

MEMORANDUM

TO: Members, Utah State Board of Education

FROM: Angie Stallings, Associate Superintendent

DATE: May 12-13, 2016

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

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.

The Committee reviewed R277-752 in April and directed staff to collect additional feedback and bring the rule back to the Committee in May.

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 Significant 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 over 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 C.F.R. § 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 when
16 the student's disabilities significantly impact ability;

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

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

25 **R277-752-2. Definitions.**

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

28 ~~—— (a) an IEP team meeting;~~

29 ~~—— (b) additional testing;~~

30 ~~_____ (c) an independent education evaluation; or~~
31 ~~_____ (d) other due process procedure.]~~
32 ~~(1)(2)1~~ “Adult student with a significant disability” or “adult student” means:
33 (a) a student who has reached the age of ~~[majority; and]~~ 18 or over;
34 (b) meets eligibility criteria for special education and related services, as
35 defined in Board special education rules~~[-]; and~~
36 (c) has a significant disability.
37 ~~[(2)(3)2] “Age of majority” means age 18 or over for a student with a disability~~
38 who:
39 ~~_____ (a) has not been determined to be incompetent under state law; and~~
40 ~~_____ (b) does not have an effective power of attorney.]~~
41 (2) “Educational activity” means the identification, evaluation, or educational
42 placement of a student or a provision of a FAPE to a student.
43 ~~(3)(4)3~~ “Educational representative” means a person who:
44 (a) is familiar with and represents the educational interests of an adult
45 student with a significant disability ~~[throughout the]~~for a period of time~~[-of IDEA~~
46 ~~eligibility]~~~~[-recommended by professionals]~~ described in Subsection R277-752-
47 ~~[4(3)]6(9)~~; and
48 (b) is appointed as described in Subsection R277-752-4(8).
49 ~~(4)(5)4~~ “IEP team” means a group of individuals that:
50 (a) is responsible for developing, reviewing, and revising an IEP for an adult
51 student with a significant disability; and
52 (b) meets the criteria required in 34 C.F.R. § 300.321.
53 ~~(5)(6)5~~ “Informed consent” means that an adult student with a significant
54 disability, the adult student’s parent, or other appropriate individual~~[-has]~~:
55 (a) has all information relevant to the activity for which consent is sought in
56 the adult student’s native language or other mode of communication;
57 (b) understands and agrees in writing to the carrying out of the activity for
58 which the adult student’s consent is sought, and the consent describes that activity
59 unless the records, if any, that will be released and to whom;

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

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

65 (e) understands the revocation of consent for the adult student's receipt of
66 special education and related services must be in writing with the LEA providing
67 accommodations to accomplish a revocation in writing; and

68 (f) understands the LEA is not required to amend the adult student's
69 educational records to remove any references to the adult student's receipt of
70 special education and related services because of the revocation of consent.

71 ([6][7]6) "LEA" includes, for purposes of this rule, the Utah Schools for the
72 Deaf and the Blind.

73 (7) "LEA representative" means a representative of an LEA who:

74 (a) is qualified to provide or supervise the provision of specially designed
75 instruction to meet the unique needs of students with disabilities;

76 (b) is knowledgeable about the general education curriculum; and

77 (c) is knowledgeable about the availability of the LEA's resources.

78 ([7]8) "Notice of [F]transfer of [R]rights" means the notification an LEA [must]is
79 required to provide to an adult student with a significant disability and the adult
80 student's parent when the adult student reaches the age of majority as described in
81 Section R277-752-3.

82 (9) "Significant disability" means a severe mental impairment which seriously
83 limits one or more functional capacities to make choices or engage in self-direction.

84 ([8][9]10) "Surrogate parent" means an individual [formerly]who is currently
85 assigned or who was previously assigned to act as a parent for an adult student with
86 a significant disability as required in Board special education rules.

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

88 (1) An LEA shall provide a [N]notice of [F]transfer of [R]rights to both an adult

89 student with a significant disability and either the parents, former surrogate parents,
90 ~~[or]~~ guardians of an adult student with a significant disability, or person holding a
91 valid power of attorney, within a reasonable time after an adult student with a
92 significant disability reaches the age of majority, but no less than 30 days before an
93 adult student's next annual IEP.

