introduction	3
2. Students and the Right to Make Educational Decisions	4 - 8
3 Procedure for Transfer of Rights to Students Who Reach the Age of Majority	9 - 13
4. Sample Notice of Transfer of Rights to Students with Disabilities Who Reach the Age of Majority	14
5. Sample Specific Power of Attorney for Educational Decisions Made Under the Individual with Disabilities Education Act	15 - 16
6. Sample Certification Form of the Inability of a Student to Provide Informed Consent for Education Decisions Made Under the Individuals with Disabilities Act	17 - 18

Introduction

This document contains information about the transfer of parental rights in special education that occurs when a student with a disability reaches the age of majority. The age of majority in Virginia is 18. The purpose of this document is to provide schools, students, parents, and families with useful information about who may make educational decisions after a student has reached the age of 18. Initially, the student and parent or parents are notified, one year prior to the student's eighteenth birthday, that the transfer of rights will occur at age 18 and efforts are made to provide a full explanation of the applicable procedural safeguards to the student. School divisions, by law, respect the educational decisions of every adult student, unless that person has been determined to be incapable of making decisions. There are three options schools shall recognize for determination of the student's ability to make educational decisions addressed in this document. The Department of Education wishes to extend a special thank you to the following individuals who assisted with the development of these materials:

Debra Beasley Director of Special Education
Goochland County Schools
Sharon deFur Associate Professor
College of William and Mary
Pat Brown-Glover Transition Specialist
Richmond City Public Schools
Anna Maria Johnson Parent Representative
State Special Education Advisory Committee
Rob Lesniak Consultant - Attorney and Counselor at Law
Richmond, Virginia
Jane Malone Parent
Henrico County Schools
Chris Martin Teacher
Henrico County Schools
Jan Zigler Attorney
Department for Rights of Virginians with Disabilities
Virginia Department of Education Staff:
Patricia Abrams, Ron Geirsbach, Lissa Power-deFur, and Karen Trump

Students and the Right to 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 for or by that student. Until a student reaches the age of 18 (also called the "age of majority"), most of those decisions are made by parents, family members, and/or guardians in consultation with teachers or education officials. The right of a parent, or surrogate parent¹, to make educational decisions for a child is a very important part of the educational process. Therefore, Virginia law protects the rights of parents to make decisions in the best interests of their children, including educational decisions.

However, when a student reaches the age of 18, that adult student is presumed under Virginia law to be capable of making his or her own decisions - including educational decisions. That does not mean that parents cannot continue to be involved in their children's education. It just means that, by law, schools respect the educational decisions of every adult student, unless that person has been determined to be incapable of making decisions.

What does it mean to be "capable of making your own decisions?"

Generally, in Virginia it is presumed that all persons who have reached the age of 18 are fully capable of making their own decisions, and are responsible for their own actions. This presumption comes from Virginia laws and statutes, not from the Virginia Department of Education, local school boards, or teachers. The right of a student to make individual educational decisions begins when a student reaches the age of 18, just as the right to vote begins. However, the presumption that adult students are capable of making their own decisions does not mean that adult students are required to change their educational program, or disregard the advice of family, teachers, or people on whom they have always relied.

What about students with special needs, or students who have a condition or illness which might impair their ability to make informed educational decisions?

The law presumes that all students are capable of making their own decisions. However, the right to make educational decisions may be transferred from an adult student to a parent, guardian, family member, or some other person, if it is sufficiently proven that the adult student is *not capable of providing informed consent* when making decisions. A parent, guardian, family member, or some other person may be appointed to make educational decisions for an *incapacitated* adult student or for an adult student who is deemed *unable or incapable of providing informed consent*, under certain circumstances. (*Note*: An incapacitated person is a person determined by a court who, because of a mental or physical illness or condition, is not capable of taking care of himself or herself, or his or her affairs. For purposes of this discussion, any person who has been declared by a court to be legally incompetent should be interpreted to be incapacitated).

1

"**Surrogate parent**" means a person appointed in accordance with procedures set forth in the Special Education Regulations to provide children who are in legal or physical custody of the state, or whose parents are not known or are unavailable, with the protection of procedural safeguards.

