17-A Update

Kathryn E. Jerian, Esq.
NYSARC, Inc., Latham, NY

1

17-A Guardianship Reform Update:

NYSBA Elder Law & Special Needs Section Summer Meeting 2019

Kathryn E. Jerian, Esq. – The Arc New York
Deputy Executive Director & General Counsel

The Arc
New York

Achieve with us.

2

Roadmap of Presentation

- I – History of 17-A & Reform Efforts
- II - DRNY Lawsuit
- III – Law Revision Commission & OCA Efforts
- IV – Current Trends/Cases of Interest
- V – Questions/Comments

The Arc New York

Achieve with us.®

3

Part I: History of 17-A Reform in a Nutshell

The Arc New York

Achieve with us.®

4

Article 17-A of the Surrogate's Court Procedure Act

1969 – law originally enacted (mainly at behest of The Arc New York and its families) & applied only to persons with "mental retardation"

1989 – Original 17-A repealed and replaced with current version, applicable to those with developmental disabilities and the "mentally retarded"

1992 – Article 81 enacted – some overlap with Article 17-A but more complicated and costly

The Arc New York

Achieve with us.®

5

Olmstead v. L.C. (U.S. Supreme Court, 1999)

- Held that States are required to provide community-based services for individual with disabilities (i.e., use of *the least restrictive setting*) as long as appropriate, the individual does not oppose the community based service, and it can be reasonably accommodated by the State
- Not until 2012…NY creates "Olmstead Plan Development and Implementation Cabinet" to advise Governor on compliance with Olmstead decision and to suggest changes in law to comply

The Arc New York

Achieve with us.®

6

NY Olmstead Report

- Issued October 2013
- Identified 17-A guardianship as one of two areas requiring legal reform
- Found that Olmstead requires that guardianship only be imposed if necessary and in the least-restrictive manner possible
- Pointed out basis for 17-A is diagnosis driven (as opposed to functional capacity), hearings are not always required, and lack of decision-making standard for routine decisions that includes the point of view of the individual under guardianship

The Arc New York

Achieve with us.®

7

17-A Workgroup

- As a result of Olmstead Report, Governor's Olmstead counsel formed a workgroup to discuss changes to 17-A
- Workgroup included a range of individuals: practitioners, a family member, DRNY, The Arc New York counsel, NYCLU counsel, PADD counsel, private attorneys, MHLS, and others
- Meetings held from Nov. 2013 - Feb. 2015 to draft proposal

The Arc New York

Achieve with us.®

8

Legislative History

- 2015 - S. 4983 (came from "Olmstead workgroup")
  - Bill now "dead"
- Sept. 2016 – DRNY files suit alleging 17-A unconstitutional (unhappy with lack of progress in legislature)(more on this in a bit…)
- May 2017 – The Arc New York gets a bill introduced seeking changes (S. 5842) – stalled in legislative process
- June 2017 – More "onerous" version of The Arc bill introduced – also stalled
- 2019 Legislative Session – Nothing…..(also more on this in a bit)

The Arc New York

Achieve with us.®

9

Part II: DRNY Challenge to Constitutionality of 17-A (dismissed 2/2019)

The Arc New York

Achieve with us.®

10

What is Disability Rights New York (DRNY)?

- Non-profit seated in NY but federally funded under the DD Act
- Role is to advocate for individuals with I/DD
- Can file suit on variety of issues – *see* suit re: NYS failure to discharge adults from out-of-state residential schools, suit against landlords for not allowing service animals on premises, etc.
- https://www.drny.org/page/litigation-12.html

The Arc New York

Achieve with us.®

11

What did the DRNY suit seek?

- Sept. 2016 – DRNY files suit in federal court alleging 17-A is unconstitutional & seeks:
  - Declaration that 17-A is unconstitutional
  - Injunction requiring notice to every individual who has a 17-A guardian telling them they have a right to terminate or modify their guardianship
  - If anyone takes up the offer in the notice, courts must hold a hearing using "clear and convincing evidence" and applying the substantive and procedural rights in Article 81
  - Disallow state courts from issuing any other 17-A decrees until the law is revised

The Arc New York

Achieve with us.®

12

What was the basis of DRNYs lawsuit?

