

**MEMORANDUM**

**TO:** Members, Utah State Board of Education

**FROM:** Angie Stallings, Associate Superintendent  
Ben Rasmussen, UPPAC Director

**DATE:** April 14-15, 2016

**ACTION:** *R277-752 Adult Students with Disabilities and Informed Consent (New)*

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**Background:**

On March 18, 2016, the Board approved R277-752 as a 120 Day (Emergency) Rule to comply with 20 USC 1415(M)(2) in the IDEA. The 120 Day (Emergency) Rule will lapse on July 16, 2016 unless adopted through the regular rulemaking process within 120 days. It is therefore necessary to process R277-752 as a new rule through the regular rulemaking process.

The purpose of R277-752 is to provide a process for when a student with a disability, (1) reaches the age of majority (age 18), (2) there is no guardianship or power of attorney, and (3) a parent or other interested person is concerned that the student with a disability lacks the ability to provide informed consent to participate in the educational activity(ies), e.g., IEP team meeting. This rule provides a process so the parent or other interested person can be appointed as an educational representative if two professionals determine and certify that the adult student with a disability lacks the ability to provide informed consent.

**Board Strategic Plan:**

This item supports the following imperative and strategies in the Board's Strategic Plan:  
Oversight - Monitor, review, and provide general supervision to all public education institutions and other entities for which the State Board has responsibility.

**Anticipated Action:**

It is proposed the Law and Licensing Committee consider approving R277-752 on first reading, and, if approved by the Committee, the Board consider approving R277-752 on second reading.

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1 **R277. Education, Administration.**

2 **R277-752. Adult Students with Disabilities and Informed Consent.**

3 **R277-752-1. Authority and Purpose.**

4 (1) This rule is authorized by:

5 (a) Utah Constitution Article X, Section 3, which vests general control and  
6 supervision of public education in the Board;

7 (b) Subsection 53A-1-402(1)~~(e)~~, which directs the Board to adopt rules  
8 regarding services to students with disabilities;

9 (c) Section 53A-1-401, which allows the Board to make rules to execute the  
10 Board's duties and responsibilities under the Utah Constitution and state law;

11 (d) the Individuals with Disabilities Education Act, 20 U.S.C. 1415(m)(2); and

12 (e) 34 CFR 300.520(b).

13 (2) The purpose of this rule is:

14 (a) to adopt procedures for determination of an adult student's ability to make  
15 informed consent in the [activities for the adult](#) student's educational program;

16 (b) to adopt procedures for appointing, [by order of priority](#), a [spouse](#), parent, ~~[~~  
17 ~~[of an adult student with a disability, or if a parent is not available and willing, a](#)~~  
18 ~~[former](#)]~~ surrogate parent, or another appropriate individual to represent the  
19 educational interests of the adult student with a disability ~~[throughout the]~~[for a period](#)  
20 [of time recommended by the professionals, which may be up to a year, or IDEA](#)  
21 [eligibility, whichever ends first](#); and

22 (c) not to replace the other legal options for participating in the decision  
23 making process for an adult student with a disability's education program.

24 **R277-752-2. Definitions.**

25 (1) "Activity" means an activity for which informed consent is required by law,  
26 including:

27 (a) an IEP team meeting;

28 (b) additional testing;

29 (c) an independent education evaluation; or

30 (d) other due process procedure.

31 ~~[4]2~~ "Adult student with a disability" means:

32 (a) a student who has reached the age of majority; and  
33 (b) meets eligibility criteria for special education and related services, as  
34 defined in Board special education rules.

35 (~~2~~3) “Age of majority” means age 18 or over for a student with a disability  
36 who:

37 (a) has not been determined to be incompetent under state law; and

38 (b) does not have an effective power of attorney.

39 (~~3~~4) “Educational representative” means a person who:

40 (a) represents the educational interests of an adult student with a disability  
41 ~~[throughout the]~~for a period of time~~[- of IDEA eligibility]~~ recommended by  
42 professionals described in Subsection R277-752-4(3); and

43 (b) is appointed as described in Subsection R277-752-4(8).