The Virginia Department of Education recognizes three ways for a parent, family member, or other person to be appointed to make educational decisions on behalf of an adult student. They are as follows:

1. The parent requests being a court-appointed guardian and is given authority to make educational decisions at a guardianship hearing before a judge;
2. The parent assists the adult student to appoint or designate, in writing, a competent adult of his or her choice to make educational decisions through a power of attorney, signed and executed by the adult student and a Notary Public. (See the sample Power of Attorney form);
3. The parent or other competent adult pursues certification that the adult special education student is unable or incapable of providing informed consent in making educational decisions and is considered by the school division to be the “educational representative” to make educational decisions for the student. (See the sample Certification Form of the Inability of a Student to Provide Informed Consent for Education Decisions).

What is adult guardianship?

A guardian is a person appointed by a court who is responsible for the personal affairs of an incapacitated person (called a “ward”), and for making decisions for that ward. Guardianship may be awarded for the purpose of making only limited decisions (such as education decisions only, or medical decisions only) or it may be a full guardianship covering all personal affairs. (*Note:* Guardians appointed after January 1, 1998, do not have the right to handle the financial affairs of a ward. A conservator is the person authorized by a court to handle the financial affairs of a ward. In many cases, however, the court will name the same person to serve as both the guardian and the conservator for the ward). Some of the main disadvantages of the guardianship and conservatorship proceedings are that they often are time-consuming, costly, and may be open to the public. All such proceedings involve at least one judge and at least one lawyer. If you have questions about guardianship or conservatorship, please contact a lawyer or the Virginia Guardianship Association² for more information.

²

What is power of attorney?

The power of attorney is a written document by which one competent adult (the student, in our case) grants authority to another competent adult (a parent, family member or friend) the authority to act and make decisions on his or her behalf. Since adult students are presumed competent under Virginia law, the power of attorney may be an important tool for many students, parents, and families. It is important that students, parents, families, and educators all understand that competent adult students may revoke or change a power of attorney at any time, as long as they are still competent. Sample forms for a power of attorney for educational decisions only have been prepared by the Virginia Department of Education as a guidance tool for students, their parents, guardians, and/or families. Be aware that the power of attorney may be used by competent adults to give various powers to other competent adults. Be sure to seek legal advice to address further questions or concerns about the use of any power of attorney.

How do I go about having an “educational representative” appointed for a special education student who is 18 years old or is about to become 18?

As was mentioned earlier, any adult special education student who has been certified to be unable or incapable of providing informed consent with regard to his or her educational decisions, may have an “educational representative” appointed to make those decisions. The option of having an educational representative appointed without having to appear in court (as would be required in a guardianship or conservatorship case) was developed by the Virginia Department of Education in accordance with federal and state laws. This was done to ease the burden placed on parents and families, while protecting the individual rights of the adult student. An education representative can be a parent, family member, or other competent adult. Before a special education student can have an educational representative appointed, the student must be evaluated and determined to be “unable or incapable of providing informed consent for educational decisions made under the Individuals with Disabilities Education Act.” The procedure included specifies who must certify that a special education student is incapable of providing informed consent. The process of having an educational representative appointed is much easier and less expensive than a guardianship proceeding. However, remember that an educational representative is authorized to make educational decisions only. The educational representative is not given any authority to make other decisions on behalf of an adult student.

What other legal concerns should students and parents be aware of?

Families may face many changes and new issues as children approach the age of majority. Many of the issues can be confusing and overwhelming, especially if the child who is approaching age 18 is a special education student. As part of ongoing efforts to assist families, the Virginia Department of Education provides the following brief answers to questions frequently asked by people who care for special education students.

What is a “representative payee”, and does my child need one?

If a student receives income from Social Security, Supplemental Security Income (SSI), or the

Veterans Administration, then a representative payee may be appointed to receive and manage the funds for that student. When students reach the age of 18, they must have a representative payee appointed to receive benefits on their behalf, if the funds are being received due to that student's disability. The person appointed to manage the funds of the disabled person will be responsible for seeing that funds are properly spent to meet the need of the disabled student. A periodic accounting must be made by the representative payee to the Social Security Administration. Additional information, and all required forms, should be available at any local Social Security office.

The management of federal benefits on behalf of someone over 18, such as Social Security, SSI, and Veterans Administration benefits, is delegated only to a representative payee. The power of attorney executed by the disabled person does not remove the need for a representative payee. The federal government will not recognize the right of the person holding the power of attorney to receive funds for the benefit of a disabled person unless that person is also named as representative payee.

What are advance medical directives?

