

# *Surrogate Parent Appointment for Students Lacking Capacity to Provide Informed Consent*

**DISCLAIMER:** This document is intended solely for informational purposes. Its use is not mandatory, and school districts are encouraged to seek legal counsel to ensure compliance with state and federal law.

## **Purpose and Overview of the Document**

This document aims to provide guidance for school districts and programs in Oregon regarding the transfer of educational rights at the age of majority for disabled adult students and adult students experiencing disability who may lack the capacity to provide informed consent regarding their education. It is intended to clarify the responsibilities of districts under federal and state law, and to offer best practices for ensuring that these students continue to have their educational interests represented. This guidance does not constitute legal advice and should not be considered definitive or legally binding. School districts are encouraged to consult with legal counsel to fully understand their obligations under the law.

## **Introduction**

When students reach the age of majority (18 years old in Oregon), all rights accorded to parents under the Individuals with Disabilities Education Act (IDEA) transfer to the student, unless they have had another adult appointed to make educational decisions through a protective proceeding as described in ORS Chapter 125. However, some disabled students and students experiencing disability may reach the age of majority without the capacity to provide informed consent regarding their educational program but will not have gone through the necessary processes for guardianship or a lesser restrictive alternative to guardianship to be in effect. This guidance outlines the procedures that the Oregon Department of Education (ODE) suggests districts follow in such cases to ensure that these students continue to have their educational interests represented.

## **Legal Framework: Federal and State Requirements**

Under 34 CFR § 300.520(b) and 20 U.S.C. § 1415(m)(2), states are required to establish procedures for appointing a representative for a student who has reached the age of majority but is unable to provide informed consent. Oregon Administrative Rules (OAR) 581-015-2320 and OAR 581-015-2325 address the procedures for appointing surrogate parents and the transfer of rights at the age of majority.

These rules establish a framework for appointing surrogate parents when necessary while promoting student autonomy and self-determination through supported decision-making practices.

## **Key Principles**

The rules and this guidance are premised on several key principles:

- **Presumption of Competence:** All students, regardless of disability, should be presumed capable of making their own decisions unless determined otherwise based on available data and information about the student and their circumstances.

## *Surrogate Parent Appointment for Students Lacking Capacity to Provide Informed Consent*

- **Self-Determination:** Every student has the right to direct their own life and make choices that impact their future. Self-determination involves having the attitudes, abilities, and opportunities to be the primary causal agent in one's life. Educational teams should recognize that developing self-determination skills is essential for all students and is associated with improved post-school outcomes. Supporting self-determination means honoring students' voices and choices while providing opportunities for them to practice making decisions about their education and future.
- **Supported Decision-Making:** Before appointing a surrogate, efforts should be made to support students in making their own decisions through appropriate accommodations and supports. Students can start practicing supported decision-making well before the age of majority, when rights will transfer. Over time, many students who may otherwise require a surrogate can learn to make supported decisions and provide their own informed consent to their educational program.
- **Dignity of Risk:** All students have the right to take reasonable risks, make mistakes, and learn from those experiences. Overprotection can inhibit growth and development. Educational teams should recognize that the opportunity to make choices—even imperfect ones—is essential for developing decision-making skills and self-determination. This principle acknowledges that avoiding all risk can be more harmful than allowing students to experience natural consequences within appropriate boundaries.
- **Student-Centered Approach:** Student preferences, interests, needs, and strengths must be central to all decision-making processes.
- **Least Restrictive Support:** Educational decision-making support should be provided in the least restrictive manner possible. If supported decision-making enables a student to provide informed consent to their educational program, a surrogate is not required. When a surrogate is required, that person should still use principles of supported decision-making to enable the student to make decisions to the maximum extent appropriate.

### **Determining Capacity to Make Educational Decisions**

Before appointing a surrogate parent or other representative, it must be determined whether the student has the capacity to provide informed consent about their educational program. According to OAR 581-015-2325, this determination should be made by the Individualized Education Program (IEP) team, which should include input from the student, parents, educational professionals, recent evaluations, and any other relevant information.

