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# A BILL FOR AN ACT

RELATING TO EDUCATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that the partnership  
2 between parents, families, professionals, and students is  
3 cornerstone to the success of student achievement. From a  
4 student's first day of school until the completion of the  
5 student's education, hundreds, possibly thousands, of  
6 educational decisions have been made for or by that student.  
7 Until a student reaches the age of eighteen, most of those  
8 decisions are made by parents, family members, or guardians in  
9 consultation with teachers or education officials. However,  
10 when a student reaches the age of eighteen, that adult student  
11 is presumed to be capable of making the adult student's own  
12 educational decisions and to have the confidence to participate  
13 fully in meetings to make educational decisions, unless  
14 determined to be incapable of making decisions. Students at  
15 this transition point, regardless of their capacity, may benefit  
16 from continued participation, guidance, and advice from the



1 people on whom they have always relied to make educational  
2 decisions.

3 With regard to the numerous decisions and planning  
4 activities related to a student with a disability who is  
5 receiving special education and related services, parents of  
6 adult students can only participate in these activities if they  
7 are either invited by the student or obtain legal guardianship  
8 over the student. While these options create a vehicle for  
9 parental participation, they are not comprehensive enough to  
10 meet the diverse needs of the students and families in our  
11 State.

12 The legislature further finds that guardianships are  
13 expensive, labor intensive, and involve a time consuming process  
14 that relinquishes all decision making authority from the student  
15 to the guardian. Some students may have the capacity and desire  
16 to make other life decisions for themselves, but do not feel  
17 confident in making educational decisions and may require  
18 continued assistance. There are also other families that  
19 philosophically strive to maintain the rights of their adult  
20 children, regardless of their capacity, and are able to do so  
21 because of the array of alternatives to guardianship in the



1 health care, welfare, housing, and financial systems. In these  
2 instances, guardianship would not be an appropriate option.

3 The purpose of this Act is to provide a comprehensive array  
4 of options for adult students or emancipated minors to ensure  
5 their ability to make educational decisions that are consistent  
6 with the needs of the student in a manner that is respectful to  
7 the values of the student and family by:

8 (1) Establishing a power of attorney for special  
9 education;

10 (2) Establishing the process to appoint a surrogate  
11 decision maker for an adult student or emancipated  
12 minor student who lacks capacity; and

13 (3) Clarifying the authority of a guardian of an adult or  
14 emancipated minor student.

15 SECTION 2. Chapter 302A, Hawaii Revised Statutes, is  
16 amended by adding a new part to be appropriately designated and  
17 to read as follows:

18 "PART . ADULT SPECIAL EDUCATION

19 §302A- Advance special education directives. (a) An  
20 adult or emancipated minor may give an individual instruction to  
21 assist in the development and implementation of individualized  
22 education plans for special education. The instruction may be



1 oral or written. The instruction may be limited to the purpose  
2 of participating in the adult's or emancipated minor's  
3 individualized education plan processes.

4 (b) An adult or emancipated minor may execute a power of  
5 attorney for special education to authorize an agent to receive  
6 notice and to participate in meetings and all procedures related  
7 to the adult's or emancipated minor's educational program. The  
8 power of attorney for special education shall remain in effect  
9 notwithstanding the adult's or emancipated minor's later  
10 incapacity and may include individual instructions. Unless  
11 related to the student by blood, marriage, or adoption, an agent  
12 shall not be an owner, operator, or employee of the educational  
13 institution at which the adult or emancipated minor is receiving  
14 special education services. The power of attorney for special  
15 education shall be:

- 16 (1) In writing;
- 17 (2) Contain the date of its execution;
- 18 (3) Signed by the adult or emancipated minor, as the case  
19 may be; and
- 20 (4) Witnessed by one of the following methods:
  - 21 (A) Signed by two individuals who either witnessed  
22 the signing of the instrument by the adult or



1                   emancipated minor or received the adult's or  
2                   emancipated minor's acknowledgment of the  
3                   veracity of the signature on the instrument; or

4           (B) Acknowledged before a notary public in the State.

