*** § 16.25 Temporary operator.**

(a) For the purposes of this section:

(1) "Established operator" shall mean the provider of services that has been established and issued an operating certificate pursuant to this article.

(2) "Extraordinary financial assistance" shall mean state funds provided to, or requested by, a program for the express purpose of preventing the closure of the program that the commissioner finds provides essential and necessary services within the community.

(3) "Serious financial instability" shall include but not be limited to defaulting or violating material covenants of bond issues, missed mortgage payments, missed rent payments, a pattern of untimely payment of debts, failure to pay its employees or vendors, insufficient funds to meet the general operating expenses of the program, failure to maintain required debt service coverage ratios and/or, as applicable, factors that have triggered a written event of default notice to the office by the dormitory authority of the state of New York.

(4) "Office" shall mean the office for people with developmental disabilities.

(5) "Temporary operator" shall mean any provider of services that has been established and issued an operating certificate pursuant to this article or which is directly operated by the office, that:

a. agrees to provide services certified pursuant to this article on a temporary basis in the best interests of its individuals served by the program; and

b. has a history of compliance with applicable laws, rules, and regulations and a record of providing care of good quality, as determined by the commissioner; and

c. prior to appointment as temporary operator, develops a plan determined to be satisfactory by the commissioner to address the program's deficiencies.

(b) (1) In the event that: (i) the established operator is seeking extraordinary financial assistance; (ii) office collected data demonstrates that the established operator is experiencing serious

financial instability issues; (iii) office collected data demonstrates that the established operator's board of directors or administration is unable or unwilling to ensure the proper operation of the program; or (iv) office collected data indicates there are conditions that seriously endanger or jeopardize continued access to necessary services within the community, the commissioner shall notify the established operator of his or her intention to appoint a temporary operator to assume sole responsibility for the provider of services' operations for a limited period of time. The appointment of a temporary operator shall be effectuated pursuant to this section, and shall be in addition to any other remedies provided by law.

(2) The established operator may at any time request the commissioner to appoint a temporary operator. Upon receiving such a request, the commissioner may, if he or she determines that such an action is necessary, enter into an agreement with the established operator for the appointment of a temporary operator to restore or maintain the provision of quality care to the individuals until the established operator can resume operations within the designated time period or other action is taken as described in section 16.17 of this article.

(c) (1) A temporary operator appointed pursuant to this section shall use his or her best efforts to implement the plan deemed satisfactory by the commissioner to correct or eliminate any deficiencies in the program and to promote the quality and accessibility of services in the community served by the provider of services.

(2) During the term of appointment, the temporary operator shall have the authority to direct the staff of the established operator as necessary to appropriately provide services for individuals. The temporary operator shall, during this period, provide services in such a manner as to promote safety and the quality and accessibility of services in the community served by the established operator until either the established operator can resume operations or until the office revokes the operating certificate for the services issued under this article.

(3) The established operator shall grant access to the temporary operator to the established operator's accounts and records in order to address any deficiencies related to the program experiencing serious financial instability or an established operator requesting financial

assistance in accordance with this section. The temporary operator shall approve any financial decision related to an established provider's day to day operations or the established provider's ability to provide services.

(4) The temporary operator shall not be required to file any bond. No security interest in any real or personal property comprising the established operator or contained within the established operator or in any fixture of the program, shall be impaired or diminished in priority by the temporary operator. Neither the temporary operator nor the office shall engage in any activity that constitutes a confiscation of property.

(d) The temporary operator shall be entitled to a reasonable fee, as determined by the commissioner and subject to the approval of the director of the division of the budget, and necessary expenses incurred while serving as a temporary operator. The temporary operator shall be liable only in its capacity as temporary operator for injury to person and property by reason of its operation of such program; no liability shall incur in the temporary operator's personal capacity, except for gross negligence and intentional acts.

(e) (1) The initial term of the appointment of the temporary operator shall not exceed ninety days. After ninety days, if the commissioner determines that termination of the temporary operator would cause significant deterioration of the quality of, or access to, care in the community or that reappointment is necessary to correct the deficiencies that required the appointment of the temporary operator, the commissioner may authorize an additional ninety-day term. However, such authorization shall include the commissioner's requirements for conclusion of the temporary operatorship to be satisfied within the additional term.

(2) Within fourteen days prior to the termination of each term of the appointment of the temporary operator, the temporary operator shall submit to the commissioner and to the established operator a report describing:

a. the actions taken during the appointment to address the identified program deficiencies, the resumption of program operations by the established operator, or the revocation of an operating certificate

issued by the office;

b. objectives for the continuation of the temporary operatorship if necessary and a schedule for satisfaction of such objectives; and

c. if applicable, the recommended actions for the ongoing provision of services subsequent to the temporary operatorship.

(3) The term of the initial appointment and of any subsequent reappointment may be terminated prior to the expiration of the designated term, if the established operator and the commissioner agree on a plan of correction and the implementation of such plan.

(f) (1) The commissioner shall, upon making a determination of an intention to appoint a temporary operator pursuant to paragraph one of subdivision (b) of this section, cause the established operator to be notified of the intention by registered or certified mail addressed to the principal office of the established operator. Such notification shall include a detailed description of the findings underlying the intention to appoint a temporary operator, and the date and time of a required meeting with the commissioner and/or his or her designee within ten business days of the receipt of such notice. At such meeting, the established operator shall have the opportunity to review and discuss all relevant findings. At such meeting, the commissioner and the established operator shall attempt to develop a mutually satisfactory plan of correction and schedule for implementation. In such event, the commissioner shall notify the established operator that the commissioner will abstain from appointing a temporary operator contingent upon the established operator remediating the identified deficiencies within the agreed upon timeframe.

(2) Should the commissioner and the established operator be unable to establish a plan of correction pursuant to paragraph one of this subdivision, or should the established operator fail to respond to the commissioner's initial notification, there shall be an administrative hearing on the commissioner's determination to appoint a temporary operator to begin no later than thirty days from the date of the notice to the established operator. Any such hearing shall be strictly limited to the issue of whether the determination of the commissioner to appoint a temporary operator is supported by substantial evidence. A copy of the

decision shall be sent to the established operator.

(3) If the decision to appoint a temporary operator is upheld such temporary operator shall be appointed as soon as is practicable and shall provide services pursuant to the provisions of this section.

(g) Notwithstanding the appointment of a temporary operator, the established operator shall remain obligated for the continued provision of services. No provision contained in this section shall be deemed to relieve the established operator or any other person of any civil or criminal liability incurred, or any duty imposed by law, by reason of acts or omissions of the established operator or any other person prior to the appointment of any temporary operator of the program hereunder; nor shall anything contained in this section be construed to suspend during the term of the appointment of the temporary operator of the program any obligation of the established operator or any other person for the maintenance and repair of the facility, provision of utility services, payment of taxes or other operating and maintenance expenses of the facility, nor of the established operator or any other person for the payment of mortgages or liens.

(h) Upon appointment of a temporary operator, the commissioner shall cause the temporary president of the senate, the speaker of the assembly, and the chairs of the senate mental health and developmental disabilities committee and the assembly mental health committee to be notified of such determination. Such notification shall include, but not be limited to, the name of the established operator, the name of the appointed temporary operator and a description of the reasons for such determination to the extent practicable under the circumstances and in the sole discretion of the commissioner.

* NB Repealed March 31, 2028