

STATE OF NEW YORK

8586

2021-2022 Regular Sessions

IN ASSEMBLY

December 22, 2021

Introduced by M. of A. SIMON, GUNTHER -- (at request of the Office for People with Developmental Disabilities) -- read once and referred to the Committee on Mental Health

AN ACT to amend the mental hygiene law, in relation to supported decision-making by people with intellectual, developmental, cognitive and psychosocial disabilities

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The mental hygiene law is amended by adding a new article
2 82 to read as follows:

3 ARTICLE 82

4 SUPPORTED DECISION-MAKING

5 Section 82.01 Legislative findings and purpose.

6 82.02 Definitions.

7 82.03 Presumption of capacity.

8 82.04 Scope.

9 82.05 Duties, responsibilities, and authority of supporters.

10 82.06 Formation and term of agreement.

11 82.07 Revocation and amendment of agreement.

12 82.08 Eligibility and resignation of supporters.

13 82.09 Facilitation of agreement.

14 82.10 Form of agreement.

15 82.11 Legal effect of decisions made with support and third-party obligations.

16 82.12 Limitations on liability.

17 82.13 Supporter notice.

18 82.14 Reporting abuse, coercion, undue influence, or financial exploitation.

19 82.15 Rules and regulations.

20 § 82.01 Legislative findings and purpose.

21 EXPLANATION--Matter in italics (underscored) is new; matter in brackets
22 [-] is old law to be omitted.

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1 (a) The legislature finds that a person's right to make their own
2 decisions is critical to their autonomy and self-determination. People
3 with intellectual, developmental, cognitive and psychosocial disabili-
4 ties are often denied that right because of stigma and outdated beliefs
5 about their capability. This right is denied, despite the reality that
6 very few people make decisions entirely on their own. Everyone uses
7 supports, as do people with disabilities; who may just need more or
8 different kinds of supports.

9 (b) The legislature further finds that the, now well recognized, prac-
10 tice of supported decision-making is a way in which people with disabili-
11 ties can make their own decisions with the support they need from
12 trusted persons in their lives, and that supported decision-making can
13 be a less restrictive alternative to guardianship. Recognizing that
14 supported decision-making can take a variety of forms, the legislature
15 finds that a more formal process, resulting in a supported decision-mak-
16 ing agreement between the person with a disability (the decision-maker)
17 and their supporter or supporters, can provide the basis for requiring
18 third parties, who might otherwise question a person's legal capacity
19 because of their disability, to recognize their decisions on the same
20 basis as others, and to grant corresponding immunity to such parties
21 when they do so in good faith. When this more formal process is
22 followed, people with disabilities can make choices confident that they
23 will be respected by others and knowing they will be solely responsible
24 for their own decisions.

25 (c) The legislature further finds that supported decision-making and
26 supported decision-making agreements should be encouraged for most
27 persons with disabilities, and that the execution of a supported deci-
28 sion-making agreement should not detrimentally impact the eligibility of
29 a person for other services, including adult protective services. At
30 present, the legislature finds there is sufficient evidence of the means
31 of providing support to persons with intellectual and developmental
32 disabilities, as demonstrated, for example, through the recently
33 completed five-year pilot project funded by the New York State Develop-
34 mental Disability Planning Council, to require third-party recognition
35 of decisions made pursuant to supported decision-making agreements made
36 through a process of facilitation for the decision-maker and their
37 supporters. Where persons with intellectual or developmental disabili-
38 ties and their supporters receive facilitation and/or education, in
39 accordance with regulations to be drafted by the office for people with
40 developmental disabilities, the legislature will deem them to have legal
41 capacity on a basis equal with all others.

42 (d) The legislature also strongly urges relevant state agencies and
43 civil society to research and develop appropriate and effective means of
44 support for older persons with cognitive decline, persons with traumatic
45 brain injuries, and persons with psychosocial disabilities, so that full
46 legislative recognition can also be accorded to the decisions made with
47 supported decision-making agreements by persons with such conditions,
48 based on a consensus about what kinds of support are most effective and
49 how they can best be delivered.

50 § 82.02 Definitions.

