

New York Public Welfare Association

Supported Decision-Making

MHL Art. 82, Chapter 481 of the Laws of 2022

***NYPWA Comments to OCFS Specific to Local DSS Adult Protective Services
in Contemplation of Future Proposed State Regulations***

August 15, 2022

Supported decision-making by people with intellectual, developmental, cognitive and psychosocial disabilities

S 82.01 Legislative findings and purpose.

- (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.

OCFS regulations and/or directives will be needed to clarify that this section does not change the Social Services Law as it relates to APS eligibility.

Social Services Law §473(1), and 18 NYCRR 457.3 and 457.1(c) contain an APS eligibility requirement that there be no one willing and able to responsibly to assist the subject of the report. Under this standard, supportive decision-making might, in some circumstances, make the subject ineligible, should the “supporter” as that term is defined in this statute, be such responsible person.

(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.

OCFS regulations and/or directives will be needed to clarify that this section does not change the Social Services Law as it relates to APS eligibility.

Social Services Law §473(1), and 18 NYCRR 457.3 and 457.1(c) contain an APS eligibility requirement that there be no one willing and able to responsibly to assist the subject of the report. Under this standard, supportive decision-making might, in some circumstances, make the subject ineligible, should the “supporter” as that term is defined in this statute, be such responsible person.

- (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.

If this section is meant to be the criteria for evaluating whether or not a person has the “capacity” to execute a supported decision-making agreement, regulations should clarify that. Usually, capacity is defined as a person’s ability to understand the nature and consequences of their decisions, such as, for example, to execute a power of attorney. Every day, people execute powers of attorney with the understanding that they are executing a POA and doing so voluntarily, unfortunately, that doesn’t always mean that they understand the nature and consequences of doing so.

To the extent that OPWDD may issue regulations concerning this section of the statute, OCFS should insist that OPWDD clarify that the “decision-maker” must also understand the nature and consequences of making a supported-decision making agreement.

S 82.04 Scope.

- (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.

OCFS regulations and/or directives will be needed to clarify that this section does not change the Social Services Law as it relates to APS eligibility.

Social Services Law §473(1), and 18 NYCRR 457.3 and 457.1(c) contain an APS eligibility requirement that there be no one willing and able to responsibly to assist the subject of the report. Under this standard, supportive decision-making might, in some circumstances, make the subject ineligible, should the “supporter” as that term is defined in this statute, be such responsible person.

S 82.08 Eligibility and resignation of supporters.

- (a) 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.

OCFS regulations and/or guidance will be required here to state that APS has no ability to sanction a “supporter” as supposed by the statute. For example, what if the decision maker still wants the neglectful, abusive or exploitative supporter to remain? In what forum would this issue be litigated? There is no statutory authority for APS be able to enforce this, particularly as this new statute stands for the right of the decision maker to continue to choose to make their own decisions, even if those decisions are “poor” decisions.

This statute is defective as it also pre-supposes that APS is aware of a supporter who has neglected, abused and/or financially exploited the decision-maker when such incidents are often under-reported. Even when reported, APS has limited options to protect the “decision-maker,” especially if the “decision-maker” chooses to retain the neglectful, abusive, and/or exploitative “supporter.”

S 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.

Regulatory and/or agency guidance from OCFS on this issue to advise local districts will be required.

(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.

Regulatory and/or agency guidance from OCFS on this issue to advise local districts will be required.

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