5           (c) A witness to a power of attorney for special education  
6 shall not be:

7           (1) A teacher;

8           (2) An employee of a teacher or school; or

9           (3) The agent.

10           (d) At least one of the witnesses to the power of attorney  
11 for special education shall be someone who is unrelated to the  
12 student by blood, marriage, or adoption.

13           (e) Unless otherwise specified in a power of attorney for  
14 special education, the authority of an agent shall be effective  
15 only upon a determination by the adult or emancipated minor to  
16 extend decision making authority to the agent, and shall cease  
17 to be effective upon a determination that the adult or  
18 emancipated minor has the capacity to make special education  
19 decisions and has discharged the agent from doing so.

20           (f) Unless otherwise specified in a written advance  
21 special education directive, a determination that an adult or  
22 emancipated minor lacks or has recovered capacity, or that



1 another condition exists that affects an adult's or emancipated  
2 minor's instruction or the authority of an agent, shall be made  
3 by a qualified administrator, such as the student's primary  
4 physician, psychologist, psychiatrist or the medical director of  
5 the department of health developmental disabilities division.

6 (g) An agent shall make a special education decision in  
7 accordance with the adult's or emancipated minor's instructions,  
8 if any, and other wishes to the extent known to the agent.  
9 Otherwise, the agent shall make the decision in accordance with  
10 the agent's determination of the adult's or emancipated minor's  
11 best interest. In determining the adult's or emancipated  
12 minor's best interest, the agent shall consider the adult's or  
13 emancipated minor's personal values to the extent known to the  
14 agent.

15 (h) A special education decision made by an agent for an  
16 adult or emancipated minor shall be effective without judicial  
17 approval.

18 (i) An advance special education directive shall be valid  
19 for purposes of this part if it complies with this part, or if  
20 it was executed in compliance with the laws of the state where  
21 it was executed.



1           **§302A-       Revocation of advance special education**

2 **directive.** (a) An individual shall revoke the designation of  
3 an agent in writing or by personally informing the supervising  
4 teacher.

5           (b) A teacher, agent, guardian, or surrogate who is  
6 informed of a revocation shall promptly communicate the fact of  
7 the revocation to the supervising teacher and to any educational  
8 institution at which the student is receiving special education  
9 services.

10           (c) A decree of annulment, divorce, dissolution of  
11 marriage, or legal separation shall revoke a previous  
12 designation of a spouse as agent unless otherwise specified in  
13 the decree or in a power of attorney for special education.

14           (d) An advance special education directive that conflicts  
15 with an earlier advance special education directive revokes the  
16 earlier directive to the extent of the conflict.

17           **§302A-       Educational decisions; surrogates.** (a) An adult  
18 or emancipated minor may designate or disqualify any individual  
19 to act as a surrogate by personally informing the supervising  
20 teacher. In the absence of a designation, or if the designee is  
21 not reasonably available, a surrogate may be appointed to make a  
22 special education decision for the adult or emancipated minor.



1 (b) A surrogate may make a special education decision for  
2 a student who is an adult or emancipated minor if the student  
3 has been determined by the qualified administrator to lack  
4 capacity and no agent or guardian has been appointed or the  
5 agent or guardian is not reasonably available. Determinants to  
6 lack capacity may include the following:

7 (1) The student's inability to understand the nature,  
8 extent, and probable consequences of a proposed  
9 educational program or option, on a continuing or  
10 consistent basis;

11 (2) The student's inability to make a rational evaluation  
12 of the benefits or disadvantages of a proposed  
13 educational decision or program as compared with the  
14 benefits or disadvantages of another proposed  
15 educational decision or program, on a continuing or  
16 consistent basis; or

17 (3) The student's inability to communicate such  
18 understanding in any meaningful way.

