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2021-2022 Regular Sessions

IN ASSEMBLY

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Introduced by M. of A. SIMON, GUNTHER, GONZALEZ-ROJAS, O'DONNELL, BYRNES -- (at request of the Office for People with Developmental Disabilities) -- read once and referred to the Committee on Mental Health -- recommitted to the Committee on Mental Health in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

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:

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

ARTICLE 82

SUPPORTED DECISION-MAKING

Section 82.01 Legislative findings and purpose.
82.02 Definitions.
82.03 Presumption of capacity.
82.04 Scope.
82.05 Duties, responsibilities, and authority of supporters.
82.06 Formation and term of agreement.
82.07 Revocation and amendment of agreement.
82.08 Eligibility and resignation of supporters.
82.09 Facilitation of agreement.
82.10 Form of agreement.
82.11 Legal effect of decisions made with support and third-party obligations.
82.12 Limitations on liability.
82.13 Supporter notice.

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

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

82.15 Rules and regulations.

§ 82.01 Legislative findings and purpose.

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intellectual, developmental, cognitive and psychosocial disabilities are often denied that right because of stigma and outdated beliefs about their capability.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

(b) The legislature further finds that the, now well recognized, practice of supported decision-making is a way in which many people with disabilities can make their own decisions with the support they need from trusted persons in their lives, and that supported decision-making can be a less restrictive alternative to guardianship. Recognizing that supported decision-making can take a variety of forms, the legislature finds that a more formal process, resulting in a supported decision-making agreement between the person with a disability (the decision-maker) and their supporter or supporters, can provide the basis for requiring third parties, who might otherwise question a person's legal capacity because of their disability, to recognize their decisions on the same basis as others. When this more formal process is followed, people with disabilities can make choices confident that they will be respected by others and knowing they will be solely responsible for their own decisions.

(c) The legislature further finds that supported decision-making and supported decision-making agreements should be encouraged when appropriate for persons with disabilities, and that the execution of a supported decision-making agreement should not detrimentally impact the eligibility of a person for other services, including adult protective services.

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

§ 82.02 Definitions.

When used in this article, the following terms shall have the following meaning, unless the context or subject matter requires a different interpretation:

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

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

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

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

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

(f) "good faith" means honest in fact and in the observance of reasonable standards of fair dealing.

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

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

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

(j) "supported decision-making agreement" is an agreement a decision-maker enters into with one or more supporters under this section that describes how the decision-maker uses supported decision-making to make their own decisions. Supported decision-making agreements can either be an informal arrangement between the decision-maker and his or her supporter or supporters, or one that is in accordance with section 82.11 of this article, which has been reviewed and signed by a facilitator.

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

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

(m) "facilitator" means an individual or entity authorized by the office for people with developmental disabilities that works with and educates the decision-maker and his or her supporter or supporters about supported decision-making and supported decision-making agreements authorized under this article.

§ 82.03 Presumption of capacity.

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

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

(c) A diagnosis of a developmental or other disability or condition shall not constitute evidence of incapacity.

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

(e) Neither the execution of a supported decision-making agreement by an individual, nor the interest in or wish to execute a supported decision-making agreement by an individual, nor the failure of an individual to execute a supported decision-making agreement may be used or considered as evidence that the individual lacks capacity, or to deny the

decision-maker benefits to which they are otherwise entitled, including adult protective services.

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

§ 82.04 Scope.

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

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

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

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

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

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

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

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

(i) Notwithstanding any other provision of law to the contrary, nothing within this article shall be construed to prohibit eligibility of a decision-maker for receipt of services or supports that they would have

otherwise been entitled, including adult protective services, absent entering into a supported decision-making agreement under the provisions of this article.

(j) A supported decision-making agreement made between a decision-maker and his or her supporter or supporters after consultation and education, which is signed by a facilitator shall have the legal force and effect authorized under section 82.11 of this article.

§ 82.05 Duties, responsibilities, and authority of supporters.

(a) A supporter must:

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

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

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

4. avoid conflicts of interest;

5. notify the decision-maker in writing, and in a manner the decision-maker can understand, of the supporter's intent to resign as a supporter; and

6. participate in facilitation and/or education programs developed under regulations promulgated by the office for people with developmental disabilities in order to enter a formal supported decision-making agreement.

