

Conditional Surrogate Parent Appointments

Oregon Department of Education
Office of Enhancing Student Opportunities

DRAFT DOCUMENT – PRELIMINARY VERSION FOR REVIEW

This document is a working draft and does not constitute official agency guidance. It is being shared for feedback purposes to refine content before final release.

DISCLAIMER: This document is intended solely for informational purposes and provides guidance to support implementation of relevant federal and state authorities. School districts retain discretion in how they implement federal and state requirements based on individual student circumstances and local context. Districts are encouraged to seek legal counsel to ensure compliance with state and federal law.

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Section 1: Start Here

What is a Conditional Surrogate Parent?

A conditional surrogate parent is someone appointed to make educational decisions for an adult student **only during specific periods** when the student’s ability to provide informed consent is temporarily impaired. Unlike a full surrogate appointment — where the surrogate has ongoing authority — a conditional surrogate’s authority **activates** and **deactivates** based on pre-established criteria that the student helped develop and agreed to.

This arrangement exists for adult students who experience changes in their capacity: times when they can provide informed consent to their educational decisions, alternating with times when they cannot. A conditional surrogate preserves the student’s decision-making authority during periods of capacity while ensuring someone is there to protect their rights during periods when they need support.

Is This Document For You?

Use this guidance if you are:

- An IEP team member considering whether an adult student needs decision-making support beyond what supported decision-making can provide
- A special education administrator implementing conditional surrogate arrangements in your district
- A case manager working with an adult student who cannot always provide informed consent to their educational program
- A staff member who may be involved in activation determinations
- A potential conditional surrogate seeking to understand the role

The Five Foundational Principles

OAR 581-015-2325(9) establishes five principles that ground all determinations related to conditional surrogate appointments:

1. *Presumption of Capacity*

Adult students are presumed capable of making educational decisions. This presumption can only be overcome by clear evidence that the student cannot provide informed consent even with maximum supports.

2. *Supported Decision-Making First*

Before any surrogate appointment, consider whether supported decision-making strategies—such as additional processing time, plain language, visual aids, or trusted supporters—could enable the student to participate meaningfully in decisions.

3. *Student Voice and Self-Determination*

The conditional surrogate framework enhances, not replaces, student self-determination. The student consents to the arrangement, participates in developing criteria, and can revoke the arrangement at any time when they have capacity.

4. *Least Restrictive Alternative*

Use the least restrictive means necessary to ensure appropriate educational services. A conditional surrogate is less restrictive than a full surrogate because it preserves the student's authority during periods of capacity.

5. *Decision-Making Capacity is Context-Specific*

Capacity is not all-or-nothing. A student may have capacity for some decisions but not others, or in some contexts but not others. Capacity for educational decisions may differ from capacity for other life decisions.

Legal Framework

Federal Law: The Individuals with Disabilities Education Act (IDEA) requires states to establish procedures for appointing surrogate parents when parents cannot be identified or located (34 CFR § 300.519). Oregon has exercised its authority under 34 CFR § 300.520(a)(2) to establish procedures for adult students who cannot provide informed consent.

Oregon Administrative Rules:

- **OAR 581-015-2325** (Transfer of Procedural Rights at Age of Majority) establishes the framework and requirements for conditional surrogate appointments
- **OAR 581-015-2320** (Surrogate Parents) establishes qualifications, duties, and protections applicable to all surrogates

Section 2: Is a Conditional Surrogate Appropriate?

Quick Comparison: Full Surrogate vs. Conditional Surrogate

Aspect	Full Surrogate	Conditional Surrogate
Authority	Ongoing decision-making authority	Authority only during activation periods
Student capacity	Student cannot provide informed consent	Student can provide informed consent at times
Student consent	Student cannot consent to arrangement	Student must consent during a period of capacity
Activation	Automatic upon appointment	Requires specific triggering criteria to be met
Student rights between activations	Student does not retain decision-making authority	Student retains full decision-making authority
Duration	Until termination conditions are met	Episode-by-episode, with ongoing review

The Continuum of Decision-Making Supports

Conditional surrogate appointments exist on a continuum of supports. Consider whether a less restrictive approach could meet the student's needs.