Advance medical directives are the documents most often used for making personal choices in health related matters. The two most common types of advance medical directives are the living will and the health care power of attorney. A competent adult must execute a legally binding advance medical directive. (Living will and health care power of attorney forms are often combined to make one form, commonly known as the advance medical directive. Sample advance medical directives are available at local health departments, hospitals, and nursing homes.)

A living will (also known as a health care declaration) is a written statement in which an adult states his or her desires regarding the use of life-prolonging medical care, should he or she become terminally ill and unable to communicate. A living will helps ensure that an individual's wishes and desires are known by family members, guardians, physicians, and health care providers.

A health care power of attorney allows an adult to appoint another competent adult (known as the "health care agent") to make any and all health care decisions on his or her behalf. Language may be included that gives the named health care agent the right to make medical decisions, only if the person is unable to make those decisions. A health care power of attorney often reduces the chance of conflict or confusion between family members, friends and health care providers.

What is a trust?

A trust is an arrangement by which assets are held by one person (known as the "trustee") for the benefit of another person (known as the "beneficiary"). The trustee is responsible for ensuring that money, or any other asset, from the trust is used appropriately and for the benefit of the beneficiary. Trusts may have an impact on a person's continuing or future eligibility for public benefits, such as Social Security Income or Medicaid, and may have important tax implications.

For these reasons, a trust agreement should be drafted with the help of any attorney.

**Procedure for Transfer of Rights to Students Who
Reach the Age of Majority**

I. A student who has reached the age of 18 years shall be presumed to be a competent adult, and thus all rights under the Individuals with Disabilities Education Act shall transfer to the adult student unless one of the following actions has been taken:

A. The adult student has been declared legally incompetent or legally incapacitated by a court of competent jurisdiction and a representative has been appointed by the court to make decisions for the student.

B. The adult student designates, in writing, another competent adult to be the student's agent to receive notices and to participate in meetings and all other procedures related to the student's educational program. A school division may rely on such a written designation until notified that the authority to act under the designation has been revoked, terminated, or superceded by court order or by the adult student.

C. The adult student has been certified, according to the following procedures, as unable to provide informed consent. Any competent adult student who has been found eligible for special education and does not have a representative appointed to make decisions on the adult student's behalf by a court of competent jurisdiction, may have an educational representative appointed based on the following certification procedure to act on the student's behalf for all rights accruing to the adult student under the Individuals with Disabilities Education Act (20 U.S.C. 1400, et seq.) and the exercise of rights related to the student's school record.

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

a. 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:

(1) One of the following from list #1:

- (a) A medical doctor licensed in the state where the doctor practices medicine;
- (b) A physician's assistant whose certification is countersigned by a supervising physician;
- (c) A certified nurse practitioner.

AND:

(2) One of the following from list #2:

- (a) A medical doctor licensed in the state where the doctor

practices medicine;

(b) A licensed clinical psychologist;

(c) A licensed clinical social worker;

(d) An attorney who is qualified to serve as guardian ad litem for adults under the rules of the Supreme Court of Virginia; or

(e) A court-appointed special advocate for the adult student.

b. The individuals who provide the certification for the adult student may not be employees of the school division currently serving the adult student or be related by blood or marriage to the adult student.

c. *Incapable of providing 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 incapable of providing informed consent may be made as early as 60 days prior to the adult student's eighteenth birthday or 65 business days prior to an eligibility meeting, if the adult student is undergoing initial eligibility for special education services.

e. The certification shall state when and how often a review of the adult student's ability to provide informed consent shall be made and state why that time period was chosen.

f. The adult student's ability to provide informed consent must be recertified at any time that the previous certifications are challenged. Challenges can be made by the student or by anyone with a bonafide interest and knowledge of the adult student. Challenges must be provided in writing to the local educational agency's director of special education who then must notify the adult student and current appointed representative. Upon receipt of

a written challenge to the certification by the adult student, the local educational agency may not rely on an educational representative appointed pursuant to the certification for any purpose. The only action that can supercede the adult student's challenge to the certification process is a designated educational representative affirmed by a court of competent jurisdiction (guardianship).

g. Upon receipt of a written challenge to the certification by anyone with a bonafide interest and knowledge of the adult student, the local educational agency may not rely on an educational representative appointed pursuant to this procedure for any purpose until a more current written certification is provided by the appointed educational representative.

h. Certifications provided after a challenge are effective for sixty days, unless a proceeding in a court of competent jurisdiction is filed challenging and requesting review of the certifications. The local educational agency shall not rely upon the designated educational representative until the representative is affirmed by the court.

