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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intellectual, developmental, cognitive and psychosocial disabilities are often denied that right because of stigma and outdated beliefs about their capability.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.

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

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

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

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

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

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

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

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

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

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

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 a developmental or other disability or condition
48 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) Neither the execution of a supported decision-making agreement by
52 an individual, nor the interest in or wish to execute a supported deci-
53 sion-making agreement by an individual, nor the failure of an individual
54 to execute a supported decision-making agreement may be used or consid-
55 ered as evidence that the individual lacks capacity, or to deny the

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

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

7 § 82.04 Scope.

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

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

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

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

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

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

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

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

54 (i) Notwithstanding any other provision of law to the contrary, noth-
55 ing within this article shall be construed to prohibit eligibility of a
56 decision-maker for receipt of services or supports that they would have

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

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

8 § 82.05 Duties, responsibilities, and authority of supporters.

9 (a) A supporter must:

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

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

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

16 4. avoid conflicts of interest;

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

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

24 (b) A supporter is prohibited from:

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

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

28 3. physically coercing the decision-maker;

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

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

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

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

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

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

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

4 (f) A supporter shall ensure the information obtained under subdivi-
5 sion (e) of this section is kept privileged and confidential, as appli-
6 cable, and is not subject to unauthorized access, use, or disclosure.

7 § 82.06 Formation and term of agreement.

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

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

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

16 § 82.07 Revocation and amendment of agreement.

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

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

28 § 82.08 Eligibility and resignation of supporters.

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

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

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

44 2. the local department of social services has found that the support-
45 er has committed abuse, neglect, financial exploitation, or physical
46 coercion against the decision-maker as such terms are defined in section
47 82.02 of this article.

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

50 (d) If the supported decision-making agreement includes more than one
51 supporter or is amended to replace the supporter who is ineligible under
52 subdivision (b) of this section or resigns under subdivision (c) of this
53 section, the supported decision-making agreement shall survive for the
54 remaining supporters, unless it is otherwise revoked under section 82.07
55 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.

1 § 82.11 Legal effect of decisions made with support and third party
2 obligations.

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

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

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

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

29 § 82.12 Limitations on liability.

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

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

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

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

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

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

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

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

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

15 4. otherwise acted inconsistently with applicable law.

16 (f) The existence or availability of a supported decision-making
17 agreement does not relieve a health care provider, or other third party,
18 of any legal obligation to provide services to individuals with disabili-
19 ties, including the obligation to provide reasonable accommodations or
20 auxiliary aids and services, including, but not limited to, interpreta-
21 tion services and communication supports to individuals with disabili-
22 ties under the federal Americans with Disabilities Act (42 U.S.C. §
23 12101).

24 § 82.13 Supporter notice.

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

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

41 § 82.14 Reporting abuse, coercion, undue influence, or financial exploi-
42 tation.

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

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

52 § 82.15 Rules and regulations.

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

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

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

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