Support Type	Who Decides	When to Consider
No formal support	Student decides independently	Student can make educational decisions without assistance
Informal supports	Student decides with advice	Student benefits from input from family or friends but makes own decisions
Supported Decision-Making	Student decides with structured support	Student needs help understanding options but can make final decisions with support
Conditional Surrogate	Surrogate decides during activation only	Student can decide sometimes but not always
Full Surrogate Parent	Surrogate decides ongoing	Student continuously lacks capacity to provide informed consent
Court-Appointed Guardian	Guardian decides	Legal guardian appointed through court protective proceeding

Decision Tree: Five Steps to Determine Appropriateness

This decision tree reflects the requirements established in OAR 581-015-2325 and can help IEP teams determine whether a conditional surrogate is appropriate for an adult student. Each district will apply these considerations based on the individual student's circumstances.

STEP 1: What is the specific concern about this student's decision-making?

Before considering any surrogate arrangement, identify the specific concern about the student's ability to provide informed consent.

Consider:

- What specific decisions has the student struggled with?
- What evidence suggests the student cannot provide informed consent?
- Is the concern about understanding, appreciation, reasoning, or expression of choice?
- Does the concern arise continuously or only at certain times?

Documenting specific observations (rather than general impressions) provides a foundation for the IEP team's determination.

⇒ **If there is no documented concern** → No surrogate needed. Continue current arrangements.

⇒ **If there is a documented concern** → Continue to Step 2.

STEP 2: Could Supported Decision-Making address this concern?

OAR 581-015-2325(3)(i) requires consideration of supported decision-making strategies before any surrogate appointment. The rule offers examples of strategies the IEP team may consider, including:

- Providing additional time for the adult student to process information and make decisions
- Using plain language, visual aids, or other communication supports
- Allowing trusted supporters chosen by the adult student to assist in understanding options
- Breaking complex decisions into smaller components
- Scheduling meetings at times when the adult student's capacity is typically at its highest level

IEP teams may identify other strategies based on the student's individual needs and circumstances.

- ⇒ **If supported decision-making could address the concern** → Implement and document SDM strategies. No surrogate appointment is needed. **END.**
- ⇒ **If supported decision-making alone cannot address the concern** → Continue to Step 3.

STEP 3: Does this student's capacity change over time?

Determine whether the student's capacity is:

- **Continuously impaired** → The student does not demonstrate capacity to provide informed consent, even with supported decision-making → Consider **full surrogate appointment** under OAR 581-015-2325(2). **END this pathway.**
- **Changes** → There are identifiable periods when the student can provide informed consent, alternating with periods when they cannot → Continue to Step 4.
- **Generally present with occasional challenges** → The student generally has capacity but experiences occasional difficult periods → These may often be addressed with **accommodations** such as rescheduling meetings or additional preparation time. **END.**

Evidence that may inform this determination includes:

- Historical documentation showing variation in the student's ability to participate
- Medical or mental health records documenting episodic conditions
- Treatment provider input about patterns
- Student self-report
- Family or caregiver observations

The IEP team, which knows the student best, makes this determination based on all available information.

⇒ **If capacity changes** → Continue to Step 4.

STEP 4: Can the IEP team identify patterns or circumstances that affect capacity?

OAR 581-015-2325(3)(d) requires that the IEP team “document specific patterns or circumstances that predictably affect the adult student’s decision-making capacity.”

The specificity of patterns will vary based on the student’s individual circumstances. Some students may have clearly predictable medical patterns; others may have situational or environmental factors that are observable but less medically defined.

Examples of documented patterns (these are illustrative, not prescriptive):

- During acute psychiatric hospitalizations
- Following certain medical events
- When specific environmental stressors occur
- During documented periods identified through assessment or observation

The key is that patterns must be:

- Based on this student’s documented experience or assessment
- Observable by school personnel or determinable through available information
- Specific enough to guide activation decisions

Each district and IEP team will define criteria based on what they know about the individual student.

- ⇒ **If the team cannot identify patterns specific enough to guide activation decisions** → A conditional surrogate may not be workable. Consider whether other supports would better serve this student. **END.**
- ⇒ **If the team can identify patterns** → Continue to Step 5.

STEP 5: Can the student consent to this arrangement?

OAR 581-015-2325(3)(b) requires that “the adult student must provide informed consent to the conditional arrangement during a period when the adult student is able to do so.”

This means:

- The student must understand what a conditional surrogate arrangement is
- The student must appreciate how it applies to their situation
- The student must voluntarily agree
- The student must be experiencing a period of capacity when they provide consent

The IEP team determines whether the student can provide this consent based on their knowledge of the student and observation of the student’s understanding.

