

STATE OF NEW YORK

7107--A

Cal. No. 540

2021-2022 Regular Sessions

IN SENATE

June 1, 2021

Introduced by Sen. MANNION -- (at request of the Office for People with Developmental Disabilities) -- read twice and ordered printed, and when printed to be committed to the Committee on Disabilities -- recommitted to the Committee on Disabilities in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

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

LBD09657-04-2

1 82.14 Reporting abuse, coercion, undue influence, or financial
2 exploitation.

3 82.15 Rules and regulations.

4 § 82.01 Legislative findings and purpose.

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8 ties are often denied that right because of stigma and outdated beliefs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

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

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

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

55 § 82.02 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

44 § 82.03 Presumption of capacity.

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

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

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

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

1 (e) Neither the execution of a supported decision-making agreement by
2 an individual, nor the interest in or wish to execute a supported deci-
3 sion-making agreement by an individual, nor the failure of an individual
4 to execute a supported decision-making agreement may be used or consid-
5 ered as evidence that the individual lacks capacity, or to deny the
6 decision-maker benefits to which they are otherwise entitled, including
7 adult protective services.

8 (f) A decision-maker may make and execute a supported decision-making
9 agreement, if the decision-maker understands that they are making and
10 executing an agreement with their chosen supporters and that they are
11 doing so voluntarily.

12 § 82.04 Scope.

13 (a) If a decision-maker voluntarily enters into a supported decision-
14 making agreement with one or more supporters, the decision-maker may, in
15 the agreement, authorize the supporter to provide support to them in
16 making their own decisions in areas they choose, including, but not
17 limited to: gathering information, understanding and interpreting infor-
18 mation, weighing options and alternatives to a decision, considering
19 the consequences of making a decision or not making it, participating in
20 conversations with third parties if the decision-maker is present and
21 requests their participation, communicating the decision-maker's deci-
22 sion to third parties if the decision-maker is present and requests
23 their participation, and providing the decision-maker support in imple-
24 menting the decision-maker's decision.

25 (b) Nothing in this article, nor the existence of an executed
26 supported decision-making agreement, shall preclude the decision-maker
27 from acting independently of the supported decision-making agreement or
28 executing, with or without the assistance of supporters under a
29 supported decision-making agreement, a power of attorney under title
30 fifteen of article five of the general obligations law, health care
31 proxy under article twenty-nine-C of the public health law, or other
32 advance directive.

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

36 (d) Notwithstanding the existence of a supported decision-making
37 agreement, a decision-maker may request and receive assistance in making
38 any decision that is not covered under the supported decision-making
39 agreement at any time and from any person, regardless of whether that
40 person is designated as a supporter in the supported decision-making
41 agreement.

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

45 (f) The availability of supported decision-making agreements is not
46 intended to limit the informal use of supported decision-making, or to
47 preclude judicial consideration of such informal arrangements as less
48 restrictive alternatives to guardianship.

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

51 (h) If a decision-maker seeks from any person professional advice that
52 would be otherwise covered by evidentiary privilege in accordance with
53 sections forty-five hundred three, forty-five hundred four, forty-five
54 hundred seven, forty-five hundred eight and forty-five hundred ten of
55 the civil practice law and rules, the inclusion in the conversation of a
56 supporter authorized by the supported decision-making agreement to

1 provide support in the area in which the decision-maker seeks the
2 professional advice shall not constitute a waiver of that privilege.

3 (i) Notwithstanding any other provision of law to the contrary, noth-
4 ing within this article shall be construed to prohibit eligibility of a
5 decision-maker for receipt of services or supports that they would have
6 otherwise been entitled, including adult protective services, absent
7 entering into a supported decision-making agreement under the provisions
8 of this article.

9 § 82.05 Duties, responsibilities, and authority of supporters.

10 (a) A supporter must:

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

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

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

17 4. avoid conflicts of interest; and

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

21 (b) A supporter is prohibited from:

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

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

25 3. physically coercing the decision-maker;

26 4. obtaining, without the consent of the decision-maker, information
27 acquired for a purpose other than assisting the decision-maker in making
28 a decision authorized by the supported decision-making agreement;

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

34 6. communicating a decision-maker's decision to a third-party without
35 the participation and presence of the decision-maker.

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

39 (d) A supporter shall not be considered a surrogate or substitute
40 decision maker for the decision-maker and shall not have the authority
41 to sign legal documents on behalf of the decision-maker or bind the
42 decision-maker to a legal agreement, but may, if such authority is
43 expressly granted in the supported decision-making agreement, provide
44 co-signature together with the decision-maker acknowledging the receipt
45 of statements of rights and responsibilities in order to permit partic-
46 ipation in such programs or activities that the decision-maker has
47 communicated a choice to participate in.

48 (e) If expressly granted by the supported decision-making agreement,
49 and the decision-maker has signed an appropriate release, the supporter
50 may assist the decision-maker in obtaining educational records under the
51 Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g),
52 protected health information under the Health Insurance Portability and
53 Accountability Act of 1996 (45 CFR §§ 164.502, 164.508), clinical
54 records and information under subdivision (c) of section 33.13 of this
55 chapter, or patient information under subdivisions two and three of
56 section eighteen of the public health law.

