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SENATE BILL NO. 585

Offered January 8, 2020

Prefiled January 7, 2020

A BILL to amend and reenact §§ 22.1-23, 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia and to amend the Code of Virginia by adding in Title 37.2 a chapter numbered 12, consisting of sections numbered 37.2-1200 through 37.2-1207, relating to guardianship; supported decision making.

Patron—Dunnavant

Referred to Committee on Rehabilitation and Social Services

Be it enacted by the General Assembly of Virginia:

1. That §§ 22.1-23, 64.2-2000, 64.2-2003, and 64.2-2007 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 37.2 a chapter numbered 12, consisting of sections numbered 37.2-1200 through 37.2-1207, as follows:

§ 22.1-23. Duties in general.

The Superintendent of Public Instruction shall:

1. Serve as secretary of the Board of Education;
2. Provide such assistance in his office as shall be necessary for the proper and uniform enforcement of the provisions of the school laws in cooperation with the local school authorities;
3. Prepare and furnish such forms for attendance officers, teachers and other school officials as are required by law;
4. (Expires July 1, 2025) At least annually, survey all local school divisions to identify critical shortages of teachers and administrative personnel by geographic area, by school division, or by subject matter, and report such critical shortages to each local school division and to the Virginia Retirement System;
5. Develop and provide to local school divisions a model exit questionnaire for teachers;
6. Along with the State Health Commissioner, work to combat childhood obesity and other chronic health conditions that affect school-age children;
7. Designate an employee of the Department of Education to serve as its liaison to the State Council of Higher Education for Virginia and the State Board for Community Colleges; ~~and~~
8. Prepare, and update as necessary, special education transition materials for students and parents to be used during a student's annual Individualized Education Program meeting as required by the State Board of Education Regulations Governing Special Education Programs for Children with Disabilities in Virginia (8VAC20-81-118 and 20 U.S.C. § 1400 et seq.) and direct local school divisions to use the material to the fullest extent possible. The materials shall include information describing services that can be provided in the least restrictive environment possible; the purpose and use of powers of attorney for health care and education; the purpose and use of supported decision-making agreements entered into pursuant to the Supported Decision-Making Act (§ 37.2-1200 et seq.); and the purpose and use of temporary guardianship, limited guardianship, and guardianship, as those terms are defined in § 64.2-2000; and
9. Perform such other duties as the Board of Education may prescribe.

CHAPTER 12.

SUPPORTED DECISION-MAKING ACT.

§ 37.2-1200. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Adult" means an individual who is 18 years of age or older.

"Affairs" means personal, health care, and financial matters arising in the course of activities of daily living and includes (i) those health care and personal affairs in which an adult makes his own health care decisions, including monitoring his own health; obtaining, scheduling, and coordinating health and support services; understanding health care information and options; and making personal decisions, including those to provide for his own care and comfort, and (ii) those financial affairs in which an adult manages his income and assets and its use for clothing, support, care, comfort, education, shelter, and payment of other liabilities of the individual.

"Good faith" means honest in fact and the observance of reasonable standards of fair dealing.

"Health care institution" means an institution, facility, or agency licensed, certified, or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

"Health care provider" means an individual licensed, certified, or otherwise authorized or permitted

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59 by law to provide health care in the ordinary course of business or practice of a profession.

60 "Immediate family member" means a spouse, child, sibling, parent, grandparent, grandchild,
61 stepparent, stepchild, or stepsibling.

62 "Person" means an adult, health care institution, health care provider, corporation, partnership,
63 limited liability company, association, joint venture, government, governmental subdivision, agency, or
64 instrumentality, public corporation, or any other legal or commercial entity.

65 "Principal" means an adult with an intellectual or developmental disability who seeks to enter, or
66 has entered, into a supported decision-making agreement with a supporter under this chapter.

67 "Supported decision-making agreement" or "agreement" means an agreement between a principal
68 and a supporter entered into under this chapter.

69 "Supporter" means a person that is named in a supported decision-making agreement and is not
70 prohibited from acting under subsection B of § 37.2-1204 or under regulations adopted pursuant to
71 § 37.2-1201.