51 When used in this article, the following terms shall have the follow-
52 ing meaning, unless the context or subject matter requires a different
53 interpretation:

54 (a) "abuse" encompasses physical abuse, sexual abuse, and emotional
55 abuse, as defined in section four hundred seventy-three of the social
56 services law.

1 (b) "adult" means an individual eighteen years of age or older.

2 (c) "advance directive" means a legally recognized written or oral
3 instruction by an adult relating to the provision of health care to the
4 adult if and when they become incapacitated, including but not limited
5 to a health care proxy, a consent to the issuance of an order not to
6 resuscitate or other orders for life-sustaining treatment recorded in a
7 patient's medical record, or other legally-recognized statements of
8 wishes or beliefs.

9 (d) "decision-maker" means an adult who has executed, or seeks to
10 execute, a supported decision-making agreement.

11 (e) "financial exploitation" has the meaning given in section four
12 hundred seventy-three of the social services law.

13 (f) "good faith" means honest in fact and in the observance of reason-
14 able standards of fair dealing.

15 (g) "neglect" has the meaning defined in paragraph (d) of subdivision
16 one of section four hundred seventy-three of the social services law.

17 (h) "physical coercion" means to place under duress, menace, or
18 threaten physical violence or imprisonment.

19 (i) "supported decision-making" means a way by which a decision-maker
20 utilizes support from trusted persons in their life, in order to make
21 their own decisions about their life, including, but not limited to,
22 decisions related to where and with whom the decision-maker wants to
23 live; decisions about finances; the services, supports, and health care
24 the decision-maker wants to receive; and where the decision-maker wants
25 to work.

26 (j) "supported decision-making agreement" is an agreement a decision-
27 maker enters into with one or more supporters under this section that
28 describes how the decision-maker uses supported decision-making to make
29 their own decisions.

30 (k) "supporter" means an adult who has voluntarily entered into a
31 supported decision-making agreement with a decision-maker, agreeing to
32 assist the decision-maker in making their own decisions as prescribed by
33 the supported decision-making agreement, and who is not ineligible under
34 section 82.08 of this article.

35 (l) "undue influence" means moral or mental coercion that leads some-
36 one to carry out the wishes of another instead of their own because they
37 are unable to refuse or resist.

38 § 82.03 Presumption of capacity.

39 (a) For the purposes of this article, every adult shall be presumed to
40 have the capacity to enter into a supported decision-making agreement,
41 unless that adult has a legal guardian, appointed by a court of compe-
42 tent jurisdiction, whose granted authority is in conflict with the
43 proposed supported decision-making agreement. This presumption may be
44 rebutted only by clear and convincing evidence.

45 (b) Capacity shall include capacity with decision-making support
46 and/or accommodations.

47 (c) A diagnosis of intellectual, developmental, or other disability or
48 condition shall not constitute evidence of incapacity.

49 (d) The manner in which an adult communicates with others shall not
50 constitute evidence of incapacity.

51 (e) No person or court may use or consider a decision-maker's
52 execution of, or wish to execute, a supported decision-making agreement
53 as evidence that the decision-maker lacks capacity, or to deny the deci-
54 sion-maker benefits to which they are otherwise entitled.

55 (f) A decision-maker may make, change, or revoke a supported deci-
56 sion-making agreement, if the decision-maker understands that they are

1 making, changing, or revoking an agreement with their chosen supporters
2 and that they are doing so voluntarily.

3 § 82.04 Scope.

4 (a) If a decision-maker voluntarily enters into a supported decision-
5 making agreement with one or more supporters, the decision-maker may, in
6 the agreement, authorize the supporter to provide support to them in
7 making their own decisions in areas they choose, including, but not
8 limited to: gathering information, understanding and interpreting infor-
9 mation, weighing options and alternatives to a decision, considering
10 the consequences of making a decision or not making it, participating in
11 conversations with third parties if the decision-maker is present and
12 requests their participation, communicating the decision-maker's deci-
13 sion to third parties, and providing the decision-maker support in
14 implementing the decision-maker's decision.