The IEP team must consider whether the student:

1. Has a disability;
2. Is unable to provide informed consent regarding their educational program due to their disability; and
3. Is not already subject to a court order designating another person to make educational decisions.

## *Surrogate Parent Appointment for Students Lacking Capacity to Provide Informed Consent*

In considering whether a student has the capacity to provide informed consent, the IEP team shall, at minimum, consider whether the student:

- Has any condition or circumstance that significantly interferes with their understanding of, and ability to participate meaningfully in, the IEP process, even with the use of supplementary aids and services; or
- Experiences any significant limitations in communicating their educational concerns, or expressing their preferences, interests, needs, or strengths regarding their IEP in a way that interferes with their ability to participate meaningfully in the IEP process, even with the use of supplementary aids and services.

Additional key considerations include:

- **Understanding Educational Information:** The student's ability to understand the nature and consequences of educational decisions, recognize their own educational strengths and needs, comprehend available options, and retain information for sufficient time to make decisions.
- **Communication of Decisions:** The student's ability to communicate decisions consistently across time and settings, express preferences, explain reasoning behind choices, and ask questions when needed, either verbally or through other means.
- **Evaluation of Options:** The student's ability to consider benefits and drawbacks of different options, relate decisions to personal goals, identify potential consequences, and adjust decisions when presented with new information.
- **Real-World Application:** Evidence of the student's decision-making in daily activities, application of learning from past experiences, ability to identify when help is needed, and advocacy for personal needs.
- **Age-appropriate transition assessment information** about the student's preferences, interests, needs, and strengths.

The **Determining Adult Student Capacity for Educational Decision-Making Sample Form** provides a structured approach to evaluating these considerations and should be used to guide the IEP team's determination.

Important notes:

- This determination can be made during any IEP meeting for the adult student. A separate meeting is not required unless requested by an IEP team member.
- Before determining that a student lacks capacity, the team should document all supplementary aids and services that have been provided to support the student's participation in educational decision-making and their effectiveness.
- The determination should not be based solely on any individual data point (including disability classification), but on the student's actual demonstrated capacity to make informed educational decisions.
- All determinations should be thoroughly documented with specific evidence supporting the team's conclusion, including direct observations of the student's decision-making in authentic contexts whenever possible.

### **Appointing a Surrogate Parent**

If the IEP team determines that the student is not able to provide informed consent with respect to their educational program and they have not had another adult appointed to make educational decisions through a protective proceeding as described in ORS Chapter 125, the school district must appoint a surrogate parent or another appropriate individual to represent the student's educational interests. The parent is to serve as the surrogate unless they are unavailable, unwilling, or unable to serve in this capacity.

#### **Eligibility to Serve as a Surrogate Parent**

The surrogate parent must have knowledge and skills that ensure adequate representation of the student's educational interests. Under OAR 581-015-2320, the school district must ensure that each person approved to serve as a surrogate:

- Is not an employee of the school district or the ODE or any other agency that is involved in the education or care of the student,
- Is free of any personal or professional interest that conflicts with representing the student's special education interests, and
- Has knowledge and skills that ensure adequate representation of the student in special education decisions.

#### **Selection Process**

In considering whether an adult is suitable to serve as surrogate parent, the school district must consider all of the following:

1. **Student Preferences:** Any indication of the adult student's preferences about who might serve as a surrogate.
2. **Parent Input:** If the parent is not appointed as the surrogate, any input from the parent about who might serve.
3. **Existing Relationships:** Whether the student has:
  - A pre-existing relationship with the proposed surrogate,
  - A history of positive interactions with the proposed surrogate, and
  - A demonstrated comfort in the presence of the proposed surrogate.
4. **Surrogate Qualifications:** Whether the other adult has:
  - Demonstrated an understanding of the responsibilities of a surrogate parent,
  - Demonstrated an understanding of and the willingness to apply the principles of supported decision-making for the benefit of the adult student, and
  - Demonstrated the capacity to reliably act to the benefit of the adult student.
5. **Disqualifying Factors:** Any factors listed in ORS 343.156, which prohibits individuals who have lost custody of a child through child welfare proceedings due to safety concerns, or who have had their parental rights terminated, from serving as educational surrogates for that child.

