

VIRGINIA DEPARTMENT OF EDUCATION
Division of Special Education and Student Services

**TRANSFER OF RIGHTS FOR STUDENTS WITH
DISABILITIES UPON REACHING THE AGE OF
MAJORITY IN VIRGINIA**

Technical Assistance Resource Document
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TABLE OF CONTENTS

	Page
Introduction	3
Students and the Right to Make Educational Decisions	
• What does it mean to be “capable of making your own decision?”	4
• What about students with special needs, or students who have a condition or illness which might impair their ability to make informed educational decisions?	4
• What is adult guardianship?	5
• What is a power of attorney?	6
• 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?	6
What Other Legal Concerns Should Students and Parents be Aware of?	7
• What is a “representative payee”, and does my child need one?	7
• What are advance medical directives?	7
• What is a trust?	8
Procedure for Transfer of Rights to Students Who Reach the Age of Majority	9
APPENDICES	
Appendix A: Sample Notice of Transfer of Rights to Students with Disabilities Who Reach the Age of Majority	12
Appendix B: Sample Specific Power of Attorney for Educational Decisions Made Under the IDEA	14
Appendix C: Sample Certification Form of the Inability of a Student to Provide Informed Consent for Education Decisions Made Under the IDEA	17

INTRODUCTION

The *Individuals with Disabilities Education Act* (IDEA) 2004 and its implementing regulations of 2006 contain provisions for the transfer of rights of students with disabilities upon reaching the age of majority. (20 USC §1415(m); 34 CFR §300.520). Virginia regulations governing special education further detail these requirements at 8 VAC 20-81-180. (*Regulations Governing Special Education Programs for Children with Disabilities in Virginia*, January 25, 2010).

The Virginia Department of Education (VDOE) developed a technical assistance resource document on this subject in 2004. VDOE staff edited the document to include the federal and state regulations governing special education to provide this current resource. The purpose of this document is to assist school administrators and parents in operationalizing the law and regulations relative to the transfer of rights of students with disabilities who reach the age of majority. School personnel will want to review this document in concert with a review of the school division's policies that may supplement this document's provisions.

Inquiries related to this document should be addressed to VDOE staff in the Office of Dispute Resolution and Administrative Services:

Phone: 804-225-2013

Voice/Relay: 1-800-292-3820 Text users dial 711 for Relay Services

E-mail: ODRAS@doe.virginia.gov

STUDENTS AND THE RIGHT TO MAKE EDUCATIONAL DECISIONS

From a student's first day of school until the completion of his or her education, a significant number 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" in Virginia), most of those decisions are made by parents, family members, and/or guardians in consultation with teachers or education officials.

The right of a person meeting the definition of parent under the Virginia Regulations, 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. Initially, the student and parent(s) are notified, at least one year prior to the student's eighteenth birthday that the transfer of rights will occur at age 18. (*see* Appendix A for sample notification form). 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 VDOE, 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.

The Virginia Department of Education recognizes four 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 adult student, based on certification by written order from a judge of competent jurisdiction, is admitted to a facility for the training, treatment and habilitation of persons with intellectual disabilities in accordance with § 37.2-806 of the *Code of Virginia*. The state-operated program serving the adult student may rely on the judicial certification and appoint an educational representative to act on the student's behalf during the student's stay at the state-operated program.
3. The parent or other competent adult pursues certification that the adult student with a disability 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* Appendix C; Certification Form of the Inability of a Student to Provide Informed Consent for Educational Decisions).
4. In addition, a competent adult student may appoint or designate, in writing, a competent adult of his or her choice to make educational decisions through a power of attorney, signed by the adult student before a Notary Public. (*see* Appendix B; the sample Power of Attorney form).

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 educational 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 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 conservator for the ward). Some of the main disadvantages of both the guardianship and the 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.¹

¹ Questions or need for additional information regarding guardianship or conservatorship may be directed to an attorney or the Virginia Guardianship Association, P.O. Box 6357, Newport News, Virginia 23606. (804) 261-4046

Another court proceeding may involve having a judge order the adult student to be admitted to a facility for the training, treatment and habilitation of persons with intellectual disabilities. In such cases, the facility may appoint a parent, or certain other persons, if the parent is unavailable, to act on behalf of the adult student with regard to educational matters.

What is a power of attorney?²

The power of attorney is a written document by which one competent adult (the student in this 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 in educational matters.

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, and that the student may still act on his or her own behalf. 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. (*see* Appendix B). 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. The procedure is detailed later in this document including the specifics of who must certify that a 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.

Remember: An educational representative is authorized to make educational decisions only. The educational representative is not given any authority to make any other decisions on behalf of an adult student.

² The use of “Power of Attorney” is in the context of the Virginia special education regulations at 8 VAC 20-81-180 C.2. “Power of Attorney” does not apply to parents of students with disabilities in an attempt to authorize a third party to act in the place of the parent with regard to special education matters. (*see* VDOE Frequently Asked Questions, FAQ #015-11, at the following web site:
http://www.doe.virginia.gov/special_ed/regulations/state/faq_implementing_regulations/index.shtml)

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 student may be incapacitated. 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 Veteran’s 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 is 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 Veteran’s 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 a 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 may 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 an attorney.