15 (b) Nothing in this article, nor the existence of an executed
16 supported decision-making agreement, shall preclude the decision-maker
17 from acting independently of the supported decision-making agreement or
18 executing, with or without the assistance of supporters under a
19 supported decision-making agreement, a power of attorney under title
20 fifteen of article five of the general obligations law, health care
21 proxy under article twenty-nine-c of the public health law, or other
22 advance directive.

23 (c) Notwithstanding the existence of a supported decision-making
24 agreement, a decision-maker shall continue to have unrestricted access
25 to their personal information without the assistance of a supporter.

26 (d) Notwithstanding the existence of a supported decision-making
27 agreement, a decision-maker may request and receive assistance in making
28 any decision that is not covered under the supported decision-making
29 agreement at any time and from any person, regardless of whether that
30 person is designated as a supporter in the supported decision-making
31 agreement.

32 (e) A supported decision-making agreement made pursuant to this arti-
33 cle may be evidence that the decision-maker has a less restrictive
34 alternative to guardianship in place.

35 (f) The availability of supported decision-making agreements is, in no
36 way, intended to limit the informal use of supported decision-making, or
37 to preclude judicial consideration of such informal arrangements as less
38 restrictive alternatives to guardianship.

39 (g) Execution of a supported decision-making agreement may not be a
40 condition of participation in any activity, service, or program.

41 (h) If a decision-maker seeks from any person professional advice that
42 would be otherwise covered by evidentiary privilege in accordance with
43 sections forty-five hundred three, forty-five hundred four, forty-five
44 hundred seven, forty-five hundred eight and forty-five hundred ten of
45 the civil practice law and rules, the inclusion in the conversation of a
46 supporter authorized by the supported decision-making agreement to
47 provide support in the area in which the decision-maker seeks the
48 professional advice shall not constitute a waiver of that privilege.

49 (i) Notwithstanding any other provision of law to the contrary, noth-
50 ing within this article shall be construed to prohibit eligibility of a
51 decision-maker for receipt of services or supports that they would have
52 otherwise been entitled absent entering into a supported decision-making
53 agreement under the provisions of this article.

54 § 82.05 Duties, responsibilities, and authority of supporters.

55 (a) A supporter must:

1 1. respect the decision-maker's right to make a decision, even when
2 the supporter disagrees with the decision or believes it is not in the
3 decision-maker's best interests;

4 2. act honestly, diligently, and in good faith;

5 3. act within the scope set forth in the executed supported decision-
6 making agreement;

7 4. avoid conflicts of interest; and

8 5. notify the decision-maker in writing, and in a manner the deci-
9 sion-maker can understand, of the supporter's intent to resign as a
10 supporter.

11 (b) A supporter is prohibited from:

12 1. making decisions for the decision-maker, except to the extent
13 otherwise granted in an advance directive;

14 2. exerting undue influence upon the decision-maker;

15 3. physically coercing the decision-maker;

16 4. obtaining, without the consent of the decision-maker, information
17 acquired for a purpose other than assisting the decision-maker in making
18 a decision authorized by the supported decision-making agreement; and

19 5. obtaining, without the consent of the decision-maker, or as
20 expressly granted by the supported decision-making agreement, and accom-
21 panied by an appropriate release, nonpublic personal information as
22 defined in 15 U.S.C. § 6809(4)(A), or clinical records or information
23 under subdivision (c) of section of 33.13 of this chapter.

24 (c) The relationship between a decision-maker and a supporter is one
25 of trust and confidence and serves to preserve the decision-making
26 authority of the decision-maker.

27 (d) A supporter shall not be considered a surrogate or substitute
28 decision maker for the decision-maker and shall not have the authority
29 to sign legal documents on behalf of the decision-maker or bind the
30 decision-maker to a legal agreement, but may, if such authority is
31 expressly granted in the supported decision-making agreement, provide
32 co-signature together with the decision-maker acknowledging the receipt
33 of statements of rights and responsibilities in order to permit partic-
34 ipation in such programs or activities that the decision-maker has
35 communicated a choice to participate in.