94 (2) A ~~[N]~~notice of ~~[T]~~transfer of ~~[R]~~rights shall include:

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

98 (b) a copy ~~[to the adult student with a disability]~~of the procedural safeguards;
99 ~~[and]~~

100 (c) a description of the rights transferred to an adult student with a significant
101 disability based upon the LEA's policy~~[:];~~;

102 ~~[(3) Based upon LEA policy, a [N]notice of [T]transfer of [R]rights may~~
103 ~~include:]~~

104 ~~[(a)d options for appointing an educational representative~~ for an adult student
105 with a significant disability and parents that ~~[may]~~shall include:

106 (i) ~~[limited]~~power of attorney pursuant to Utah law;

107 (ii) guardianship pursuant to Utah law; or

108 (iii) a determination by two or more professionals' written certification that the
109 professional determined the adult student with a significant disability lacks the ability
110 to provide informed consent with respect to the educational activities for the adult
111 student's education program pursuant to R277-752-6;

112 ~~[(b)e] copies of forms to facilitate options identified in Subsection [R277-752-~~
113 ~~3](3)(a), which may be [created]provided by the [Board's office]Superintendent;~~

114 ~~[(e)f] links to resources; and~~

115 ~~[(d)g] any other information an LEA deems appropriate to assist the adult~~
116 student with a significant disability and spouse, parent, ~~[former]~~surrogate parent, ~~[or~~
117 ~~]guardian, or person with a valid power of attorney.~~

118 (3) Notwithstanding the requirements of Subsections (1) and (2), an LEA will

119 not be considered to be in violation of the requirement to provide FAPE if the LEA
120 does not take action pursuant to Section R277-752-5.

121 **R277-752-4. Adult Student Rights to Provide Informed Consent to Educational**
122 **Activities.**

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

125 (2) An adult student with a significant disability shall be afforded the
126 opportunity to share decision making, receive support in decision making or delegate
127 decision-making without professional determination.

128 (3) A parent or an individual may not use the process described in Section
129 R277-752-6 to undermine an adult student with a significant disability's decisions
130 regarding the student's educational program.

131 **R277-752-5. Adult Student Options to Demonstrate Informed Consent.**

132 (1)(a) Before initiating a procedure to determine that an adult student with a
133 significant disability lacks the ability to provide informed consent as described in
134 Section R277-752-6, a member of the adult student with a significant disability's IEP
135 team shall make at least three documented attempts to obtain the adult student's
136 informed consent with respect to an educational activity using the adult student's
137 native language or other mode of communication consistent with IDEA § 300.503.

138 (b) If the adult student provides a clear response in Subsection (1)(a) or
139 clearly demonstrates the student's ability to provide informed consent:

140 (i) there is no need to make multiple attempts to obtain informed consent; or
141 (ii) follow the procedures described in Section R277-752-6.

142 (2) If an adult student doesn't respond, refuses to respond, or provides
143 inconsistent responses to the IEP team member's attempts described in Subsection
144 (1), the adult student's spouse, parent, a person currently serving as the student's
145 parent, a person who has served as a parent, or the LEA representative may:

146 (a) follow the procedures in Section R277-752-6 to:

147 (i) make a determination that the adult student does not have the ability to
148 provide informed consent with respect to the activities for the adult student's
149 educational program; and

150 (ii) appoint an educational representative to represent the educational
151 interests of the adult student with a significant disability with respect to the activities
152 for the adult student's educational program;

153 (b) seek a power of attorney pursuant to Utah law; or

154 (c) seek guardianship pursuant to Utah law.

155 **R277-752-~~4~~6. Procedure for Determining an Adult Student's Ability to Provide**
156 **Informed Consent and Appointment of Educational Representative.**

157 ~~[(1) An adult student with a disability is presumed to be capable of making the~~
158 ~~adult student's own decisions.~~

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

163 ~~[(3)1] [To rebut the presumption,]~~To make a determination that an adult
164 student with a significant disability does not have the ability to provide informed
165 consent as described in Subsection R277-752-5 (2)(a), ~~[after having consent of the~~
166 ~~adult student with a disability], after following the requirements of Section R277-752-~~
167 ~~5, at least ~~[one]two~~ professionals from~~[-each of]~~ the following~~[-two]~~ list[s] shall~~
168 ~~[determine whether]~~evaluate the adult student and provide a written certification of
169 the professional's determination that ~~[an]~~the adult student with a significant disability
170 lacks the ability to provide informed consent with respect to the educational activities
171 for the adult student's educational program:

172 ~~[(a) at least one of the following:]~~

173 ~~[(i)a]~~ a medical doctor licensed in the state where the doctor practices
174 medicine;