(b) A supporter is prohibited from:

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

2. exerting undue influence upon the decision-maker;

3. physically coercing the decision-maker;

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

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

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

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

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

(e) If expressly granted by the supported decision-making agreement, and the decision-maker has signed an appropriate release, the supporter may assist the decision-maker in obtaining educational records under the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g), protected health information under the Health Insurance Portability and Accountability Act of 1996 (45 CFR §§ 164.502, 164.508), clinical

records and information under subdivision (c) of section 33.13 of this chapter, or patient information under subdivisions two and three of section eighteen of the public health law.

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

§ 82.06 Formation and term of agreement.

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

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

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

§ 82.07 Revocation and amendment of agreement.

(a) The decision-maker may revoke all or part of a supported decision-making agreement by notifying the supporters orally or in writing, or by any other act evincing a specific intent to revoke the agreement. The failure of the decision-maker to notify supporters shall not invalidate the revocation of all or part of the supported decision-making agreement.

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

§ 82.08 Eligibility and resignation of supporters.

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

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

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

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

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

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

(e) If the supported decision-making agreement does not include more than one supporter, and is not amended to replace the supporter who becomes ineligible under subdivision (b) of this section or resigns under subdivision (c) of this section, the supported decision-making agreement shall be considered terminated.

§ 82.09 Facilitation of agreement.

The provisions of section 82.11 and subdivisions (b) through (d) of section 82.12 of this article shall only apply in circumstances where a decision is made by a decision-maker pursuant to a supported decision-making agreement created in accordance with this article where such decision-maker and his or her supporter or supporters have worked with a facilitator, such supporter or supporters have followed a recognized supported decision-making facilitation or education process as defined and prescribed by regulations promulgated by the office for people with developmental disabilities and such facilitator has signed such agreement.

§ 82.10 Form of agreement.

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

(b) A supported decision-making agreement must:

1. be in writing;

2. be dated;

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

4. list the categories of decisions with which a supporter is authorized to assist the decision-maker;

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

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

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

8. be signed by all designated supporters; and

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

(c) A supported decision-making agreement may:

1. appoint more than one supporter;

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

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

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

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

1. be signed by a facilitator or educator;

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

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

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

(a) This section shall apply only to decisions made pursuant to supported decision-making agreements created in accordance with this article and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities. Additionally, such decisions shall be signed by a facilitator.

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

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

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

§ 82.12 Limitations on liability.

(a) Subdivisions (b), (c) and (d) of this section shall apply only to decisions made pursuant to supported decision-making agreements created in accordance with this article which are signed by a facilitator and following a recognized supported decision-making facilitation or education process, as prescribed by regulations governing the facilitation and education processes promulgated by the office for people with developmental disabilities.

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

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

(d) Any public or private entity, custodian, or organization that discloses personal information about a decision-maker in reliance on the terms of a duly executed supported decision-making agreement created in accordance with this article, to a supporter authorized by the terms of

the supported decision-making agreement to assist the decision-maker in accessing, collecting, or obtaining that information under subdivision (e) of section 82.05 of this article, shall be immune from any action alleging that it improperly or unlawfully disclosed such information to the supporter unless the entity, custodian, or organization had actual knowledge that the decision-maker had revoked such authorization.

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

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

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

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

4. otherwise acted inconsistently with applicable law.

(f) The existence or availability of a supported decision-making agreement does not relieve a health care provider, or other third party, of any legal obligation to provide services to individuals with disabilities, including the obligation to provide reasonable accommodations or auxiliary aids and services, including, but not limited to, interpretation services and communication supports to individuals with disabilities under the federal Americans with Disabilities Act (42 U.S.C. § 12101).

§ 82.13 Supporter notice.

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

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

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

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

(b) Nothing in this section may be construed as eliminating or limiting a person's duty or requirement to report under any other statute or regulation.

§ 82.15 Rules and regulations.

(a) The commissioner of the office for people with developmental disabilities shall promulgate within one year of the passage of this act the rules and regulations necessary to implement this article for adults who receive or are eligible to receive services that are operated, certi-

fied, funded or approved by the office for people with developmental disabilities.

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

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