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## SENATE BILL NO. 585

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on the Judiciary  
on February 5, 2020)

(Patron Prior to Substitute—Senator Dunnivant)

A BILL to amend and reenact §§ 64.2-2000, 64.2-2003, 64.2-2007, and 64.2-2009 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 22.1-217.2, relating to guardianship.

Be it enacted by the General Assembly of Virginia:

1. That §§ 64.2-2000, 64.2-2003, 64.2-2007, and 64.2-2009 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 22.1-217.2, as follows:

§ 22.1-217.2. *Special education transition materials.*

The Superintendent of Public Instruction shall make available 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. Such materials shall be prepared and updated as necessary by the Department of Behavioral Health and Developmental Services and 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; and the purpose and use of temporary guardianship, limited guardianship, and guardianship, as those terms are defined in § 64.2-2000.

§ 64.2-2000. **Definitions.**

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

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

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

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." The term "Conservator" includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide conservatorial 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 conservator, it may also serve as a conservator for other individuals.

"Estate" includes both real and personal property.

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

"Guardian" means a person appointed by the court who has the powers and duties set out in § 64.2-2019, or § 63.2-1609 if applicable, and who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public guardian pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 or (ii) any local or regional tax-exempt charitable organization established pursuant to § 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.

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

71 *"Individualized education plan" or "IEP" means a plan or program developed annually to ensure*  
72 *that a child who has a disability identified under the law and is attending an elementary or secondary*  
73 *educational institution receives specialized instruction and related services as provided by 20 U.S.C.*  
74 *§ 1414.*

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

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

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

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

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

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

90 "Property" includes both real and personal property.

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

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

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

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

99 **§ 64.2-2003. Appointment of guardian ad litem.**

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

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

113 C. In the report required by clause (iv) of subsection B, the guardian ad litem shall address the  
114 following major areas of concern: (i) whether the court has jurisdiction; (ii) whether a guardian or  
115 conservator is needed *based on evaluations and reviews conducted pursuant to subsection B*; (iii) the  
116 extent of the duties and powers of the guardian or conservator; (iv) the propriety and suitability of the  
117 person selected as guardian or conservator after consideration of the person's geographic location,  
118 familial or other relationship with the respondent, ability to carry out the powers and duties of the  
119 office, commitment to promoting the respondent's welfare, any potential conflicts of interests, wishes of  
120 the respondent, and recommendations of relatives; (v) a recommendation as to the amount of surety on  
121 the conservator's bond, if any; and (vi) consideration of proper residential placement of the respondent.

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

125 **§ 64.2-2007. Hearing on petition to appoint.**

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

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

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

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

153 The court in its order shall make specific findings of fact and conclusions of law in support of each  
154 provision of any orders entered. *The order of appointment shall be made in a form that complies with*  
155 *the requirements set out in § 64.2-2009.*

156 **§ 64.2-2009. Court order of appointment; limited guardianships and conservatorships.**

157 A. The court's order appointing a guardian or conservator shall (i) state the nature and extent of the  
158 person's incapacity; (ii) define the powers and duties of the guardian or conservator so as to permit the  
159 incapacitated person to care for himself and manage property to the extent he is capable; (iii) specify  
160 whether the appointment of a guardian or conservator is limited to a specified length of time, as the  
161 court in its discretion may determine; (iv) specify the legal disabilities, if any, of the person in  
162 connection with the finding of incapacity, including but not limited to mental competency for purposes  
163 of Article II, Section 1 of the Constitution of Virginia or Title 24.2; (v) include any limitations deemed  
164 appropriate following consideration of the factors specified in § 64.2-2007; (vi) set the bond of the  
165 guardian and the bond and surety, if any, of the conservator; and (vii) where a petition is brought prior  
166 to the incapacitated person's eighteenth birthday, pursuant to subsection C of § 64.2-2001, whether the  
167 order shall take effect immediately upon entry or on the incapacitated person's eighteenth birthday.

168 B. The court may appoint a limited guardian for an incapacitated person who is capable of  
169 addressing some of the essential requirements for his care for the limited purpose of medical decision  
170 making, decisions about place of residency, or other specific decisions regarding his personal affairs.  
171 The court may appoint a limited conservator for an incapacitated person who is capable of managing  
172 some of his property and financial affairs for limited purposes that are specified in the order.

173 C. Unless the guardian has a professional relationship with the incapacitated person or is employed  
174 by or affiliated with a facility where the person resides, the court's order may authorize the guardian to  
175 consent to the admission of the person to a facility pursuant to § 37.2-805.1, upon finding by clear and  
176 convincing evidence that (i) the person has severe and persistent mental illness that significantly impairs  
177 the person's capacity to exercise judgment or self-control, as confirmed by the evaluation of a licensed  
178 psychiatrist; (ii) such condition is unlikely to improve in the foreseeable future; and (iii) the guardian  
179 has formulated a plan for providing ongoing treatment of the person's illness in the least restrictive  
180 setting suitable for the person's condition.

181 D. A guardian need not be appointed for a person who has appointed an agent under an advance  
182 directive executed in accordance with the provisions of Article 8 (§ 54.1-2981 et seq.) of Chapter 29 of

183 Title 54.1, unless the court determines that the agent is not acting in accordance with the wishes of the  
184 principal or there is a need for decision making outside the purview of the advance directive.

185 A conservator need not be appointed for a person (i) who has appointed an agent under a durable  
186 power of attorney, unless the court determines pursuant to the Uniform Power of Attorney Act  
187 (§ 64.2-1600 et seq.) that the agent is not acting in the best interests of the principal or there is a need  
188 for decision making outside the purview of the durable power of attorney or (ii) whose only or major  
189 source of income is from the Social Security Administration or other government program and who has  
190 a representative payee.

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

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

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

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

206 4. Pursuant to § 64.2-2012 of the Code of Virginia, all guardianship orders are subject to petition  
207 for restoration of the incapacitated person to capacity; modification of the type of appointment or areas  
208 of protection, management, or assistance granted; or termination of the guardianship."

209 **2. That the Department of Behavioral Health and Developmental Services (the Department) shall**  
210 **convene a group of stakeholders, to include representatives of the Arc, AARP, the Alzheimer's**  
211 **Association, the Virginia Department for Aging and Rehabilitative Services, the Northern Virginia**  
212 **Aging Network, the Virginia Bar Association, and the Virginia Academy of Elder Law Attorneys,**  
213 **to study the use of supported decision-making agreements in the Commonwealth, including**  
214 **making recommendations as to the use of supported decision-making agreements as a less**  
215 **restrictive alternative to the appointment of a guardian or conservator for an incapacitated person.**  
216 **The Department shall report the findings and recommendations of the stakeholder group's study**  
217 **to the Chairmen of the Senate Committee on the Judiciary and the House Committee on Health,**  
218 **Welfare, and Institutions no later than November 1, 2020.**