72 "Support services" means a coordinated system of social and other services supplied by private,
73 state, institutional, or community providers designed to help maintain the independence of an adult,
74 including any of the following:

75 1. Homemaker-type services, including house repair, home cleaning, laundry, shopping, and meal
76 provision;

77 2. Companion-type services, including transportation and facilitation of written, oral, and electronic
78 communication;

79 3. Visiting nurse and attendant care;

80 4. Health care provider;

81 5. Physical and psychosocial assessments;

82 6. Financial assessments and advisement on banking, taxes, loans, investments, and management of
83 real property;

84 7. Legal assessments and advisement;

85 8. Education and educational assessment and advisement;

86 9. Hands-on treatment or care, including assistance with activities of daily living, such as bathing,
87 dressing, eating, range of motion, toileting, transferring, and ambulation;

88 10. Care planning; and

89 11. Other services needed to maintain the independence of an adult.

90 **§ 37.2-1201. Administration of chapter; regulatory authority.**

91 A. This chapter shall be administered and interpreted in accordance with the following principles:

92 1. All adults should be able to live in the manner they wish and to accept or refuse support,
93 assistance, or protection as long as they do not harm others and are capable of making decisions about
94 those matters.

95 2. All adults should be able to be informed about and, to the best of their ability, participate in the
96 management of their affairs.

97 3. All adults should receive the most effective yet least restrictive and intrusive form of support,
98 assistance, or protection when they are unable to care for themselves or manage their affairs alone.

99 4. The values, beliefs, wishes, cultural norms, and traditions that an adult holds should be respected
100 in managing an adult's affairs.

101 B. The Department shall develop the forms necessary to implement this chapter.

102 C. The Board shall adopt regulations necessary to implement this chapter.

103 **§ 37.2-1202. Presumption of capability.**

104 A. All adults are presumed to be capable of managing their affairs and to have capacity unless
105 otherwise determined by a court.

106 B. The manner in which an adult communicates with others is not grounds for deciding that the
107 adult is incapable of managing his own affairs.

108 C. Execution of a supported decision-making agreement shall not be used as evidence of incapacity
109 and shall not preclude the ability of the adult who has entered into such an agreement to act
110 independently of the agreement.

111 **§ 37.2-1203. Supported decision-making agreements.**

112 A. An adult with an intellectual or developmental disability may enter into a supported
113 decision-making agreement if all of the following apply:

114 1. The adult enters into the agreement voluntarily and without coercion or undue influence; and

115 2. The adult understands the nature and effect of the agreement.

116 B. A supported decision-making agreement shall include:

117 1. Designation of at least one supporter;

118 2. The types of decisions for which the supporter is authorized to assist; and

119 3. The types of decisions, if any, for which the supporter shall not assist.