36 (e) If expressly granted by the supported decision-making agreement,
37 and the decision-maker has signed an appropriate release, the supporter
38 may assist the decision-maker in obtaining educational records under the
39 Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g),
40 protected health information under the Health Insurance Portability and
41 Accountability Act of 1996 (45 CFR §§ 164.502, 164.508), or clinical
42 records and information under subdivision (c) of section 33.13 of this
43 chapter.

44 (f) A supporter shall ensure the information under this section is
45 kept privileged and confidential, as applicable, and is not subject to
46 unauthorized access, use, or disclosure.

47 § 82.06 Formation and term of agreement.

48 (a) An adult may enter into a supported decision-making agreement at
49 any time if the adult enters into the agreement voluntarily.

50 (b) A decision-maker may sign a supported decision-making agreement in
51 any manner, including electronic signatures permitted under article
52 three of the state technology law.

53 (c) A supported decision-making agreement formed under the provisions
54 of this article shall remain in effect unless and until revoked by the
55 decision-maker.

56 § 82.07 Revocation and amendment of agreement.

1 (a) The decision-maker may revoke all or part of a supported deci-
2 sion-making agreement by notifying the supporters orally or in writing,
3 or by any other act evincing a specific intent to revoke the agreement.
4 The failure of the decision-maker to notify supporters shall not invali-
5 date the revocation of all or part of the supported decision-making
6 agreement.

7 (b) A decision-maker may amend a supported decision-making agreement
8 at any time for any reason, subject to the requirements of this section.
9 The decision-maker shall notify all supporters of any amendment made to
10 the supported decision-making agreement, but the failure to do so shall
11 not invalidate the amendment.

12 § 82.08 Eligibility and resignation of supporters.

13 (a) A supporter shall be any adult chosen by the decision-maker.

14 (b) An individual who has been chosen by the decision-maker to be a
15 supporter, or who has entered into a supported decision-making agreement
16 as a supporter shall be deemed ineligible to act, continue to serve as
17 supporter upon the occurrence of any of the following:

18 1. a court authorizes a protective order or restraining order against
19 the supporter on request of or on behalf of the decision-maker; or

20 2. the local department of social services has found that the support-
21 er has committed abuse, neglect, financial exploitation, or physical
22 coercion against the decision-maker as such terms are defined in section
23 82.02 of this article.

24 (c) A supporter may resign as supporter by written or oral notice to
25 the decision-maker and the remaining supporters. If the supported deci-
26 sion-making agreement includes more than one supporter or is amended to
27 replace the supporter who has resigned, the supported decision-making
28 agreement shall survive for supporters who have not resigned as support-
29 ers, unless it is otherwise revoked under this section.

30 (d) If a supporter with whom a decision-maker entered into a supported
31 decision-making agreement becomes ineligible to serve as supporter under
32 subdivision (b) of this section, or resigns as supporter under subdivi-
33 sion (c) of this section, and the decision-maker does not amend the
34 supported decision-making agreement to designate a replacement, the
35 supported decision-making agreement shall be considered terminated as to
36 the role of the ineligible or resigned supporter, but shall continue to
37 have effect as to any other designated supporters.

38 § 82.09 Facilitation of agreement.

39 The provisions of section 82.11 and subdivisions (b) through (d) of
40 section 82.12 of this article shall only apply in circumstances where a
41 decision is made by a decision-maker who receives or is eligible to
42 receive services that are operated, certified, funded or approved by the
43 office for people with developmental disabilities, pursuant to a
44 supported decision-making agreement made in accordance with this article
45 and following a recognized supported decision-making facilitation or
46 education process as defined and prescribed by regulations promulgated
47 by the office for people with developmental disabilities.

48 § 82.10 Form of agreement.

49 (a) A supported decision-making agreement may be in any form consist-
50 ent with the requirements set forth in this article.