44 (~~4~~5) “IEP team” means a group of individuals that is responsible for  
45 developing, reviewing, and revising an IEP for a student with a disability.

46 (~~5~~6) “Informed consent” means that an adult student with a disability, the  
47 adult student’s parent, or other appropriate individual~~[-has]:~~

48 (a) has all information relevant to the activity for which consent is sought in  
49 the adult student’s native language or other mode of communication;

50 (b) understands and agrees in writing to the carrying out of the activity for  
51 which the adult student’s consent is sought, and the consent describes that activity  
52 unless the records, if any, that will be released and to whom;

53 (c) understands that the granting of consent is voluntary on the part of the  
54 adult student and may be revoked at any time;

55 (d) understands that revocation is not retroactive, i.e., it does not negate an  
56 action that has occurred after the consent was given and before the consent was  
57 revoked;

58 (e) understands the revocation of consent for the adult student’s receipt of  
59 special education and related services must be in writing with the LEA providing  
60 accommodations to accomplish a revocation in writing; and

61 (f) understands the LEA is not required to amend the adult student’s  
62 educational records to remove any references to the adult student’s receipt of  
63 special education and related services because of the revocation of consent.

64 ([6]7) “LEA” includes, for purposes of this rule, the Utah Schools for the Deaf  
65 and the Blind.

66 ([7]8) “Notice of [F]transfer of [R]rights” means the notification an LEA [must]is  
67 required to provide to an adult student with a disability and the adult student’s parent  
68 when the adult student reaches the age of majority.

69 ([8]9) “Surrogate parent” means an individual formerly assigned to act as a  
70 parent for a student with a disability as required in Board special education rules.

71 **R277-752-3. Notice of Transfer of Rights.**

72 (1) An LEA shall provide a [N]notice of [F]transfer of [R]rights to both an adult  
73 student with a disability and either the parents, former surrogate parents,[-of]  
74 guardians of an adult student with a disability, or person holding a valid power of  
75 attorney, within a reasonable time after an adult student with a disability reaches the  
76 age of majority, but no less than 30 days before an adult student’s next annual IEP.

77 (2) A [N]notice of [F]transfer of [R]rights shall include:

78 (a) notice that an adult student with a disability has reached the age of  
79 majority causing the rights of parents, or former surrogate parents under the IDEA,  
80 to transfer to the adult student with a disability;[-and]

81 (b) a copy to the adult student with a disability the procedural safeguards; and

82 (c) a description of the rights transferred to an adult student with a disability  
83 based upon the LEA’s policy[:].

84 (3) Based upon LEA policy, a [N]notice of [F]transfer of [R]rights may include:

85 (a) options for an adult student with a disability and parents that may include:

86 (i) [limited-]power of attorney pursuant to Utah law;

87 (ii) guardianship pursuant to Utah law; or

88 (iii) a determination by two or more professionals’ written certification that the  
89 professional determined the adult student with a disability lacks the ability to provide  
90 informed consent with respect to the activities for the adult student’s education  
91 program pursuant to R277-752;

92 (b) copies of forms to facilitate options identified in Subsection [R277-752-  
93 3](3)(a), which may be [created]provided by the [Board’s office]Superintendent;

94 (c) links to resources; and

95 (d) any other information an LEA deems appropriate to assist the adult  
96 student with a disability and parent, former surrogate parent, ~~or~~ guardian, or person  
97 with a valid power of attorney.

98 **R277-752-4. Procedure for Determining Ability to Provide Informed Consent**  
99 **and Appointment of Educational Representative.**

100 (1) An adult student with a disability is presumed to be capable of making the  
101 adult student's own decisions.

102 (2) In accordance with the requirements of Subsection (3), the presumption  
103 in Subsection (1) is rebuttable if an adult student with a disability is determined by  
104 two or more professionals' written certification, to lack the ability to provide informed  
105 consent with respect to the activities for the adult student's educational program.