The district should give priority to appointing the student's parent as the surrogate parent unless they are unavailable, unwilling, or unable to serve in this capacity. If the parent is not appointed, the district should document the reasons and identify another individual who can fulfill this role.

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### **Responsibilities of the Surrogate Parent**

According to OAR 581-015-2320(7), the duties of the surrogate parent are to:

- Protect the special education rights of the [adult] student;
- Be acquainted with the student's disability and special education needs;
- Represent the student in all matters relating to identification, evaluation, IEP, and educational placement; and
- Represent the student in all matters relating to the provision of a Free Appropriate Public Education (FAPE).

### **Review and Termination**

The necessity of a surrogate parent must be reviewed at least every 365 days or when requested by the adult student or surrogate parent. This ensures that surrogate appointments do not continue unnecessarily when students develop capacity to make their own decisions.

### **Best Practices for Ensuring Representation of Student Interests**

#### **Early Planning**

Begin discussions about the potential need for a surrogate parent or representative well before the student reaches the age of majority. This allows time for appropriate assessments and decision-making. Families may not be prepared for the transition at 18 if the school does not begin planning for it early. Additionally, with early planning, many students will be able to learn to provide informed consent for their own educational program through earlier practice with decision-making.

#### **Supported Decision-Making**

Even when a surrogate is appointed, continue to use supported decision-making practices:

- Involve the student in all educational decisions to the maximum extent possible
- Use supported decision-making approaches to build student capacity
- Provide information in formats accessible to the student
- Allow adequate processing time for student input

#### **Clear Communication**

Clearly communicate with the student's family about the options available for representation and the process for appointing a surrogate parent. Early, repeated information through multiple channels can provide parents and families with the opportunity to make the best decisions for themselves.

#### **Documentation**

Maintain documentation of all decisions related to the determination of capacity and the appointment of a surrogate parent, including:

- Evidence considered in determining the student's capacity
- Supplementary aids and services provided to support student participation
- Student preferences regarding surrogate selection
- Rationale for surrogate selection decisions
- The consent of the appointed surrogate

### **Ongoing Review**

Regularly review the student's situation to determine if the appointment of a surrogate parent continues to be necessary or if changes in the student's circumstances might affect their capacity to make informed decisions.

### **Important Note on Guardianship Alternatives**

Families may have been told that full guardianship is the only option when they have concerns about their child's decision-making capacity. However, guardianship is just one option on a spectrum of supports, and might not be the least restrictive option. Schools should provide families with information about the full range of alternatives, including:

- **Supported Decision-Making Agreements:** Formal or informal arrangements where the student maintains their legal rights but receives support from trusted individuals to understand, make, and communicate decisions.
- **Surrogate Parent Appointment:** As outlined in OAR 581-015-2320, which applies specifically to educational decisions while preserving the student's autonomy in other areas.
- **Limited Power of Attorney:** The student can designate specific powers to a trusted person while maintaining control in other areas of their life.
- **Limited Guardianship:** If needed, courts can establish guardianship for specific domains only (e.g., financial, healthcare) while preserving the student's rights in other areas.

Early, thorough planning allows teams to identify the least restrictive options that provide appropriate support while maximizing the student's autonomy and self-determination. This approach aligns with the "dignity of risk" principle, recognizing that the opportunity to make choices, learn from mistakes, and grow in decision-making ability is essential to human development.

### **Frequently Asked Questions**

#### **General Questions**

##### **Q: When do educational rights transfer to students?**

A: In Oregon, educational rights transfer to all students when they turn 18 (the age of majority), unless a court has determined otherwise.