175 ~~[(ii)b]~~ a physician's assistant whose certification is countersigned by a

176 supervising physician meeting the criteria specified in Subsection (3)(a)(i);~~[-of]~~
177 ~~[(iii)c]~~ a certified nurse practitioner;~~[-and]~~
178 ~~[(b) at least one of the following:]~~
179 ~~[(i)d]~~ a licensed clinical psychologist;
180 ~~[(ii)e]~~ a licensed clinical social worker;
181 ~~[(iii)f]~~ an attorney who is qualified to serve as a guardian ad litem for adults;
182 or
183 ~~[(iv)g]~~ a court-appointed special advocate for the adult student with a
184 ~~significant~~ disability.
185 ~~(2) It is preferred that the written certifications described in Subsection (1)~~
186 ~~come from professionals from two different disciplines.~~
187 ~~(3) The evaluation of the adult student described in Subsection (1) shall be~~
188 ~~conducted by the professional within one year of the written certification.~~
189 ~~(4) A written certification described in Subsection (~~2~~1) shall include at least~~
190 the following:
191 ~~(a) name of the adult student with a significant disability being evaluated;~~
192 ~~(b) name of the professional examining, observing, or interviewing the adult~~
193 ~~student with a significant disability;~~
194 ~~(c) professional degree or license that demonstrates that the professional~~
195 ~~qualifies to make the determination and certification;~~
196 ~~(d) a description of the professional's relationship to the adult student with a~~
197 ~~significant disability prior to this determination;~~
198 ~~[(d)e]~~ statements that demonstrate the professional's determination:
199 ~~(i) is based upon personal examination, observation, or interview of the adult~~
200 ~~student with a significant disability as necessary to determine the adult student's~~
201 ~~ability or lack thereof to provide an informed consent with respect to the adult~~
202 ~~student's educational program;~~
203 ~~(ii) is supported by specific factual information or data obtained in the~~
204 ~~personal examination, observation, or interview of the adult student with a significant~~
205 ~~disability;~~

206 (iii) that the adult student with a significant disability lacks the ability to provide
207 an informed consent with respect to the adult student's education program;

208 (iv) that the professional informed the adult student with a significant disability
209 of the professional's determination verbally or in writing; and

210 (v) of how often a review of the adult student with a significant disability's lack
211 of ability to provide informed consent shall be made, and why, but which may not be
212 less than annually;

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

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

215 (ii) the professional's duty to determine the adult student with a significant
216 disability's ability to provide informed consent with respect to the activities for the
217 adult student's educational program under the IDEA, based~~;~~ upon examination,
218 observation, or interview of the adult student with a significant disability;

219 (f)g the signature of the professional;

220 (g)h the title of the professional;

221 (h)i the address and email of the professional;

222 (i)j the phone number of the professional;

223 (j)k a witness's signature;

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

225 (l)m the witness's phone number.

226 (5) A professional who provides a written certification described in Subsection
227 ~~(2)1~~ may not~~:~~

228 ~~— (a) be an employee of the LEA currently serving the adult student with a~~
229 ~~disability; or~~

230 ~~— (b) be related by blood, adoption, or marriage to:~~

231 (a) the adult student with a significant disability~~;~~; or

232 (b) any required member of the adult student's IEP team.

233 (6) A professional determination evaluating and certifying an adult student
234 with a significant disability ~~[is incapable of]~~ lacks the ability to provid~~ing~~e informed
235 consent to the activities for the adult student's educational program may be made:

236 (a) as early as 60 calendar days prior to the adult student with a **significant**
237 disability's age of majority; or

238 (b) within a reasonable time for the **spouse**, parent, former surrogate parent,
239 or other appropriate individual to represent the educational interests of the adult
240 student with a **significant** disability [~~by participating in the annual IEP meeting~~].

241 (7) An individual who seeks to have a determination and certification made
242 by two or more professionals as described in this **Section [R277-752-3]** shall:

243 (a) [~~be responsible to~~] pay the costs for the professional's examination,
244 observation, or interview of the adult student with a **significant** disability; and

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

247 (i) the LEA; and

248 (ii) anyone with priority **as** described in Subsection (8) [~~at least 10 days~~
249 ~~before the IEP meeting~~].

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

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

255 (b) if there is no spouse or the spouse is unavailable or unwilling, then the
256 parents of the adult student with a **significant** disability;

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

259 (d) if there is no former surrogate parent or the former surrogate parent is
260 unavailable or unwilling, then another appropriate individual under the
261 circumstances.