106 (3) To rebut the presumption~~;~~ as described in Subsection(2), at least one  
107 professional from each of the following two lists shall determine whether an adult  
108 student with a disability lacks the ability to provide informed consent with respect to  
109 the activities for the adult student's educational program:

110 (a) at least one of the following:

111 (i) a medical doctor licensed in the state where the doctor practices medicine;

112 (ii) a physician's assistant whose certification is countersigned by a  
113 supervising physician meeting the criteria specified in Subsection (3)(a)(i); or

114 (iii) a certified nurse practitioner; and

115 (b) at least one of the following:

116 (i) a licensed clinical psychologist;

117 (ii) a licensed clinical social worker;

118 (iii) an attorney who is qualified to serve as a guardian ad litem for adults; or

119 (iv) a court-appointed special advocate for the adult student with a disability.

120 (4) A written certification described in Subsection (2) shall include at least the  
121 following:

122 (a) name of the adult student with a disability being evaluated;

123 (b) name of the professional examining, observing, or interviewing the adult  
124 student with a disability;

125 (c) professional degree or license that demonstrates that the professional

126 qualifies to make the determination and certification;

127 (d) statements that demonstrate the professional's determination:

128 (i) is based upon personal examination, observation, or interview of the adult

129 student with a disability as necessary to determine the [adult](#) student's ability or lack

130 thereof to provide an informed consent with respect to the [adult](#) student's

131 educational program;

132 (ii) is supported by specific factual information or data obtained in the

133 personal examination, observation, or interview of the adult student with a disability;

134 (iii) that the adult student with a disability lacks the ability to provide an

135 informed consent with respect to the [adult](#) student's education program;

136 (iv) that the professional informed the adult student with a disability of the

137 professional's determination verbally or in writing; [and](#)

138 (v) of how often a review of the adult student with a disability's lack of ability

139 to provide informed consent shall be made, and why, but which may not be less than

140 annually;

141 (e) a declaration that the professional has read and understands:

142 (i) all parts of the determination process; and

143 (ii) the professional's duty to determine the adult student with a disability's

144 ability to provide informed consent with respect to the [activities for the adult](#) student's

145 educational program under the IDEA, based~~[;]~~ upon examination, observation, or

146 interview of the adult student with a disability;

147 (f) the signature of the professional;

148 (g) the title of the professional;

149 (h) the address and email of the professional;

150 (i) the phone number of the professional;

151 (j) a witness's signature;

152 (k) the witness's address or email; and

153 (l) the witness's phone number.

154 (5) A professional who provides a written certification described in Subsection

155 (2) may not:

156 (a) be an employee of the LEA currently serving the adult student with a

157 disability; or

158 (b) be related by blood or marriage to the adult student with a disability.

159 (6) A professional determination certifying an adult student with a disability ~~is~~  
160 ~~incapable of~~ lacks the ability to provide ~~ing~~ informed consent to the activities for the  
161 adult student's educational program may be made:

162 (a) as early as 60 calendar days prior to the adult student with a disability's  
163 age of majority; or

164 (b) within a reasonable time for the parent, former surrogate parent, or other  
165 appropriate individual to represent the educational interests of the adult student with  
166 a disability ~~by participating in the annual IEP meeting~~.

167 (7) An individual who seeks to have a determination and certification made  
168 by two or more professionals as described in ~~this~~ Section R277-752-3 shall:

169 (a) ~~be responsible to~~ pay the costs for the professional's examination,  
170 observation, or interview of the adult student with a disability; and

171 (b) at least 10 days before the activity for which consent is sought, provide the  
172 professional determinations and certifications to:

173 (i) the LEA; and

174 (ii) anyone with priority as described in Subsection (8) ~~at least 10 days~~  
175 ~~before the IEP meeting~~.

176 (8) Upon receiving two or more professional certifications of determination  
177 that an adult student with a disability lacks the ability to provide informed consent  
178 with respect to the adult student's education program, the LEA shall appoint an  
179 educational representative in the following order:

180 (a) first, the spouse of an adult student with a disability if married;

181 (b) if there is no spouse or the spouse is unavailable or unwilling, then the  
182 parents of the adult student with a disability;

183 (c) if the parents are unavailable or unwilling, then a former surrogate parent;  
184 or

185 (d) if there is no former surrogate parent or the former surrogate parent is  
186 unavailable or unwilling, then another appropriate individual under the  
187 circumstances.