2. Upon receiving the written certification of the adult student's inability to provide informed consent, the local educational agency shall designate the parent or parents of the adult student to act as an educational representative of the adult student (unless the student is married, in which event the student's adult spouse shall be designated as educational representative). If the parent or adult spouse is not available or competent to give informed consent, the individual designated by the local education agency shall designate a competent individual from among the following:
 - a. An adult brother or sister; or
 - b. An adult aunt or uncle; or
 - c. A grandparent.
 - d. If no one from the previous categories is willing and able to serve as the adult student's educational representative, then an individual (who is not an employee of the local educational agency) shall be designated to serve in this capacity (by the local educational agency).

II. Notification

A. The local educational agency shall notify the parent or parents and the student of the following:

1. That educational rights under the Individual's with Disabilities Education Act

(20 USC 1400 et seq.) will transfer from the parent or parents to the student upon the student reaching the age of majority. Such notification must be given at least one year prior to the student's eighteenth birthday.

2. The procedures for appointing the parent, or, if the parent or parents are not available, another appropriate individual, to represent the educational interests of the student throughout the student's eligibility for special education and related services if that individual is determined not to have the ability to provide informed consent with respect to the educational program as specified in subsection I.

B. The local educational agency shall include a statement on the Individualized Education Program (IEP) (beginning at least one year before the student reaches the age of majority) that the student has been informed of the rights that will transfer to the student on reaching the age of 18.

C. The local educational agency shall provide any further notices required under the Individuals with Disabilities Education Act (20 USC 1400 et seq.) to both the student and the parent or parents. The local educational agency may continue to invite the parent or parents, as bonafide interested parties knowledgeable of the student's abilities, to participate in meetings where decisions are being made regarding their adult student's educational program.

D. The adult student may invite his or her parent or parents to participate in meetings where decisions are being made regarding the student's educational program.

III. All rights accorded to the parent or parents under the Individuals with Disabilities Education Act (20 USC 1400 et seq.) transfer to individuals when they reach the age of majority (18) who are incarcerated in an adult or juvenile federal, state, or local correctional institution.

Sample Notice of Transfer of Rights to Students with Disabilities Who Reach the Age of Majority

[School Division Name]
[School Division Address]
[School Division Phone]

Notice of Transfer of Rights to Students with Disabilities Who Reach the Age of Majority

Student: _____ School: _____

Date: _____

Dear Parent(s)/Guardian(s) and Student;

This letter is to inform you that according to federal special education regulations, when students with disabilities who are receiving special education and related services reach the age of majority (age 18 in Virginia), the Parental Rights in Special Education transfer to the student. This means that the student has full access to the school record and makes the final decision in all matters related to special education including the contents of the Individualized Education Program (IEP). The student is required to sign permission for placement where the parent has formerly been the person granting this permission.

In situations where a student or parent believes that the student will be unable to make an informed consent decision, there are procedures that permit the parent to continue to represent the student in the special education process. Materials explaining the possible options available to parents have been enclosed for your convenience. For further assistance in this matter, please contact the principal of your school, the student's special education teacher, or the student's guidance counselor.

Sincerely,

Principal (or Designee)
School Telephone # _____

Sample Specific Power Of Attorney For Educational Decisions Made

Under The Individuals With Disabilities Education Act

This is a suggested form developed by the Virginia Department of Education regarding the specific power of attorney for the designation of an agent to act on behalf of students who have reached the age of eighteen (18) and who have not been determined to be legally incompetent or incapacitated. This power of attorney is specific to educational rights under the Individuals with Disabilities Education Act. When completed, executed, and notarized by the adult student, it becomes legally binding unless and until the powers granted by the student are revoked by the student, or until the specific power of attorney is revoked by a court, or upon the death of a student. When changes are appropriate, they should be made. If this form is not understood, legal advice should be obtained from an attorney before the form is signed. School officials are not authorized to give legal advice, and the decision to seek legal advice rests solely with the adult student.