19 Upon a determination that an adult or emancipated minor lacks  
20 decisional capacity to provide informed consent, the qualified  
21 administrator or the qualified administrator's designee shall  
22 make reasonable efforts to notify the adult or emancipated minor





1 of the adult's or emancipated minor's lack of capacity. The  
2 qualified administrator, or the qualified administrator's  
3 designee, shall designate the parent or parents of the adult or  
4 emancipated minor to act as the surrogate unless the adult or  
5 emancipated minor is married, in which event the adult's or  
6 emancipated minor's adult spouse shall be designated as  
7 educational representative. If the parent or adult spouse is  
8 not available or competent to give informed consent, the  
9 administrator shall designate a competent adult brother or  
10 sister, adult aunt or uncle, or grandparent. If these relatives  
11 are not willing and able to serve as the adult's or emancipated  
12 minor's educational representative, then an individual shall be  
13 designated to serve in this capacity by the department; provided  
14 that the individual is not an employee of the department.

15 (c) If any interested person, the guardian, or qualified  
16 administrator believes the adult or emancipated minor has  
17 regained decisional capacity, the qualified administrator shall  
18 reexamine the adult or emancipated minor and determine whether  
19 or not the adult or emancipated minor has regained decisional  
20 capacity and shall enter a decision and the basis for the  
21 decision into the adult or emancipated minor's educational  
22 record and shall notify the adult or emancipated minor, the



1 surrogate decision maker, and the person who initiated the  
2 redetermination of decisional capacity.

3 (d) A surrogate who has been designated by the adult or  
4 emancipated minor may make educational decisions for the adult  
5 or emancipated minor.

6 (e) A surrogate who has not been designated by the adult  
7 or emancipated minor shall make educational decisions for the  
8 adult or emancipated minor based on the wishes of the adult or  
9 emancipated minor, or, if the wishes of the adult or emancipated  
10 minor are unknown or unclear, on the adult's or emancipated  
11 minor's best interest.

12 (f) A special education decision made by a surrogate for  
13 an adult or emancipated minor shall be effective without  
14 judicial approval.

15 (g) A supervising teacher shall require a surrogate to  
16 provide a written declaration under the penalty of false  
17 swearing stating facts and circumstances reasonably sufficient  
18 to establish the claimed authority.

19 **§302A- Decisions by guardian.** (a) Absent a court order  
20 to the contrary, a special education decision of a guardian  
21 appointed pursuant to chapter 560 takes precedence over that of  
22 an agent.



1 (b) A special education decision made by a guardian for  
2 the ward shall be effective without judicial approval; provided  
3 that a guardian shall comply with the ward's individual  
4 instructions and shall not revoke a ward's pre-incapacity  
5 advance special education directive unless expressly authorized  
6 by a court.

7 **§302A- Obligations of teacher.** (a) Before implementing  
8 a special education decision made for an adult or emancipated  
9 minor, a supervising teacher, if possible, shall promptly  
10 communicate to the adult or emancipated minor the decision made  
11 and the identity of the person making the decision.

12 (b) A supervising teacher who knows of the existence of an  
13 advance special education directive, a revocation of an advance  
14 special education directive, or a designation or  
15 disqualification of a surrogate shall promptly record its  
16 existence in the adult's or emancipated minor's education record  
17 and, if it is in writing, shall request a copy and if one is  
18 furnished shall arrange for its maintenance in the education  
19 record.

20 (c) A supervising teacher who makes or is informed of a  
21 determination that an adult or emancipated minor lacks or has  
22 recovered capacity, or that another condition exists that



1 affects an individual instruction or the authority of an agent,  
2 guardian, or surrogate, shall promptly record the determination  
3 in the adult's or emancipated minor's educational record and  
4 communicate the determination to the adult or emancipated minor,  
5 if possible, and to any person then authorized to make  
6 educational decisions for the adult or emancipated minor.