188 (9)(a) Recertification of an adult student with a disability's inability to provide  
189 informed consent shall occur at least 45 days before the annual IEP team meeting

190 where the adult student with a disability's educational program activities will be  
191 discussed and consented to for the next year.

192 (b) The recertification process shall consist of all requirements as set forth in  
193 these procedures for certification.

194 (10) A professional's determination and certification[;] or the LEA's  
195 appointment of an educational representative may be challenged by one of the  
196 following individuals subject to the following priority:

197 (a) a court appointed guardian;

198 (b) the adult student with a disability;

199 (c) the spouse of the adult student with a disability;

200 (d) a parent of the adult student with a disability;

201 (e) the nearest living relative of the adult student with a disability;

202 (f) a person who:

203 (i) is seeking guardianship of the adult student with a disability; and

204 (ii) has provided a copy of the guardianship documents filed in court; or

205 (g) any individual with a bona fide interest in and knowledge of the adult  
206 student with a disability's ability to consent to the activities for the adult student's  
207 educational program.

208 (11)(a) A challenge to a professional determination and certification or the  
209 LEA's appointment of an educational representative shall be provided in writing to  
210 the LEA.

211 (b) If a person making a challenge is unable to provide the challenge in  
212 writing, an LEA shall:

213 (i) obtain information related to the challenge described in Subsection (11)(a)  
214 from the person making the challenge; and

215 (ii) complete the written challenge for the person.

216 (c) If a person making a challenge described in Subsection (11)(a) uses  
217 alternative communication, an LEA shall reasonably accommodate the person to  
218 obtain the challenge in writing.

219 (12) Upon receiving a challenge described in Subsection (11)[(a)], an LEA  
220 shall provide the following to the adult student with a disability and the adult student's  
221 educational representative:

- 222 (a) a copy of the challenge described in Subsection (11); and  
223 (b) notice of action the LEA will take, which may include:  
224 (i) the transfer of all educational rights back to the adult student with a  
225 disability;  
226 (ii) holding an IEP meeting for the purpose of compliance with IDEA with the  
227 adult student with a disability and the individual with priority described in Subsection  
228 (10); or  
229 (iii) any other action the LEA will take while the challenge is resolved through  
230 the process set forth in Board special education rules.

231 **R277-752-5. Applicability of Rule to Adult Students with Disabilities.**

- 232 (1) This rule only applies if:  
233 (a) the presumption that an adult student with a disability is capable of making  
234 the adult student's own decisions is rebutted as set forth in R277-752-4;~~and~~  
235 (b) the adult student with a disability has not been determined to be  
236 incompetent by a court~~;~~; and  
237 (c) there is no valid general power of attorney or specific power of attorney  
238 that grants authority to represent the educational interests of the adult student with  
239 a disability to provide informed consent in the activities for the adult student with a  
240 disability's educational program.  
241 (2) This rule does not apply if:  
242 (a) there is a valid ~~limited~~ power of attorney, that is signed by the adult  
243 student with a disability and a parent or other appropriate individual, ~~to~~that either  
244 generally or specifically allows the parent or other appropriate individual to represent  
245 the educational interests of the adult student with a disability throughout the IDEA  
246 eligibility period that complies with the requirements of Utah law; or  
247 (b) there is a court-issued guardianship decree ~~that provides~~that includes  
248 either general or specific ~~the guardian will~~authority to an individual to represent the  
249 educational interests of the adult student with a disability throughout the IDEA  
250 eligibility period.

251 **KEY: special education**

252 **Date of Enactment of Last Substantive Amendment: March 18, 2016**  
253 **Authorizing, and Implemented or Interpreted Law: Art X Sec 3; 53A-1-402(1)(c);**  
254 **53A-1-401; 20 U.S.C. 1415(m)(2); 34 CFR 300.520(b)**