**SPECIFIC POWER OF ATTORNEY
FOR EDUCATIONAL DECISIONS MADE UNDER THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT**

KNOW ALL PERSONS BY THESE PRESENTS:

That I, _____ (full name), residing at _____
_____ (full address), and born on _____ (month, date, year), hereby
make, constitute, and appoint _____ (full name) of
_____ (full address), as my lawful attorney-in-fact to act
in my name, place and stead, make all educational decision on my behalf, act and legally bind me to any and all
educational decisions and/or programs, including, but not limited to, the following hereinafter described:

- (initial) _____ receive notice of all meetings and actions proposed or refused pertinent to my special education program
- (initial) _____ participate in all meetings pertinent to my special education program
- (initial) _____ request legal due process proceedings if a disagreement regarding my special education program arises
- (initial) _____ represent my interests in mediation to resolve disputes with the local school division
- (initial) _____ agree or disagree with proposed Individualized Education Programs and special education placements
- (initial) _____ Other _____

as I would, might or could do if acting personally. I hereby ratify and confirm all lawful acts done by said attorney-in-fact in accordance with this specific power of attorney. This specific power of attorney shall not terminate upon me becoming disabled, incompetent, or incapacitated, and all power and authority granted hereunder to said attorney-in-fact shall continue and be exercisable by said attorney-in-fact notwithstanding that I may subsequently become disabled, incompetent, or incapacitated, and all acts done by said attorney-in-fact pursuant to this specific power of attorney during the period of any such disability, incompetence, or incapacity, shall have in all respects the same effect and shall inure to the benefits and bind me and my estate as fully as if I were not subject to such disability, incompetence, or incapacity, and all power and authority granted hereunder shall remain in full force and effect until such time as such power and authority granted hereunder shall be revoked by me in writing.

Plural shall be substituted for the singular and singular for the plural wherever the context hereof so requires.

WITNESS the following signatures on this _____ day of _____, _____.

Student

COMMONWEALTH OF VIRGINIA }

} To Wit:

CITY/COUNTY OF _____ }

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, in the Commonwealth of Virginia, do hereby certify that _____(student), whose name is signed to the foregoing Specific Power of Attorney, has acknowledged the same before me in the jurisdiction aforesaid.

Given under my hand this _____ day of _____, _____-/-

_____(Notary Public)

My Commission expires: _____

NOTE: This form, with original signatures, must be filed with the student=s school record and with the Director of Special Education for the school division before an attorney-in-fact can be recognized by the local school division. For the local school division to recognize any changes or revocations, written notification to the Director of Special Education must be provided of those changes or revocations. Such notification must be dated and witnessed.

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 Virginia Department of Education regarding the certification process for the designation of a parent or other competent adult, to act on behalf of students who have reached the age of 18 and who have not been determined to be legally incompetent or incapacitated only. This certification is specific to educational rights under the Individuals with Disabilities Education Act. Local educational 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

Please provide the following information:

1. Name of the student being evaluated: _____;
2. Name of the competency evaluator personally evaluating the Student:
_____;
3. Professional degree or license that entitles the competency evaluator to make this determination: (Circle One - See attached *Transfer of Rights to Students Who Reach the Age of Majority*, for additional information and requirement of specific professionals)

Medical Doctor Physician's Assistant Certified Nurse Practitioner

Licensed Clinical Psychologist Licensed Clinical Social Worker

Guardian Ad Litem for the Adult Student Court Appointed Special Advocate
4. Has the competency evaluator, in the course of his/her professional duties, personally evaluated the person whose capacity is in question (the student)?

YES/NO (Circle One)

5. The 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 student, it is my professional opinion that the student ***IS CAPABLE / IS NOT CAPABLE*** of providing informed consent for educational decisions made under the Individuals with Disabilities Education Act; and

7. Due to the nature of the 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 on _____ (date) and thereafter every _____ years. (Fill in the blank with a number not exceeding three years. Re-evaluation should occur annually unless the condition that makes the student incapable of providing informed consent is either degenerative, irreversible or perpetual given the present state of medical science, as known by the Competency Evaluator)

I have read and understand all parts of the document, *Transfer of Rights to Students Who Reach the Age of Majority*, pertaining to informed consent for educational decisions made under the Individuals with Disabilities Education Act. I understand them and I have completed this evaluation form based on the guidelines set forth in the Procedure.

Signature of Competency Evaluator Date

Title of Competency Evaluator

Address of Competency Evaluator

Witness

Address of Witness

This is a suggested evaluation form for use in determining and certifying whether a student is capable of providing informed consent for purposes of making their own educational decisions after having reached the age of eighteen (18). When changes to this form are necessary, they should be made. If this form is not understood, advice should be sought from the appropriate professional(s) before it is completed. School officials and employees are not authorized to give legal or medical advice regarding this form, or the completion of this form.