7 (d) A teacher or institution providing special education  
8 and or related services to an adult or emancipated minor shall:

9 (1) Comply with an individual instruction of the adult or  
10 emancipated minor and with a reasonable interpretation  
11 of that instruction made by a person then authorized  
12 to make educational decisions for the adult or  
13 emancipated minor; and

14 (2) Comply with a special education decision for the adult  
15 or emancipated minor made by a person then authorized  
16 to make educational decisions for the adult or  
17 emancipated minor to the same extent as if the  
18 decision had been made by the adult or emancipated  
19 minor while the adult or emancipated minor had  
20 capacity.

21 (e) A teacher or institution that declines to comply with  
22 the special education decision for the adult or emancipated



1 minor made by a person then authorized to make educational  
2 decisions for the adult or emancipated minor shall:

3 (1) Promptly so inform the adult or emancipated minor, if  
4 possible, and any person then authorized to make  
5 educational decisions for the adult or emancipated  
6 minor; and

7 (2) Provide continuing special education or related  
8 services as defined by the individualized education  
9 plan to the adult or emancipated minor until a  
10 transfer can be effected.

11 (f) A teacher or institution shall not require or prohibit  
12 the execution or revocation of an advance special education  
13 directive as a condition for providing special education or  
14 related services.

15 **§302A- Educational information.** Unless otherwise  
16 specified in an advance special education directive, a person  
17 then authorized to make educational decisions for a student has  
18 the same rights as the student to request, receive, examine,  
19 copy, and consent to the disclosure of the individualized  
20 education plan or any other educational records.

21 **§302A- Immunities.** (a) A teacher or institution acting  
22 in good faith and in accordance with generally accepted



1 educational standards applicable to the teacher or institution  
2 shall not be subject to civil or criminal liability or to  
3 discipline for unprofessional conduct for:

4 (1) Complying with a special education decision of a  
5 person apparently having authority to make a special  
6 education decision for an adult or emancipated minor,  
7 including a decision to withhold or withdraw special  
8 education or related services;

9 (2) Declining to comply with a special education decision  
10 of a person based upon a belief that the person then  
11 lacked authority; or

12 (3) Complying with an advance special education directive  
13 and assuming that the directive was valid when made  
14 and has not been revoked or terminated.

15 (b) An individual acting as agent, guardian, or surrogate  
16 under this part shall not be subject to civil or criminal  
17 liability or to discipline for unprofessional conduct for  
18 educational decisions made in good faith.

19 **§302A- Effect of copy.** A copy of a written advance  
20 special education directive, revocation of an advance special  
21 education directive, or designation or disqualification of a  
22 surrogate has the same effect as the original.



1           **§302A- Effect of this part.** (a) This part shall not  
2 create a presumption concerning the intention of an individual  
3 who has not made or who has revoked an advance special education  
4 directive.

5           (b) This part shall not authorize or require a teacher or  
6 institution to provide special education or related services  
7 contrary to generally accepted educational standards applicable  
8 to the teacher or institution.

9           (c) This part shall not affect other statutes of this  
10 State governing treatment for mental illness of an individual  
11 involuntarily committed to a psychiatric facility.

12           **§302A- Judicial relief.** On petition of an adult or  
13 emancipated minor, the adult's or emancipated minor's agent,  
14 guardian, or surrogate, or a teacher or institution involved  
15 with the adult's or emancipated minor's education, any court of  
16 competent jurisdiction may enjoin or direct a special education  
17 decision or order other equitable relief. A proceeding under  
18 this section shall be governed by .

19           **§302A- Uniformity of application and construction.** This  
20 part shall be applied and construed to effectuate its general  
21 purpose to make uniform the law with respect to the subject of  
22 this part among states enacting it."



1 SECTION 3. This Act shall take effect on July 1, 2050.





**Report Title:**

DOE; SPED; Transfer of Rights; Appropriation

**Description:**

Establishes a power of attorney for special education.  
Establishes the process to appoint a surrogate decision maker  
for an adult or emancipated minor student who lacks capacity.  
Clarifies the authority of a guardian of an adult or emancipated  
minor student. (SB2879 SD2)