- ⇒ **If the student CAN consent to the arrangement** → **Proceed with the conditional surrogate appointment process.** See Section 3.

- ⇒ If the student **CANNOT** consent even during periods when capacity is highest → A conditional surrogate is not appropriate because the foundational requirement cannot be met. Consider a **full surrogate appointment** instead. **END.**

Section 3: The Appointment Process at a Glance

Overview: 10 Steps from Identification to Implementation

Once the IEP team has determined that a conditional surrogate is appropriate, these steps provide an overview of the appointment process. The specific procedures and timeline may vary based on district practices and individual student circumstances.

Step	What Happens	Who
1	Identify the need	IEP team
2	Consider SDM	IEP team
3	Identify potential surrogate	Student + IEP team
4	Screen the surrogate	District
5	Obtain student consent	Case manager or designated staff
6	Develop activation criteria	Student + IEP team + surrogate
7	Develop deactivation criteria	Student + IEP team + surrogate
8	Hold IEP meeting	Full IEP team
9	Train surrogate and establish protocols	District
10	Implement and monitor	District + surrogate

Who May Serve as a Conditional Surrogate

OAR 581-015-2320(3) establishes that a surrogate parent must:

- **Not be an employee** of the school district, ODE, or any agency involved in the student's education or care
- **Be free of conflicts of interest** with the student
- **Have knowledge and skills** to ensure adequate representation in special education decisions

Additional considerations for conditional surrogates:

Districts may consider factors such as:

- The surrogate's availability to respond when activation occurs
- The surrogate's understanding of the role and activation criteria
- The surrogate's willingness to make decisions based on the student's known preferences
- The surrogate's ability to maintain appropriate communication with the school

Student preference: OAR 581-015-2325(3)(c) requires the district to consider "any indication of the adult student's preferences about who might serve as a surrogate parent."

Can a parent serve? Yes. OAR 581-015-2325(3)(a) specifies that when determining a surrogate is necessary, the district shall appoint the parent of an adult student or, if the parent is not available, not willing, or not able, another appropriate individual.

The IEP Meeting: Required Elements

The conditional surrogate arrangement is documented through the IEP process. OAR 581-015-2325(3)(d) allows this determination to be made “in any IEP meeting for the adult student.”

Required participants include those required for any IEP meeting, and districts should invite:

- The adult student (during a period of capacity)
- Proposed conditional surrogate
- Other IEP team members as appropriate to the student’s needs

The IEP team’s discussion typically addresses:

- The basis for determining a conditional surrogate is needed
- Evidence of supported decision-making consideration
- Evidence regarding capacity patterns
- Proposed activation criteria developed with the student
- Proposed deactivation criteria developed with the student
- Proposed surrogate’s qualifications
- Process safeguards (notification, review, dispute resolution)
- Documentation of student consent
- Review schedule

What Gets Documented

OAR 581-015-2325(8)(b) requires specific documentation. Districts typically document:

Required Element	What This Means
Basis for appointment	Why the team determined a conditional surrogate is necessary
Specific patterns or circumstances	The documented patterns that affect the student’s capacity
Activation criteria	When the surrogate’s authority activates
Deactivation criteria	When the surrogate’s authority ends
Student consent	Documentation that the student consented during a period of capacity
Surrogate identification	Who the surrogate is and evidence they meet qualifications
Process safeguards	How activation is determined; notification procedures; review process

Timeline Considerations

The timeline for establishing a conditional surrogate arrangement varies based on student circumstances and district procedures. Factors that may affect timing include:

- The student's current capacity to participate in the consent conversation
- Availability of potential surrogates
- Scheduling of IEP meetings
- Time needed to develop specific, individualized criteria

There is no requirement that this process be completed within a specific timeframe. Districts should move as quickly as appropriate while ensuring the student can meaningfully participate throughout.

What Happens After the Arrangement Is Established

Once the conditional surrogate arrangement is documented, **the arrangement is in place but not active.** The student continues to exercise their own decision-making authority.

Activation occurs only when the specific, documented criteria are met:

- The designated personnel determine that activation criteria are present
- The student is notified per the established protocol
- The conditional surrogate exercises decision-making authority
- Documentation is completed

Deactivation occurs when deactivation criteria are met, returning full authority to the student.

Review occurs at least annually per OAR 581-015-2325(8)(b)(3), and more frequently if requested by the student or if circumstances warrant.

