



# Navigating Guardianship in Special Education

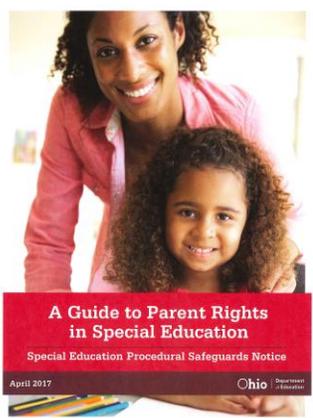
*By Elaine Hamilton*

Raising a child with a disability can be a tremendous challenge. Parents, grandparents/caregivers and/or guardians need to develop a support system to help them better understand the process.

## Transfer of Parental Rights

One year before the child's 18th birthday, the district must notify both the child and the parents regarding parental rights. They must advise them that parental rights will transfer to the child upon reaching the age of majority.

The district also must provide the child with a copy of the procedural safeguards notice (A Guide to Parent Rights in Special Education).



## When Your Child with a Disability Turns 18

For any child who has special health-care needs, or mental or physical disabilities, guardianship is an important issue. At age 18, individuals are their own guardians, regardless of their mental or physical ability to assess and make decisions that affect their own educational, financial, and healthcare needs. If the disability interferes with the ability to make decisions, the caregiver may need to obtain guardianship.

The process of becoming a guardian can be daunting. For this reason it is suggested that starting the process at least 6 months before the child's 18<sup>th</sup> birthday would be beneficial.

## What is Guardianship?

Guardianship is a legal proceeding in which someone (usually a family member) asks the court to find that a person is unable to manage his or her affairs competently because of a disability. A guardian assumes the responsibility for the person with a disability and makes the decisions for



them. There are different types of guardianship depending on the person's needs. Generally, there is a guardian of the person and a guardian of the property, and one person can serve as both.

**A guardian of the person** can make decisions about a person's health-care, housing, food, clothing, and other subjects that affect the person.

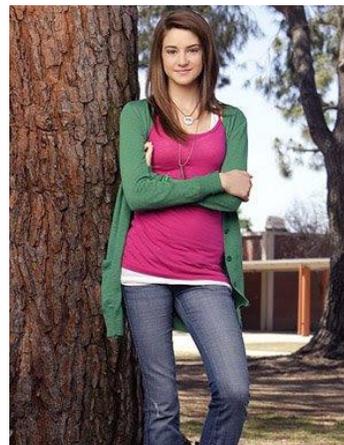
**A guardian of the property** makes decisions about a person's money, income, property, public benefits, and other financial matters.

## Will your child need a guardian?

Appointment of a guardian is an important issue. Guardians are appointed by the court, and it can be difficult, costly, and time consuming to establish and maintain a guardianship.

Because the guardian makes all the decisions as ordered by the court, the individual under the guardianship loses a great deal of independence. That person will no longer have the authority to make decisions about his or her personal life or property because that authority has been delegated to the guardian.

In general, a guardian should be appointed only if there are no less restrictive alternatives. A diagnosis of a mental illness or intellectual disability does not automatically mean that a person lacks the capacity to make decisions.



## Who should be named as guardian?

***Guardians are subject to court supervision, which provides a powerful tool to prevent the guardian from mishandling the person's finances or taking advantage of them. Sometimes, especially with professional guardians, the guardian must post a bond (a special type of insurance that protects the person's estate from mishandling).***



In some cases, guardians can be reimbursed for their expenses and paid for their services from the assets of the person they are taking care of. Generally, payments are made only to professional guardians, but a family member who has been appointed as guardian may, depending on state law, also seek compensation by making a request to the court.

When a guardian can no longer serve, the guardianship itself does not end. Rather, a new guardian is appointed by the court. In the case with a parent of a child with a disability, as the parent ages, he or she may no longer be able to care for their child. The guardian should consider who would replace him, should he no longer be able to serve.



## Obtaining Guardianship Through the Court

A guardian is appointed by the court upon petition by an interested

person. The petition contains all the basic facts including the petitioner's relationship to the person to be under guardianship and a brief description of the disability and how it affects the person's ability to make decisions. The petition should also include the reasons why the court should appoint a guardian. This may generally include an affidavit or certification from a doctor attesting to a person's level of functioning.

There will be a hearing before a judge. The petitioner must present evidence of the need for guardianship. The petitioner usually must prove: that the person lacks sufficient understanding or capacity to make responsible decisions; that this lack of capacity is caused by a disability; and that no less restrictive alternatives are available. The petitioner must also show that the proposed guardian is fit to be appointed, is capable of carrying out the responsibilities of a guardian, and that no one of higher priority (for example a parent) is available.

Generally, for the hearing, two attorneys are involved. There is one representing the person asking the court to appoint a guardian, and one representing the best interests of the



person to be cared for. Witnesses, such as the person’s doctor, other providers, friends, or family may be called to provide information on the person’s level of functioning.

