

What if my child is not capable of representing themselves? Guardianship may be needed

Takeaways from this handout

- Some students may not be capable of managing their educational rights.
- It is important to know your state's laws about guardianship.
- A person under guardianship is considered to be legally incompetent.

Age of majority

"Age of majority is the legal age established under state law at which an individual is no longer a minor, and as a young adult, has the right and responsibility to make certain legal choices that adults make." (NCSET Parent Brief: Age of Majority 2002).

If a state allows **transfer of rights at the age of majority**, the Individuals with Disabilities Education Act (IDEA) requires at least a one-year notice to parents and students before a student reaches the age of majority. This notice alerts families to consider whether or not their child is capable of representing themselves. Some students may not be able to recognize when a decision needs to be made, consider possible options, or recognize the consequences of their decisions without additional support. In the Individualized Education Program (IEP) meetings where the transfer of student's rights at the age of majority is discussed, there may be a need for information about guardianship, especially if there is uncertainty about whether a student is capable of making their own educational decisions.

Guardianship or conservatorship

Obtaining guardianship or conservatorship for a person requires:

- A petition to be filed with a court saying that the person needs such an arrangement
- A court hearing on the case
- Annual reports filed with the court regarding the status of the arrangement

The petition for guardianship or conservatorship often involves numerous complicated forms although it is usually not required that an attorney be involved. Many parents do use an attorney who specializes in this area. While having an attorney is not required, having support from a professional who specializes in disability law may be important. Information about finding an attorney or other appropriate person may be obtained in each state from the federally mandated Protection and Advocacy and Client Assistance Program (P&A/CAP) at: <http://www.ndrn.org/index.php>.

Under guardianship, a person is considered to be *legally incompetent*. The individual loses the authority to make all decisions granted to adults. A person called the “guardian” is assigned by the court to make these decisions. The guardian is usually a parent. The person under guardianship is sometimes legally referred to as a “ward.”

Some states (not all) have a legal process to determine if a student who receives special education services and has reached the age of majority continues to need help in planning their IEP.

- Students may not necessarily have the ability to provide informed consent to their educational program even though they have **not** been determined to be incompetent.
- Such states have a mechanism to determine that a student with a disability, who has reached the age of majority under state law and has not been determined incompetent, still does not have the ability to provide informed consent with respect to their educational program.
- In such cases, the state establishes procedures for appointing the parent. If the parent is not available, another appointed individual can represent the educational interests of the student throughout the student’s eligibility under IDEA.
- It is important to know your state’s laws.

If your state does not have a legal process such as this, guardianship, conservatorship, or another form of representation may be appropriate. To find out about the laws about guardianship in your state, contact the Social Security Administration <https://secure.ssa.gov/poms.nsf/lnx/0200502300> or Bridging Refugee Youth and Children’s Services - Refugee portal <https://brycs.org/refugee-portal>.

Many states also offer *limited guardianship*, sometimes called *conservatorship*. People who are granted conservatorship for another individual are assigned limited decision-making responsibility based on the individual’s needs. These responsibilities are carefully outlined in a court order. Conservatorship is designed to allow a person to retain as many of their rights as possible. A person under conservatorship is not considered to be legally incompetent. They retain as many rights as deemed appropriate by the court. Different people have different limitations under conservatorship, depending on their individual vulnerabilities.

Another approach to decision making now being studied under a federal grant, is supported decision making. This concept is based on working with friends and family members to make decisions with help for those with disabilities. Sometimes, this would involve granting power of attorney and advanced direction to aid in specifics of decision making with the individual with a disability.

Informed choice: Know your options

In some states, there may be additional laws and procedures that allow for a lesser determination of competency for specific purposes, such as competency for providing informed consent with respect to the individual’s educational program. Under state procedures, if the parent is not available, a guardian or surrogate could be an appropriate individual to represent the educational interests of the student (34 CFR § 300.19).

Guardianship, and to a lesser extent conservatorship, severely limits an individual’s right to make independent decisions and should only be considered when there is no less restrictive alternative. For more information concerning guardianship in your state, contact your Parent Training and Information Center: <http://www.parentcenterhub.org/find-your-center>.