120 C. A supported decision-making agreement may include:

1. A designation of more than one supporter;
 2. A provision for an alternate to act in the place of a supporter in circumstances that may be specified in the agreement; and
 3. Authorization for a supporter to share information with any other supporter named in the agreement, as a supporter believes is necessary.
 - D. A supported decision-making agreement is valid only if all of the following occur:
 1. The agreement is in a writing that contains the elements of the form developed by the Department pursuant to § 37.2-1201;
 2. The agreement is dated; and
 3. Each party to the agreement signed the agreement in the presence of two adult witnesses, who shall not be a supporter for the principal, an employee or agent of a supporter named in the supported decision-making agreement, or any person who does not understand the type of communication the principal uses, unless an individual who understand the principal's means of communication is present to assist during the execution of the supported decision-making agreement.
 - E. A supported decision-making agreement shall contain a separate declaration signed by each supporter named in the agreement indicating all of the following:
 1. The supporter's relationship to the principal;
 2. The supporter's willingness to act as a supporter; and
 3. The supporter's acknowledgement of the duties of a supporter under this chapter.
 - F. A supported decision-making agreement may authorize a supporter to assist the principal to decide whether to give or refuse to give consent to provide health care services.
 - G. A supported decision-making agreement extends until terminated by either party, in writing and with notice to the other parties to the agreement, or by the terms of the agreement, except that it is automatically terminated if:
 1. There has been an administrative determination or judicial finding that the principal has been abused, neglected, or exploited by a supporter;
 2. A supporter is found criminally liable for any actions affecting the principal; or
 3. There has been a judicial determination that the principal lacks the capacity to engage in the making of specific decisions covered by the agreement despite the assistance of a supporter so that a guardian or conservator is appointed for the principal for the purposes of making such decisions pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2.
- § 37.2-1204. Supporters.**
- A. Except as otherwise provided by a supported decision-making agreement, a supporter may do all of the following:
 1. Assist the principal in understanding information, options, responsibilities, and consequences of the principal's life decisions, including those decisions relating to the principal's affairs or support services;
 2. Help the principal access, obtain, and understand any information that is relevant to any given life decision, including medical, psychological, financial, or educational decisions, or any treatment records or other records necessary to manage the principal's affairs or support services;
 3. Assist the principal in finding, obtaining, making appointments for, and implementing the principal's support services or plans for support services;
 4. Help the principal monitor information about the principal's affairs or support services, including keeping track of future necessary or recommended services; and
 5. Ascertain the wishes and decisions of the principal, assist in communicating those wishes and decisions to other persons, and advocate to ensure that the wishes and decisions of the principal are implemented.
 - B. Except as permitted by regulation promulgated under § 37.2-1201, any of the following are disqualified from acting as a supporter:
 1. A person who is an employer or employee of the principal, unless the person is an immediate family member of the principal;
 2. A person directly providing paid support services to the principal, with the exception of supported decision-making services, unless the person is an immediate family member of the principal; and
 3. An individual against whom the principal has obtained an order of protection from abuse or an individual who is the subject of a protective order prohibiting contact with the principal.
 - C. A supporter is prohibited from doing any of the following:
 1. Exerting undue influence upon, or making decisions on behalf of, the principal;
 2. Obtaining, without the consent of the principal, information that is not reasonably related to the matter for which the supporter is authorized to assist under the supported decision-making agreement; and
 3. Using, without the consent of the principal, information acquired for a purpose other than

182 assisting the principal to make a decision under the supported decision-making agreement.

183 D. A supporter shall act with the care, competence, and diligence ordinarily exercised by individuals
184 in similar circumstances, with due regard to either the possession of, or lack of, special skills or
185 expertise.

186 **§ 37.2-1205. Recognition of supporters.**

187 A decision or request made or communicated with the assistance of a supporter in conformity with
188 this chapter shall be recognized for the purposes of any provision of law as the decision or request of
189 the principal and may be enforced by the principal or supporter in law or equity on the same basis as a
190 decision or request of the principal.

191 **§ 37.2-1206. Limitation of liability.**

192 A person who in good faith relies on an authorization in a supported decision-making agreement, or
193 who in good faith declines to honor an authorization in a supported decision-making agreement, is not
194 subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following:

195 1. Complying with an authorization in a supported decision-making agreement based on an
196 assumption that the underlying supported decision-making agreement was valid when made and has not
197 been revoked or abrogated under § 37.2-1203;

198 2. Declining to comply with an authorization in a supported decision-making agreement based on
199 actual knowledge that the agreement is invalid or has been revoked or abrogated under § 37.2-1203;
200 and

201 3. Declining to comply with an authorization related to health care in a supported decision-making
202 agreement because the action proposed to be taken under the agreement is contrary to the conscience
203 or good faith medical judgment of the person or to a written policy of a health care institution that is
204 based on reasons of conscience.

205 **§ 37.2-1207. Access to information.**

206 A. A supporter may assist the principal with obtaining any information to which the principal is
207 entitled, including, with a signed and dated specific consent, protected health information under the
208 federal Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, or educational
209 records under the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g.

210 B. The supporter shall ensure all information collected on behalf of the principal under this section
211 is kept privileged and confidential, as applicable; is not subject to unauthorized access, use, or
212 disclosure; and is properly disposed of when appropriate.

213 C. The existence of a supported decision-making agreement does not preclude the principal from
214 seeking personal information without the assistance of a supporter.

215 **§ 64.2-2000. Definitions.**

216 As used in this chapter, unless the context requires a different meaning:

217 "Advance directive" shall have the same meaning as provided in the Health Care Decisions Act
218 (§ 54.1-2981 et seq.) § 54.1-2982.

219 "Annual report" means the report required to be filed by a guardian pursuant to § 64.2-2020.