PROCEDURE FOR TRANSFER OF RIGHTS TO STUDENTS WHO REACH THE AGE OF MAJORITY

8 VAC 20-81-180 C and D

C. 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 Improvements Act of 2004 (IDEA)] shall transfer to the adult student, unless one of the following actions has been taken:

1. The adult student is 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;
2. The adult student designates, in writing, by power of attorney or similar legal document, 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 local educational agency shall rely on such designation until notified that the authority to act under the designation is revoked, terminated, or superseded by court order or by the adult student;
3. The adult student is certified, according to the following procedures, as unable to provide informed consent. Any adult student who is found eligible for special education pursuant to this chapter 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 matters described in this chapter and to exercise rights related to the student's scholastic record. An educational representative may be appointed based on the following conditions and procedures:
 - a. Two professionals (one from list one and one from list two, as set out in the following subdivisions,) shall, based on a personal examination or interview, certify in writing that the adult student is incapable of providing informed consent and that the student has been informed of this decision:
 - (1) List one includes (i) a medical doctor licensed in the state where the doctor practices medicine; (ii) a physician's assistant whose certification is countersigned by a supervising physician; or (iii) a certified nurse practitioner.
 - (2) List two includes (i) a medical doctor licensed in the state where the doctor practices medicine; (ii) a licensed clinical psychologist; (iii) a licensed clinical social worker; (iv) an attorney who is qualified to serve as a guardian ad litem for adults under the rules of the Supreme Court of Virginia; or (v) a court-appointed special advocate for the adult student.
 - b. The individuals who provide the certification in section 3a of this subsection may not be employees of the local educational agency 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 section, means that the individual is unable to:
 - (1) Understand the nature, extent and probable consequences of a proposed educational program or option on a continuing or consistent basis;
 - (2) 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) 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 calendar 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 why that time period was chosen.
- f. The adult student's ability to provide informed consent shall be recertified at any time that the previous certifications are challenged. Challenges can be made by the student or by anyone with a bona fide interest and knowledge of the adult student, except that challenges cannot be made by employees of local educational agencies. Challenges shall be provided in writing to the local educational agency's administrator of special education who then shall notify the adult student and current appointed representative.
 - (1) 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 subsection D of this section, for any purpose until a designated educational representative is affirmed by a court of competent jurisdiction;
 - (2) Upon receipt of a written challenge by anyone with a bona fide interest and knowledge of the adult student, the local educational agency may not rely on an educational representative, appointed pursuant to subsection D of this section for any purpose until a more current written certification is provided by the appointed educational representative. Certifications provided after a challenge are effective for 60 calendar 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; or
- 4. The adult student, based on certification by written order from a judge of competent jurisdiction, is admitted to a facility for the training, treatment and habilitation of persons with intellectual disabilities in accordance with § 37.2-806 of the Code of Virginia. The state-operated program serving the adult student may rely on the judicial certification and appoint an educational representative to act on the student's behalf during the student's

stay at the state-operated program.

- D. If the local educational agency receives written notification of the action in subdivision C 3 of this section or if the state-operated program receives the judicial certification in subdivision C 4 of this section, the local educational agency shall designate the parent(s) 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).
1. If the parent(s) or adult spouse is not available and competent to give informed consent, the administrator of special education or designee shall designate a competent individual from among the following:
 - a. an adult brother or sister;
 - b. an adult aunt or uncle;
 - c. a grandparent.
 2. If no family member from the previous categories is available and competent to serve as the adult student's educational representative, then a person trained as a surrogate parent shall be appointed to serve as the educational representative by the local educational agency.

APPENDICES

- A. Sample Notice of Transfer of Rights to Students with Disabilities Who Reach the Age of Majority**
- B. Sample Specific Power of Attorney for Educational Decisions Made Under the *Individuals with Disabilities Education Act***
- C. Sample Certification Form of the Inability of a Student to Provide Informed Consent for Education Decisions Made Under the *Individuals with Disabilities Education Act***

APPENDIX A

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 # _____

APPENDIX B

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 }

}

ToWit:

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.

APPENDIX C

Sample Certification Form of the Inability of a Student to Provide Informed Consent 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 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. 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.

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 evaluator personally evaluating the Student: _____;
3. Professional degree or license that entitles the evaluator to make this determination: (Circle One - See *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 informed consent 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*** (**circle one**) 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 degenerative, irreversible or perpetual given the present state of medical science, as known by the Evaluator)

I am familiar with the Special Education procedures pertaining to informed consent for educational decisions made under the Individuals with Disabilities Education Act. I understand those procedures and have completed this evaluation form based on the guidelines set forth in the Procedure.

Signature of Evaluator _____ Date _____

Title of Evaluator _____

Address of Evaluator _____

Witness _____

Address of Witness _____