Key Reminders

- ✓ **The rule establishes requirements; districts implement based on student circumstances.** How criteria are developed, how specific they need to be, and how the process unfolds will vary based on what the IEP team knows about the individual student.
- ✓ **Student consent is required.** The student must consent to this arrangement during a period when they have capacity.
- ✓ **Student preference matters.** Consider the student's preferences about who should serve as their conditional surrogate.
- ✓ **Documentation supports the arrangement.** Clear documentation of the basis, criteria, and process helps ensure the arrangement works as intended.
- ✓ **The student participates throughout.** The student helps develop criteria, consents to the arrangement, and participates in reviews.

Section 4: What Remains the Student's Right

Even during activation periods, the adult student retains fundamental rights that cannot be suspended or transferred to the conditional surrogate. These rights are grounded in the rule's foundational principles and in IDEA's protections for student autonomy and participation.

Rights That Never Transfer to the Conditional Surrogate

- **Right to meaningful participation:** When possible, the student participates in decisions that affect them, even during activation periods. The conditional surrogate's role is to ensure decisions are made—not to exclude the student from understanding or input.
- **Right to known preferences and values:** Decisions made during activation are guided by what the student would want, based on their known preferences, values, and previously expressed wishes. The surrogate is not making decisions according to the surrogate's judgment of what's "best"—they are following the student's direction.
- **Right to challenge activation:** If the student believes activation is not appropriate, they can request an IEP meeting to challenge the determination. The IEP team can reconsider whether the activation criteria are actually met.
- **Right to revoke the arrangement:** At any time when the student has capacity, they can end the conditional surrogate arrangement by providing notice to the district.
- **Right to be notified:** The student must be informed when the conditional surrogate's authority has been activated and when it has been deactivated.
- **Right to supported decision-making:** Even during activation, the surrogate should maximize the student's involvement in decision-making to the extent possible. The student is not removed from the process; they are supported within it.
- **Right to due process:** All standard special education procedural safeguards apply. The student (or their surrogate when activated) can request a due process hearing to resolve disputes.
- **Right to receive procedural safeguards notice:** The district must ensure the student receives notice of their rights under special education law, which must explain conditional surrogate appointment rights.

What Happens Between Activations

Between activation periods, the student has full decision-making authority. They are treated as the educational decision-maker, the same as any adult student without a conditional surrogate arrangement. The student can:

- Participate in and make decisions at IEP meetings
- Request changes to their IEP
- Request evaluations
- Approve or refuse special education services
- Request meetings with the IEP team

The conditional surrogate has no authority during these periods.

Civil Rights and Autonomy

The conditional surrogate arrangement protects the student's right to educational decision-making during periods when they lack capacity. It does not diminish the student's rights to:

- Have their disability respected and their needs addressed
- Participate in decisions about their education to the maximum extent possible
- Have their preferences considered in all decisions

- Live in the most integrated setting appropriate
- Receive a free appropriate public education

The arrangement is a tool for protecting these rights, not for overriding them.

Section 5: Key Roles At-A-Glance

School District Responsibilities

The school district bears primary responsibility for establishing and maintaining the conditional surrogate arrangement:

- **Screen and select** a qualified conditional surrogate (with consideration of student preference)
- **Ensure the student provides informed consent** to the arrangement
- **Develop clear activation and deactivation criteria** in consultation with the student and surrogate
- **Document the arrangement in the IEP** with required elements
- **Provide training** to the conditional surrogate and relevant staff
- **Establish communication protocols** so activation can be determined and executed reliably
- **Make activation determinations** according to established procedures and qualified personnel
- **Document all activations and deactivations** with required information
- **Monitor the arrangement** and ensure it is working as intended
- **Conduct at least annual reviews** of the need for the arrangement
- **Ensure the student is notified** when activation and deactivation occur

IEP Team Responsibilities

The IEP team, which includes the adult student, is responsible for the decision-making process:

- **Determine whether a conditional surrogate is appropriate** using the five-step decision tree
- **Document the basis** for the determination (what led the team to conclude a conditional surrogate is needed)
- **Ensure supported decision-making has been considered** and document the results
- **Document evidence of capacity** based on available information
- **Develop activation and deactivation criteria** in partnership with the student and proposed surrogate
- **Facilitate student consent** to the arrangement
- **Ensure adequate representation** of all perspectives and knowledge (e.g., service providers, family members, student advocates if applicable)
- **Include the student** meaningfully in the IEP meeting (they must be present and capable of participating)
- **Review the arrangement** at least annually and modify it if circumstances change