262 [~~(9)(a) Recertification of an adult student with a disability's inability to provide~~
263 ~~informed consent shall occur at least 45 days before the annual IEP team meeting~~
264 ~~where the adult student with a disability's educational program activities will be~~
265 ~~discussed and consented to for the next year.~~

266 ~~_____ (b) The recertification process shall consist of all requirements as set forth in~~
267 ~~these procedures for certification.]~~

268 (9) The determination that an adult student lacks the capacity to provide
269 informed consent remains in effect until:

270 (a) the adult student reaches age 22;

271 (b) the adult is no longer eligible for services under IDEA;

272 (c) the adult student has a power of attorney;

273 (d) someone is awarded guardianship over the student; or

274 (e) there is a successful challenge of the determination as described in
275 Section R277-752-7.

276 **R277-752-7. Appeal Process to Challenge a Determination that an Adult**
277 **Student Lacks the Ability to Provide Informed Consent.**

278 ([10]1) A professional's determination and certification[.] or the LEA's
279 appointment of an educational representative may be challenged by one of the
280 following individuals subject to the following priority:

281 ([b]a) the adult student with a significant disability;

282 ([a]b) a court appointed guardian;

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

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

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

286 (f) a person who:

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

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

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

292 ([11]2)(a) A challenge to a professional determination and certification of the
293 LEA's appointment of an educational representative shall be provided in writing to
294 the LEA.

295 (b) If a person making a challenge is unable to provide the challenge to the
296 LEA in writing~~[-an LEA shall]:~~

297 (i) the LEA shall notify the State Director of Special Education; and

298 (ii) the State Director of Special Education shall:

299 (i)A) obtain information related to the challenge described in Subsection
300 (~~11~~2)(a) from the person making the challenge; and

301 (ii)B) complete the written challenge for the person.

302 (c) If a person making a challenge described in Subsection (~~11~~2)(a) uses
303 alternative communication, ~~[an LEA]~~the State Director of Special Education shall
304 reasonably accommodate the person to obtain the challenge in writing.

305 (~~12~~3) Upon receiving a challenge described in Subsection (~~11~~[(a)2], an
306 LEA shall provide the following to the adult student with a significant disability and
307 the adult student's educational representative:

308 (a) a copy of the challenge described in Subsection (~~11~~2); and

309 (b) notice of action the LEA will take, which may include:

310 (i) the transfer of all educational rights back to the adult student with a
311 significant disability;

312 (ii) holding an IEP meeting for the purpose of compliance with IDEA with the
313 adult student with a significant disability and the individual with priority described in
314 Subsection (~~10~~1); or

315 (iii) any other action the LEA will take while the challenge is resolved through
316 the process set forth in Board special education rules.

317 **R277-752-~~5~~8. Applicability of Rule to Adult Students with Significant**
318 **Disabilities.**

319 (1) This rule only applies if:

320 (a) the presumption that an adult student with a significant disability is capable
321 of making the adult student's own decisions is rebutted as set forth in R277-752-

322 ~~[4]5;[-and]~~

323 (b) the adult student with a significant disability has not been determined to

324 be incompetent by a court~~[-];~~ and
325 (c) there is no valid general power of attorney or specific power of attorney
326 that grants authority to represent the educational interests of the adult student with
327 a significant disability to provide informed consent in the activities for the adult
328 student with a significant disability's educational program.

329 (2) This rule does not apply to an adult student with a significant disability if:

330 (a) ~~[there is]~~the adult student has a valid ~~[limited-]~~power of attorney, that is
331 signed by the adult student with a significant disability and a parent or other
332 appropriate individual, ~~[to]~~that either generally or specifically allows the parent or
333 other appropriate individual to represent the educational interests of the adult
334 student with a significant disability throughout the IDEA eligibility period that
335 complies with the requirements of Utah law; or

336 (b) there is a court-issued guardianship decree ~~[that provides-]~~that includes
337 either general or specific ~~[the guardian will]~~authority to an individual to represent the
338 educational interests of the adult student with a significant disability throughout the
339 IDEA eligibility period.

340 **KEY: special education**

341 **Date of Enactment of Last Substantive Amendment: March 18, 2016**

342 **Authorizing, and Implemented or Interpreted Law: Art X Sec 3; 53A-1-402(1)(c);**

343 **53A-1-401; 20 U.S.C. 1415(m)(2); 34 CFR 300.520(b)**