Anyone, including the person who is to be under the guardianship, can object to the appointment of a guardian in general, or to a specific choice that the guardian makes. There are different processes through different courts, but generally, any objections involve a hearing and filing papers with the court.

## Determining Competency

To obtain a guardianship, a judge must determine that the person does not have the capacity to care for him or herself in some way. Determining capacity is important, because the degree to which a person is capable of making an informed decision relates to which decisions he or she can make. Capacity is a fluid concept depending on the person, the circumstances, and the decision to be made. A person can be competent to make some decisions, but not others.

Usually, an affidavit, a statement written under oath, from a medical doctor attesting to the person’s level

of functioning, decision-making ability, prognosis, and diagnosis must be used to support a claim that a guardianship is necessary. However, depending on the state law, more evidence, like an evaluation by a psychologist, school performance records, prior medical records or testimony from the person and his or her support network may be necessary to establish the need for a guardian.

The standards differ from state to state, so it is important to check the law where you live. In general, there must be clear and convincing evidence that a person lacks understanding to make or communicate decisions, or is unable to manage his property and affairs effectively due to disability.





## What are the duties of a guardian?

The court will outline the duties given to the guardian, and those duties will be only those necessary to provide for the demonstrated need of the person with a disability. The duties could be for a specific type of decision, for guardianship of the person, guardianship of the property, or guardianship of both.

There are some instances where the guardian must ask special permission from the court, such as in the case of a life-threatening medical treatment or changes in where the person will live (i.e., selling property or moving the person to a facility or group home).

The guardian usually must file a regular (usually annual) report with the court. The report allows the court to supervise the guardian's actions, to verify the person's needs are being met, and to question whether the guardianship should be modified or terminated. In the case of finances, the guardian must provide a record of everything done with the property under the guardianship order.

If a guardian fails to perform the duties of that position appropriately, that person may be removed or subject to other court sanctions.

## The Family Educational Rights and Privacy Act (FERPA)

Parents, grandparents/caregivers and/or guardians must be aware of the term "educational rights" as well as a commonly used acronym FERPA, The Family Educational Rights and Privacy Act.

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18, or attends a school beyond the high school level. Students to whom the rights have transferred are "eligible students."



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- Parents or eligible students have the right to inspect and review the student's education records maintained by the school. Schools are not required to provide copies of records unless, for reasons such as great distance, it is impossible for parents or eligible students to review the records. Schools may charge a fee for copies.
  - Parents or eligible students have the right to request that a school correct records which they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement with the record, setting forth his or her view about the contested information.
  - Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without consent, to the following parties or under the following conditions (34 CFR § 99.31):
    - School officials with legitimate educational interest;
    - Other schools to which a student is transferring;
    - Specified officials for audit or evaluation purposes;
    - Appropriate parties in connection with financial aid to a student;
    - Organizations conducting certain studies for, or on behalf of the school;
    - Accrediting organizations;
    - To comply with a judicial order or lawfully issued subpoena;
    - Appropriate officials in cases of health and safety emergencies; and
    - State and local authorities, within a juvenile justice system, pursuant to specific state law.
- Schools may disclose, without consent, "directory" information, such as a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools must tell parents and eligible students about directory information,



and allow parents and eligible students a reasonable amount of time to request that the school not disclose directory information, about them.

Schools must notify parents and eligible students annually of their rights under FERPA. The actual means of notification (special letter, inclusion in a PTA bulletin, student handbook, or newspaper article) is left to the discretion of each school.

For additional information, you may call 1-800-USA-LEARN (1-800-872-5327) (voice). Individuals who use TDD may use the Federal Relay Service. Or you may contact them at the following address:

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202-8520



### Online and Local Guardianship Training Course for Ohio

<http://www.supremecourt.ohio.gov/Boards/judCollege/adultGuardianship/default.asp>

### Grandparent Rules for Ohio

[https://education.ohio.gov/getattachment/Topics/Data/EMIS/Technical-Documentation/2005-EMIS-Manual/HB-130-Fact-Sheet-\(new-Grandparent-Rule\).pdf.aspx](https://education.ohio.gov/getattachment/Topics/Data/EMIS/Technical-Documentation/2005-EMIS-Manual/HB-130-Fact-Sheet-(new-Grandparent-Rule).pdf.aspx)

### Other Resources:

Ohio Coalition for the Education of  
Children with Disabilities  
<https://www.ocecd.org/>

Disability Rights Ohio  
<https://disabilityrightsohio.org/>

Friendship Circle  
<https://www.friendshipcircle.org/online/>



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To remove your name from our mailing list, or if you have questions, please contact [leeand@ocecd.org](mailto:leeand@ocecd.org) or call 1-844-382-5452.

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