##### **Q: Does having a disability automatically mean a student needs a surrogate?**

A: No. All students, regardless of disability, should be presumed capable of making their own decisions unless determined otherwise through the IEP team. Most disabled students and students experiencing disabilities can make their own educational decisions, with or without support.

##### **Q: What is the difference between guardianship and surrogate appointment?**

A: Guardianship is a legal process through the court system that may remove many or all decision-making rights from an individual. A surrogate appointment is specific only to educational decisions,

preserves the student's rights in all other areas, does not require court involvement, and can be reversed as the student's ability to provide informed consent develops.

### **Determining Capacity**

**Q: Who decides if a student can provide informed consent?**

A: The IEP team (which includes the student, parents, and educators) makes this determination based on assessment data, observations, and input from all team members.

**Q: If a student is determined to lack capacity now, is that permanent?**

A: No. The determination must be reviewed at least annually and can be reviewed earlier at the request of a member of the IEP team. Many students develop decision-making capacity over time, especially with appropriate supports and practice.

**Q: Does the IEP team need to hold a separate meeting just to determine capacity?**

A: No. This determination can be made during any IEP meeting for the adult student. A separate meeting is not required unless requested by an IEP team member.

### **Appointing Surrogates**

**Q: Who can serve as a surrogate parent?**

A: Priority is given to the student's parent unless they are unavailable, unwilling, or unable to serve. Otherwise, it could be another adult who has a positive relationship with the student, understands surrogate responsibilities, and can reliably act to benefit the student.

**Q: Can school district employees serve as surrogate parents?**

A: No. Under OAR 581-015-2320, district employees or employees of any agency involved in the education or care of the student cannot serve as surrogates.

**Q: Does the student have any say in who becomes their surrogate?**

A: Yes. The student's preferences about who might serve as surrogate must be considered in the selection process.

### **Implementation**

**Q: What documentation is required for surrogate parent appointments?**

A: Districts should document the determination of capacity process, evidence considered, supports provided, student preferences for surrogate selection, rationale for selection decisions, and the consent of the appointed surrogate.

**Q: If a student already has a court-appointed guardian, is a surrogate needed?**

A: No. If a court has already appointed a guardian with authority over educational decisions, that



guardian has the legal authority to make educational decisions, and no surrogate appointment is needed.

**Q: What should we do if a student challenges the determination that they lack capacity?**

A: The student has the right to challenge this determination. If they do so, the IEP team should review the results of the determination in light of the student's request. Following the determination, the district should provide the student with written notice explaining the determination, the evidence supporting the decision, and the process for filing a state complaint to formally challenge the decision. The district should also take steps to ensure that the student understands all of this information in a manner consistent with the student's unique circumstances.

### **Supported Decision-Making**

**Q: What is supported decision-making?**

A: Supported decision-making is an approach where disabled individuals and individuals experiencing disabilities maintain their decision-making authority but receive support from trusted people to understand, make, and communicate choices. This support can include explaining options in accessible language, helping weigh advantages and disadvantages, or assisting with communication.

**Q: How can we implement supported decision-making before a student turns 18?**

A: As early as possible, provide students with opportunities to practice making decisions about their education, involve them meaningfully in IEP meetings, teach decision-making skills explicitly, and gradually increase decision-making responsibilities as appropriate. Often, transition aged students may have measurable annual IEP goals related to development of decision-making skills.

**Q: Does supported decision-making have to be a formal arrangement?**

A: No. While formal supported decision-making agreements exist in some states, effective supported decision-making can happen informally through established relationships with trusted individuals who help the student understand and communicate decisions. However, a formal supported decision-making agreement can always be developed.

**Q: If a surrogate is appointed, does the student still participate in decisions?**

A: Yes. Even when a surrogate is appointed, the student should continue to be involved in all educational decisions to the maximum extent possible. The surrogate should use supported decision-making approaches to build the student's capacity and honor their preferences.