Conditional Surrogate Responsibilities

The conditional surrogate has specific responsibilities while serving in this role:

- **Exercise authority only when activation criteria are met** and no longer
- **Involve the adult student** in decision-making to the greatest extent possible, even during activation
- **Make decisions based on** the adult student's known preferences, values, and previously expressed wishes—not the surrogate's own judgment
- **Immediately cease exercising authority** when deactivation criteria are met or the student requests deactivation
- **Respond promptly** when notified that activation criteria are present
- **Maintain appropriate communication** with the school and, when possible, the student
- **Participate in training** provided by the district
- **Participate in the IEP team** during annual reviews and when the arrangement is modified
- **Document decisions** made during activation as required by the district

The surrogate's authority is limited to **educational matters during activation periods**. The surrogate has no authority outside of the documented activation periods.

Student Responsibilities

While the student is not responsible for managing the conditional surrogate arrangement, they have meaningful participation roles:

- **Provide informed consent** to the arrangement during a period of capacity
- **Participate in developing** activation and deactivation criteria
- **Communicate their preferences** about who should serve as the conditional surrogate
- **Participate in annual reviews** and request modifications if needed
- **Notify the school or surrogate** if they believe activation is not appropriate
- **Request deactivation** at any time when they have capacity
- **Participate in IEP meetings** to the extent they are able

Section 6: Red Flags (What NOT to Do)

This section highlights common misunderstandings or misuses of the conditional surrogate arrangement. These practices are inconsistent with the rule, the foundational principles, and best practice.

Do not activate the conditional surrogate because:

- **The student makes a decision the team disagrees with.** A student with capacity has the right to make decisions others consider unwise. Poor judgment is not the same as lack of capacity.
- **The student refuses to participate or is uncooperative.** Unwillingness to engage is not the same as inability to provide informed consent. Refusing to attend a meeting or refusing to accept recommendations does not meet activation criteria.

- **The student has a diagnosis or disability label.** Having a psychiatric diagnosis, intellectual disability, autism, or other disability does not automatically mean the student lacks capacity. Capacity must be assessed in relation to the specific decision at hand.
- **It would be more convenient for staff.** The arrangement exists to protect the student's rights, not to streamline IEP processes.
- **The student is on an involuntary psychiatric hold.** An involuntary hold addresses danger and safety concerns, not educational decision-making capacity. A student can be held involuntarily while still retaining capacity for educational decisions.

Do not base activation criteria on:

- "When the student is stressed or upset"
- "When the student has a bad day"
- "When the student refuses medication"
- "When the student does not comply with treatment recommendations"
- "When the student makes poor choices"
- "When the student exhibits challenging behaviors"
- Behavioral noncompliance without connection to decision-making capacity

Activation criteria must be tied to **demonstrated inability to provide informed consent** (inability to understand, appreciate, reason, or express a choice about educational decisions), not to emotional distress, behavioral challenges, or noncompliance with treatment or medications.

Do not use the conditional surrogate arrangement to:

- **Remove the student from IEP meetings.** The student participates in IEP meetings where their own education is discussed. Even during activation, the student's presence and input are expected.
- **Prevent the student from communicating their preferences.** The student's known preferences and values guide all decisions, including those made during activation.
- **Override the student's revocation.** If the student revokes the arrangement while they have capacity, the arrangement ends. The team cannot keep it in place against the student's wishes.
- **Extend the arrangement beyond documented periods.** If activation criteria are no longer being met, the arrangement must be deactivated. Do not continue activation because "we might need it again soon."

Be cautious if:

- **Activation criteria are vague.** Criteria like "whenever we think it's needed" or "when staff believe the student cannot decide" are too subjective to implement fairly.
- **The student was not involved in developing criteria.** The foundational principles require student voice and self-determination. If the student did not participate in developing criteria, the arrangement lacks legitimacy.

- **There is no written record of student consent.** The rule requires documented consent. “The student seemed okay with it” is not sufficient documentation.
- **Activations are frequent and continuous.** If the arrangement is activated most of the time, a full surrogate might be more appropriate. Or the criteria may be too broadly defined.
- **There is no clear deactivation plan.** Criteria for when authority ends must be as clear as criteria for when it begins.
- **No one is clearly designated to make activation determinations.** If it is unclear who determines when criteria are met, the arrangement cannot function reliably or fairly.