1 (f) A supporter shall ensure the information obtained under subdivi-
2 sion (e) of this section is kept privileged and confidential, as appli-
3 cable, and is not subject to unauthorized access, use, or disclosure.
4 § 82.06 Formation and term of agreement.

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

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

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

13 § 82.07 Revocation and amendment of agreement.

14 (a) The decision-maker may revoke all or part of a supported deci-
15 sion-making agreement by notifying the supporters orally or in writing,
16 or by any other act evincing a specific intent to revoke the agreement.
17 The failure of the decision-maker to notify supporters shall not invali-
18 date the revocation of all or part of the supported decision-making
19 agreement.

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

25 § 82.08 Eligibility and resignation of supporters.

26 (a) A supporter shall be any adult chosen by the decision-maker; if
27 the supporter chosen by the decision-maker is an employee of a provider
28 from whom the decision-maker receives services, the employee and the
29 provider shall follow the requirements set out in regulations promulgat-
30 ed by the office for people with developmental disabilities, or other
31 appropriate regulatory body which address those circumstances, with
32 attention paid to relative labor law and employment obligations and
33 possible conflicts of interest or the appearance of a conflict of inter-
34 est.

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

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

41 2. the local department of social services has found that the support-
42 er has committed abuse, neglect, financial exploitation, or physical
43 coercion against the decision-maker as such terms are defined in section
44 82.02 of this article.

45 (c) A supporter may resign as supporter by written or oral notice to
46 the decision-maker and the remaining supporters.

47 (d) If the supported decision-making agreement includes more than one
48 supporter or is amended to replace the supporter who is ineligible under
49 subdivision (b) of this section or resigns under subdivision (c) of this
50 section, the supported decision-making agreement shall survive for the
51 remaining supporters, unless it is otherwise revoked under section 82.07
52 of this article.

53 (e) If the supported decision-making agreement does not include more
54 than one supporter, and is not amended to replace the supporter who
55 becomes ineligible under subdivision (b) of this section or resigns

1 under subdivision (c) of this section, the supported decision-making
2 agreement shall be considered terminated.

3 § 82.09 Facilitation of agreement.

4 The provisions of section 82.11 and subdivisions (b) through (d) of
5 section 82.12 of this article shall only apply in circumstances where a
6 decision is made by a decision-maker pursuant to a supported decision-
7 making agreement created in accordance with this article and following a
8 recognized supported decision-making facilitation or education process
9 as defined and prescribed by regulations promulgated by the office for
10 people with developmental disabilities.

11 § 82.10 Form of agreement.

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

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

- 15 1. be in writing;
- 16 2. be dated;
- 17 3. designate the decision-maker, and at least one supporter;
- 18 4. list the categories of decisions with which a supporter is author-
19 ized to assist the decision-maker;
- 20 5. list the kinds of support that each supporter may give for each
21 area in which they are designated as a supporter;
- 22 6. contain an attestation that the supporters agree to honor the right
23 of the decision-maker to make their own decisions in the ways and areas
24 specified in the agreement, respect the decision-maker's decisions, and,
25 further, that they will not make decisions for the decision-maker;
- 26 7. state that the decision-maker may change, amend, or revoke the
27 supported decision-making agreement at any time for any reason, subject
28 to the requirements of section 82.06 of this article;
- 29 8. be signed by all designated supporters; and
- 30 9. be executed or endorsed by the decision-maker in the presence of at
31 least two adult witnesses who are not also designated as supporters, or
32 with the attestation of a notary public.

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

- 34 1. appoint more than one supporter;
- 35 2. authorize a supporter to obtain personal information as described
36 in subdivision (e) of section 82.05 of this article;
- 37 3. authorize a supporter to share information with any other supporter
38 or others named in the agreement; or
- 39 4. detail any other limitations on the scope of a supporter's role
40 that the decision-maker deems important.

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

- 44 1. be signed by a facilitator or educator;
- 45 2. include a statement that the supported decision-making agreement
46 was made in accordance with a recognized facilitation and/or education
47 process; and
- 48 3. include an attached attestation by the decision-maker that a
49 particular decision has been made in accordance with the support
50 described in the supported decision-making agreement.

51 § 82.11 Legal effect of decisions made with support and third-party
52 obligations.

53 (a) This section shall apply only to decisions made pursuant to
54 supported decision-making agreements created in accordance with this
55 article and following a recognized supported decision-making facili-
56 tation or education process, as prescribed by regulations governing the

1 facilitation and education processes promulgated by the office for
2 people with developmental disabilities.

3 (b) A decision or request made or communicated by a decision-maker
4 with the assistance of a supporter in accordance with the provisions of
5 a supported decision-making agreement must, notwithstanding any other
6 provision of law, be recognized as the decision or request of the deci-
7 sion-maker and may be enforced by the decision-maker in law or equity on
8 the same basis as all others.