220 "Conservator" means a person appointed by the court who is responsible for managing the estate and
221 financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited
222 conservator" or a "temporary conservator." The term "Conservator" includes (i) a local or regional
223 program designated by the Department for Aging and Rehabilitative Services as a public conservator
224 pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional
225 tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to
226 provide conservatorial services to incapacitated persons. Such tax-exempt charitable organization shall
227 not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization
228 has been designated by the Department for Aging and Rehabilitative Services as a public conservator, it
229 may also serve as a conservator for other individuals.

230 "Estate" includes both real and personal property.

231 "Facility" means a state or licensed hospital, training center, psychiatric hospital, or other type of
232 residential or outpatient mental health or mental retardation facility. When modified by the word "state,"
233 "facility" means a state hospital or training center operated by the Department of Behavioral Health and
234 Developmental Services, including the buildings and land associated with it.

235 "Guardian" means a person appointed by the court who has the powers and duties set out in
236 § 64.2-2019 and who is responsible for the personal affairs of an incapacitated person, including
237 responsibility for making decisions regarding the person's support, care, health, safety, habilitation,
238 education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission,
239 residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary
240 guardian." The term includes (i) a local or regional program designated by the Department for Aging
241 and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14
242 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to
243 § 501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such

tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Department for Aging and Rehabilitative Services as a public guardian, it may also serve as a guardian for other individuals.

"Guardian ad litem" means an attorney appointed by the court to represent the interests of the respondent and whose duties include evaluation of the petition for guardianship or conservatorship and filing a report with the court pursuant to § 64.2-2003.

"Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 unless the court order entered pursuant to this chapter specifically provides otherwise.

"Individualized education plan" or "IEP" means a plan or program developed annually to ensure that a child who has a disability identified under the law and is attending an elementary or secondary educational institution receives specialized instruction and related services as provided by 20 U.S.C. § 1414.

"Individual receiving services" or "individual" means a current direct recipient of public or private mental health, developmental, or substance abuse treatment, rehabilitation, or habilitation services and includes the terms "consumer," "patient," "resident," "recipient," or "client."

"Limited conservator" means a person appointed by the court who has only those responsibilities for managing the estate and financial affairs of an incapacitated person as specified in the order of appointment.

"Limited guardian" means a person appointed by the court who has only those responsibilities for the personal affairs of an incapacitated person as specified in the order of appointment.

"Mental illness" means a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others.

"Petition" means the document filed with a circuit court to initiate a proceeding to appoint a guardian or conservator.

"Power of attorney" has the same meaning ascribed to it in § 64.2-1600.

"Property" includes both real and personal property.

"Respondent" means an allegedly incapacitated person for whom a petition for guardianship or conservatorship has been filed.

"Supported decision-making agreement" means an agreement entered into pursuant to the Supported Decision-Making Act (§ 37.2-1200 et seq.).

"Temporary conservator" means a person appointed by a court for a limited duration of time as specified in the order of appointment.

"Temporary guardian" means a person appointed by a court for a limited duration of time as specified in the order of appointment.

"Transition plan" means the plan that is required as part of the IEP used to help students and families prepare for the future after the student reaches the age of majority.

§ 64.2-2003. Appointment of guardian ad litem.

A. On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent. The guardian ad litem shall be paid a fee that is fixed by the court to be paid by the petitioner or taxed as costs, as the court directs.

B. Duties of the guardian ad litem include (i) personally visiting the respondent; (ii) advising the respondent of rights pursuant to §§ 64.2-2006 and 64.2-2007 and certifying to the court that the respondent has been so advised; (iii) recommending that legal counsel be appointed for the respondent, pursuant to § 64.2-2006, if the guardian ad litem believes that counsel for the respondent is necessary; (iv) investigating the petition and evidence, requesting additional evaluation if necessary, *considering whether a less restrictive alternative to guardianship or conservatorship is available, including the use of an advance directive or durable power of attorney*, and filing a report pursuant to subsection C; and (v) personally appearing at all court proceedings and conferences. *If the respondent is between 17 and a half and 21 years of age and has an IEP and transition plan, the guardian ad litem shall review such IEP and transition plan and include the results of his review in the report required by clause (iv).*

C. In the report required by clause (iv) of subsection B, the guardian ad litem shall address the following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or conservator is needed *based on evaluations and reviews conducted pursuant to subsection B*; (iii) *whether a supported decision-making agreement entered into pursuant to the Supported Decision-Making Act (§ 37.2-1200 et seq.) is a viable option in lieu of guardianship or conservatorship*; (iv) the extent of the duties and powers of the guardian or conservator; ~~(iv)~~ (v) the propriety and suitability of the person selected as guardian or conservator after consideration of the person's geographic location, familial or other relationship with the respondent, ability to carry out the powers and duties of the office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of the respondent, and recommendations of relatives; ~~(v)~~ (vi) a recommendation as to the amount of surety on the conservator's bond, if any; and ~~(vi)~~ (vii) consideration of proper residential placement of the respondent.