- Equal Protection Problems - federal constitution provides that no state can deny any person "equal protection of the law"
- DRNY claims because NYS has two different laws for guardianship Article 81 (for any disabilities) and Article 17-A (only for I/DD), that people with I/DD aren't equally protected by the law BECAUSE provisions are different
- Due Process Violation Problems – federal constitution again prohibits government from taking away life, liberty, or property w/o due process
- They claim granting guardianship removes "liberty" and that the process in 17-A doesn't meet constitutional safeguards

The Arc New York

Achieve with us.®

13

Status of DRNY Suit

- Aug. 2017 – Defendants motion to dismiss the case was granted based on abstention
- Feb. 2019 – Appeal dismissed; lower court dismissal affirmed (https://casetext.com/case/york-v-new-york-1)
- Link to oral argument here: http://www.ca2.uscourts.gov/decisions/isysquery/a3fe6238-d548-4b77-8983-5c87a656f941/1/doc/17-2812.mp3

The Arc New York

Achieve with us.®

14

Bottom Line

- No further action since February 2019 dismissal
- Informal comments from State Legislators indicate that they expect reform will be a long process…see next section!

The Arc New York

Achieve with us.®

15

Part III: Current Reform Efforts by NYS Law Revision Commission & Office of Court Administration

The Arc New York

Achieve with us.®

16

NYS Law Revision Commission

- Main concept is seeking to obtain consensus.
- Interviews of parents, MHLS, DRNY, attorneys from around the state and other professionals who work with individuals with disabilities as well as professionals from other states that have a two track system have been conducted.
- Draft of bill is completed, but no bill introduced yet this past session, which ended June 19, 2019.

The Arc New York

Achieve with us.®

17

Law Revision Commission Bill Draft: Main Points

- Diagnosis alone cannot be basis for appointment – now based on functional level, adaptive behaviors
- G'ship to be last resort (considering all other decision-making alternatives) and tailored to the needs of each person (not plenary)
- Clear and convincing evidence of harm if guardian NOT appointed will be standard of proof absent consent by individual
- Mental Hygiene Legal Service (MHLS) to be appointed counsel unless respondent retains their own or MHLS has conflict
- Hearings only on contested issues of fact (by jury trial)
- Court must make findings, and decree must include duration of g'ship
- Process for removal, discharge, or modification of g'ship added
- Decision-making standard added (no longer best interests/substituted judgment as first step)

The Arc New York

Achieve with us.®

18

OCA/Surrogate Judges' Work

- Some saw judges as the "missing voice" in prior reform efforts
- Cost to system/strain on staffing for new bills?
- How does it actually work now?
- Does it need reform?
- So…judges undertook to start at square one and craft their own bill
- Like LRC, nothing was introduced during 2019 session

The Arc New York

Achieve with us.®

19

OCA/Surrogate Judges' Work: Main Points

- Clear and convincing evidence, imposed in least restrictive manner based on functional abilities that the individual is incapable of managing his/her affairs will be the standard
- MHLS to be appointed counsel as general default
- GAL may also be appointed, or respondent can proceed *pro se* if court allows it
- Tailoring is expected if warranted (in scope and duration)
- Includes new decision-making standard (best interests a last resort)

The Arc New York

Achieve with us.®

20

Part IV: Current Trends/ Cases of Interest

- Sloane v. M.G. (NY County Supreme Court ➡ 1st Dep't)
- MG – 80 y/o man lived in CR for 25 years prior to hosp. admission
- Suffered heart attack, anoxic brain injury resulting in permanent vegetative state/dependent on ventilator
- Family member/guardian tried to remove life sustaining treatment under 1750-b and MHLS objected claiming: (1) 1750-b shouldn't be used because MG previously had capacity, and (2) using 1750-b violates equal protection
- Court held that equal protection isn't violated because people with ID/DD are differently situated since many of them never had capacity – unlike people who would normally use the Family Health Care Decisions Act
- M.G. died prior to the court's decision

The Arc New York

Achieve with us.®

Part IV: Current Trends/ Cases of Interest

- In re: Anna F. (App. Div., 2nd Dept.)
- Parents of 51 y/o woman applied for 17-A g'ship – trial court denied the petition and parents appealed
- Anna has cerebral palsy, 24-hour supervision, can't feed herself – developmental age of ~ 4 mos.
- Appeals court held that Anna met the standard for 17-A guardianship and there was no reason the trial court should have denied the petition
- Court remanded and ordered trial court to issue decree naming the parents Anna's 17-A guardian
- Trial Court made decision that 17-A was not appropriate because Article 81 was an available option and was less restrictive, ignoring the fact that 17-A is on the books.

The Arc New York

Achieve with us.®

Part IV: Current Trends/ Cases of Interest

- In re: Capurso (Westchester County, Surr. Ct. 3/26/19)
- DRNY repped individual with I/DD to revoke 17-A g'ship previously obtained by his parents when he was ~22 y/o
- Parents/guardians supported the relief sought
- Burden is on "ward" to demonstrate continued g'ship is not in his/her best interests
- Court found "ward" had gained independence, sustained employment, and demonstrated other ability to live and function independently
- Court recommended HCP and POA instead of g'ship

The Arc New York

Achieve with us.®

Part IV: Current Trends/ Cases of Interest

- A host of other cases preceding *Anna F.* where Surrogates denied a 17-A application due to it not being appropriate or the least restrictive alternative and directing family to seek out an alternative.
- In at least one case, *Matter of Cronin*, Court sought to determine how a Trust was being utilized in the context of the life of an individual with a disability in the context of a 17-A proceeding.
- Continuing Communication and Education is required.