51 (b) A supported decision-making agreement must:

52 1. be in writing;

53 2. be dated;

54 3. designate the decision-maker, and at least one supporter;

55 4. list the categories of decisions with which a supporter is author-
56 ized to assist the decision-maker;

1 5. list the kinds of support that each supporter may give for each
2 area in which they are designated as a supporter;

3 6. contain an attestation that the supporters agree to honor the right
4 of the decision-maker to make their own decisions in the ways and areas
5 specified in the agreement, respect the decision-maker's decisions, and,
6 further, that they will not make decisions for the decision-maker;

7 7. state that the decision-maker may change, amend, or revoke the
8 supported decision-making agreement at any time for any reason, subject
9 to the requirements of section 82.06 of this article;

10 8. be signed by all designated supporters; and

11 9. be executed or endorsed by the decision-maker in the presence of at
12 least two adult witnesses who are not also designated as supporters, or
13 with the attestation of a notary public.

14 (c) A supported decision-making agreement may:

15 1. appoint more than one supporter;

16 2. authorize a supporter to obtain personal information as described
17 in subdivision (e) of section 82.05 of this article;

18 3. authorize a supporter to share information with any other supporter
19 or others named in the agreement; or

20 4. detail any other limitations on the scope of a supporter's role
21 that the decision-maker deems important.

22 (d) In order to be subject to the provisions of section 82.11 and
23 subdivisions (b) through (d) of section 82.12 of this article, a
24 supported decision-making agreement must also:

25 1. be signed by a facilitator or educator;

26 2. include a statement that the supported decision-making agreement
27 was made in accordance with a recognized facilitation and/or education
28 process; and

29 3. include an attached attestation by the decision-maker that a
30 particular decision has been made in accordance with the support
31 described in the supported decision-making agreement.

32 § 82.11 Legal effect of decisions made with support and third-party
33 obligations.

34 (a) This section shall apply only to decisions made by adults who
35 receive or are eligible to receive services that are operated, certi-
36 fied, funded or approved by the office for people with developmental
37 disabilities, and pursuant to supported decision-making agreements made
38 in accordance with this article and following a recognized supported
39 decision-making facilitation or education process, as prescribed by
40 regulations governing the facilitation and education processes promul-
41 gated by the office for people with developmental disabilities.

42 (b) A decision or request made or communicated by a decision-maker
43 with the assistance of a supporter in accordance with the provisions of
44 a supported decision-making agreement must, notwithstanding any other
45 provision of law, be recognized as the decision or request of the deci-
46 sion-maker and may be enforced by the decision-maker in law or equity on
47 the same basis as all others.

48 (c) A person, entity, or agency required to recognize and honor a
49 decision made pursuant to a supported decision-making agreement author-
50 ized by this section may require the decision-maker to execute or
51 endorse an attestation, as provided in paragraph three of subdivision
52 (d) of section 82.10 of this article, as a condition of recognizing and
53 honoring the decision.

54 (d) A person, entity, or agency that receives a supported decision-
55 making agreement must honor a decision made in accordance with the
56 agreement, unless the person, entity, or agency has substantial cause to

1 believe the supported decision-making agreement has been revoked, or the
2 decision-maker is being abused, coerced, unduly influenced, or finan-
3 cially exploited by the supporter, or that the decision will cause the
4 decision-maker substantial and imminent physical or financial harm.

5 § 82.12 Limitations on liability.

6 (a) Subdivisions (b), (c) and (d) of this section shall apply only to
7 decisions made by adults who receive or are eligible to receive services
8 that are operated, certified, funded or approved by the office for
9 people with developmental disabilities, and pursuant to supported deci-
10 sion-making agreements made in accordance with this article and follow-
11 ing a recognized supported decision-making facilitation or education
12 process, as prescribed by regulations governing the facilitation and
13 education processes promulgated by the office for people with develop-
14 mental disabilities.

15 (b) A person shall not be subject to criminal or civil liability and
16 shall not be determined to have engaged in professional misconduct for
17 an act or omission if the act or omission is done in good faith and in
18 reliance on a decision made by an decision-maker pursuant to a duly
19 executed supported decision-making agreement made in accordance with
20 this article.

21 (c) Any health care provider that provides health care based on the
22 consent of a decision-maker, given with support or assistance provided
23 through a duly executed supported decision-making agreement, made in
24 accordance with this article, shall be immune from any action alleging
25 that the decision-maker lacked capacity to provide informed consent
26 unless the entity, custodian, or organization had actual knowledge or
27 notice that the decision-maker had revoked the supported decision-making
28 agreement, or that the supporter had committed abuse, physical coercion,
29 undue influence, or financial exploitation with respect to the decision
30 to grant consent.