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

15 (d) A person, entity, or agency that receives a supported decision-
16 making agreement must honor a decision made in accordance with the
17 agreement, unless the person, entity, or agency has substantial cause to
18 believe the supported decision-making agreement has been revoked, or the
19 decision-maker is being abused, coerced, unduly influenced, or finan-
20 cially exploited by the supporter, or that the decision will cause the
21 decision-maker substantial and imminent physical or financial harm.

22 § 82.12 Limitations on liability.

23 (a) Subdivisions (b), (c) and (d) of this section shall apply only to
24 decisions made pursuant to supported decision-making agreements created
25 in accordance with this article and following a recognized supported
26 decision-making facilitation or education process, as prescribed by
27 regulations governing the facilitation and education processes promul-
28 gated by the office for people with developmental disabilities.

29 (b) A person shall not be subject to criminal or civil liability and
30 shall not be determined to have engaged in professional misconduct for
31 an act or omission if the act or omission is done in good faith and in
32 reliance on a decision made by a decision-maker pursuant to a duly
33 executed supported decision-making agreement created in accordance with
34 this article.

35 (c) Any health care provider that provides health care based on the
36 consent of a decision-maker, given with support or assistance provided
37 through a duly executed supported decision-making agreement created in
38 accordance with this article, shall be immune from any action alleging
39 that the decision-maker lacked capacity to provide informed consent,
40 unless the entity, custodian, or organization had actual knowledge or
41 notice that the decision-maker had revoked the supported decision-making
42 agreement, or that the supporter had committed abuse, physical coercion,
43 undue influence, or financial exploitation with respect to the decision
44 to grant consent.

45 (d) Any public or private entity, custodian, or organization that
46 discloses personal information about a decision-maker in reliance on the
47 terms of a duly executed supported decision-making agreement created in
48 accordance with this article, to a supporter authorized by the terms of
49 the supported decision-making agreement to assist the decision-maker in
50 accessing, collecting, or obtaining that information under subdivision
51 (e) of section 82.05 of this article, shall be immune from any action
52 alleging that it improperly or unlawfully disclosed such information to
53 the supporter unless the entity, custodian, or organization had actual
54 knowledge that the decision-maker had revoked such authorization.

1 (e) This section may not be construed to provide immunity from actions
2 alleging that a health care provider, or other third-party, has done any
3 of the following:

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

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

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

9 4. otherwise acted inconsistently with applicable law.

10 (f) The existence or availability of a supported decision-making
11 agreement does not relieve a health care provider, or other third-party,
12 of any legal obligation to provide services to individuals with disabili-
13 ties, including the obligation to provide reasonable accommodations or
14 auxiliary aids and services, including, but not limited to, interpreta-
15 tion services and communication supports to individuals with disabili-
16 ties under the federal Americans with Disabilities Act (42 U.S.C. §
17 12101).

18 § 82.13 Supporter notice.

19 (a) If any state or municipal law requires that an agency, entity, or
20 person provide a prescribed notice to a decision-maker, and the agency,
21 entity, or person required to provide such notice has received a
22 supported decision-making agreement from a decision-maker that specifies
23 that a supporter is also to receive a copy of any such notice, then the
24 agency, entity, or person in possession of the supported decision-making
25 agreement shall also provide the specified supporter with a copy of such
26 notice.

27 (b) Notwithstanding the provisions of this subsection, if any state or
28 municipal law requires that an agency, entity, or person provide a
29 prescribed notice to a decision-maker and such notice includes protected
30 information, including private health information or educational records
31 protected by state or federal law, such notice shall not be provided to
32 the specified supporter unless the supported decision-making agreement
33 is accompanied by a release authorizing the specified supporter to
34 obtain the protected information.

35 § 82.14 Reporting abuse, coercion, undue influence, or financial exploi-
36 tation.

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

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

46 § 82.15 Rules and regulations.

47 (a) The commissioner of the office for people with developmental disa-
48 bilities shall promulgate within one year of the passage of this act the
49 rules and regulations necessary to implement this article for adults who
50 receive or are eligible to receive services that are operated, certi-
51 fied, funded or approved by the office for people with developmental
52 disabilities.

53 (b) Additional regulations related to this article may be promulgated
54 by state agencies whose service populations may benefit from the imple-
55 mentation of supported decision-making.

1 § 2. This act shall take effect ninety days from the date that the
2 regulations issued in accordance with section one of this act appear in
3 the New York State Register, or the date such regulations are adopted,
4 whichever is later; and provided that the commissioner of mental
5 hygiene shall notify the legislative bill drafting commission upon the
6 occurrence of the appearance of the regulations in the New York State
7 Register or the date such regulations are adopted, whichever is later,
8 in order that the commission may maintain an accurate and timely effec-
9 tive data base of the official text of laws of the state of New
10 York in furtherance of effectuating the provisions of section 44 of the
11 legislative law and section 70-b of the public officers law.