D. A health care provider *and local school division* shall disclose or make available to the guardian ad litem, upon request, any information, records, and reports concerning the respondent that the guardian ad litem determines necessary to perform his duties under this section.

§ 64.2-2007. Hearing on petition to appoint.

A. The respondent is entitled to a jury trial upon request, and may compel the attendance of witnesses, present evidence on his own behalf, and confront and cross-examine witnesses.

B. The court or the jury, if a jury is requested, shall hear the petition for the appointment of a guardian or conservator. The hearing may be held at such convenient place as the court directs, including the place where the respondent is located. The hearing shall be conducted within 120 days from the filing of the petition unless the court postpones it for cause. The proposed guardian or conservator shall attend the hearing except for good cause shown and, where appropriate, shall provide the court with a recommendation as to living arrangements and a treatment plan for the respondent. The respondent is entitled to be present at the hearing and all other stages of the proceedings. The respondent shall be present if he so requests or if his presence is requested by the guardian ad litem. Whether or not present, the respondent shall be regarded as having denied the allegations in the petition.

C. In determining the need for a guardian or a conservator and the powers and duties of any guardian or conservator, if needed, consideration shall be given to the following factors: (i) the limitations of the respondent; (ii) the development of the respondent's maximum self-reliance and independence; (iii) the availability of less restrictive alternatives, including advance directives and durable powers of attorney; (iv) the extent to which it is necessary to protect the respondent from neglect, exploitation, or abuse; (v) the actions needed to be taken by the guardian or conservator; (vi) the suitability of the proposed guardian or conservator; and (vii) the best interests of the respondent.

D. If, after considering the evidence presented at the hearing, the court or jury determines on the basis of clear and convincing evidence that the respondent is incapacitated and in need of a guardian or conservator, the court shall appoint a suitable person, who may be the spouse of the respondent, to be the guardian or the conservator or both, giving due deference to the wishes of the respondent. *If a guardian or conservator is appointed, the court shall inform him of his duties and powers pursuant to Article 2 (§ 64.2-2019 et seq.) and shall further inform the guardian or conservator that, to the extent feasible, the respondent should be encouraged to participate in decisions, act on his own behalf, and develop or maintain the capacity to manage his personal affairs if he retains any decision-making rights.*

The court in its order shall make specific findings of fact and conclusions of law in support of each provision of any orders entered.

E. All orders appointing a guardian shall include the following statements in conspicuous bold print in at least 14-point type:

"1. Pursuant to § 64.2-2009 of the Code of Virginia, _____ (name of guardian), is hereby appointed as guardian of _____ (name of respondent) with all duties and powers granted to a guardian pursuant to § 64.2-2019 of the Code of Virginia, including but not limited to: (enter a statement of the rights removed and retained, if any, at the time of appointment; whether the appointment of a guardian is a full guardianship, public guardianship pursuant to § 64.2-2010, limited guardianship pursuant to § 64.2-2009, or temporary guardianship, and the duration of the appointment).

2. Pursuant to the provisions of subsection E of § 64.2-2019 of the Code of Virginia, a guardian, to the extent possible, shall encourage the incapacitated person to participate in decisions, shall consider the expressed desires and personal values of the incapacitated person to the extent known, and shall not unreasonably restrict an incapacitated person's ability to communicate with, visit, or interact with other persons with whom the incapacitated person has an established relationship.

3. Pursuant to § 64.2-2020 of the Code of Virginia, an annual report shall be filed by the guardian with the local department of social services for the jurisdiction where the incapacitated person resides.

4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition for restoration of the incapacitated person to capacity, modification of the type of appointment or areas

367 *of protection, management, or assistance granted, or termination of the guardianship."*