31 (d) Any public or private entity, custodian, or organization that
32 discloses personal information about a decision-maker in reliance on the
33 terms of a duly executed supported decision-making agreement made in
34 accordance with this article, to a supporter authorized by the terms of
35 the supported decision-making agreement to assist the decision-maker in
36 accessing, collecting, or obtaining that information under subdivision
37 (e) of section 82.05 of this article shall be immune from any action
38 alleging that it improperly or unlawfully disclosed such information to
39 the supporter unless the entity, custodian, or organization had actual
40 knowledge that decision-maker had revoked such authorization.

41 (e) This section may not be construed to provide immunity from actions
42 alleging that a health care provider has done any of the following:

43 1. caused personal injury as a result of a negligent, reckless, or
44 intentional act;

45 2. acted inconsistently with the expressed wishes of a decision-maker;

46 3. failed to provide information to either decision-maker or their
47 supporter that would be necessary for informed consent; or

48 4. otherwise acted inconsistently with applicable law.

49 (f) The existence or availability of a supported decision-making
50 agreement does not relieve a health care provider of any legal obli-
51 gation to provide services to individuals with disabilities, including
52 the obligation to provide reasonable accommodations or auxiliary aids
53 and services, including, but not limited to, interpretation services and
54 communication supports to individuals with disabilities under the feder-
55 al Americans with Disabilities Act (42 U.S.C. § 12101).

56 § 82.13 Supporter notice.

1 (a) If any state or municipal law requires that an agency, entity, or
2 person provide a prescribed notice to a decision-maker, and the agency,
3 entity, or person required to provide such notice has received a
4 supported decision-making agreement from a decision-maker that specifies
5 that a supporter is also to receive a copy of any such notice, then the
6 agency, entity, or person in possession of the supported decision-making
7 agreement shall also provide the specified supporter with a copy of such
8 notice.

9 (b) Notwithstanding the provisions of this subsection, if any state or
10 municipal law requires that an agency, entity, or person provide a
11 prescribed notice to a decision-maker and such notice includes protected
12 information, including private health information or educational records
13 protected by state or federal law, such notice shall not be provided to
14 the specified supporter unless the supported decision-making agreement
15 is accompanied by a release authorizing the specified supporter to
16 obtain the protected information.

17 § 82.14 Reporting abuse, coercion, undue influence, or financial exploi-
18 tation.

19 (a) Any person who receives a copy of or an original supported deci-
20 sion-making agreement and has cause to believe the decision-maker is
21 being abused, physically coerced, or financially exploited by a support-
22 er, may report the alleged abuse, physical coercion, or financial
23 exploitation to adult protective services pursuant to section four
24 hundred seventy-three of the social services law.

25 (b) Nothing in this section may be construed as eliminating or limit-
26 ing a person's duty or requirement to report under any other statute or
27 regulation.

28 § 82.15 Rules and regulations.

29 (a) The commissioner of the office for people with developmental disa-
30 bilities shall promulgate within one year of the passage of this act the
31 rules and regulations necessary to implement this article for adults who
32 receive or are eligible to receive services that are operated, certi-
33 fied, funded or approved by the office for people with developmental
34 disabilities.

35 (b) Further regulations related to this article may be promulgated by
36 state agencies whose service populations may benefit from the implemen-
37 tation of supported decision-making.

38 § 2. This act shall take effect ninety days from the date that the
39 regulations issued in accordance with section one of this act appear in
40 the New York State Register, or the date such regulations are adopted,
41 whichever is later; and provided that the commissioner of mental
42 hygiene shall notify the legislative bill drafting commission upon the
43 occurrence of the appearance of the regulations in the New York State
44 Register or the date such regulations are adopted, whichever is later,
45 in order that the commission may maintain an accurate and timely effec-
46 tive data base of the official text of laws of the state of New
47 York in furtherance of effecting the provisions of section 44 of the
48 legislative law and section 70-b of the public officers law.