The Arc New York

Achieve with us.®

Questions/Comments

The Arc New York

Achieve with us.®

Contact Information

- Kathryn E. Jerian, Esq., General Counsel (The Arc New York)

jeriank@thearcny.org

The Arc New York

Achieve with us.®

Docket No. 17-2812-cv
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Disability RIghts N.Y. v. New York

Decided Feb 15, 2019

CHIN, Circuit Judge

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK Before: CABRANES, LYNCH, and CHIN, *Circuit Judges*.

2 *2 Appeal from a judgment entered in the United States District Court for the Southern District of New York (Hellerstein, *J.)* granting defendants-appellees' motion for judgment on the pleadings and dismissing the complaint. Plaintiff-appellant Disability Rights New York ("DRNY") alleges constitutional and other deficiencies in the manner in which guardianship proceedings are conducted in New York Surrogate's Court under Article 17A of the Surrogate's Court Procedure Act. Relying on *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), the district court determined that it was required to abstain from hearing the case. On appeal, DRNY contends that the district court erred in abstaining.

AFFIRMED. JENNIFER J. MONTHIE (Lara H. Weissman, *on the brief)*, Disability Rights New York, Albany, New York, *for Plaintiff-Appellant*. MARK S. GRUBE, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General for the State of New York, New York, New York, *for Defendants-*
3 *Appellants*. *3 CHIN, *Circuit Judge*:

Article 17A of the New York Surrogate's Court Procedure Act (the "SCPA") governs guardianship proceedings in New York State Surrogate's Court for individuals with intellectual and developmental disabilities. The statute was enacted in 1969 to permit the appointment of parents or other interested persons as guardians for individuals unable to care for themselves. Plaintiff-appellant Disability Rights New York ("DRNY") brought this action below contending that the statute is unconstitutional because it does not provide adequate protection for these individuals, and seeking declaratory and injunctive relief to compel defendants-appellees -- the State of New York, its court system, and its Chief Judge and Chief Administrative Judge ("Defendants") -- to alter the manner in which guardianship proceedings are conducted.

The district court did not reach the merits of DRNY's claims as it granted Defendants' motion for judgment on the pleadings, abstaining pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974).

For the reasons set forth below, we affirm the judgment of the district court.

1 [1] As we affirm on abstention grounds, we do not reach the issue of standing raised by Defendants on appeal because we may "decide a case under *Younger* without addressing [DRNY's] constitutional standing to bring suit." *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 74 (2d Cir. 2003); *see also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999) (reaffirming the inherent flexibility that federal courts exercise "to choose among threshold grounds" for disposing of a case without reaching the merits).

BACKGROUND

A. *Relevant Statutory Provisions*

New York State utilizes two primary procedures related to legal guardianships: Article 17A of the Surrogate's Court Procedure Act (the "SCPA") and Article 81 of the New York Mental Hygiene Law (the "MHL").

1. ***Article 17A***

Article 17A governs guardianship proceedings in New York State Surrogate's Court for individuals with intellectual and developmental disabilities. it was designed primarily to allow parents to serve as long-term guardians of children who cannot care for themselves. *See In re Chaim A.K.*, 885 N.Y.S.2d 582, 586 (Sur. Ct. New York County 2009). Guardianships are not limited, however, to parent-child relationships, and guardianship can be obtained by any "interested person," including certain non-profit organizations. *See* SCPA §§ 1751, 1760.

5 *5 Article 17A guardianships, which allocate broad decision-making authority to the petitioner over the individual with alleged disabilities, are obtained through judicial proceedings before the New York Surrogate's Court. *See In re Chaim A.K.*, 885 N.Y.S.2d at 585. These procedures are designed to be accessible to lay people. *See id.* "Virtually all" Article 17A proceedings are uncontested and devoid of controversy. *See In re Derek*, 821 N.Y.S.2d 387, 390 (Sur. Ct. Broome County 2006).

An Article 17A proceeding commences with service of notice by the person seeking guardianship to a wide range of interested parties. *See* SCPA § 1753. The court then conducts a hearing at "which [the potential ward] shall have the right to a jury trial." *Id.* § 1754(1). The court can dispense with a hearing with the consent of both parents. *Id.* The individual with an alleged disability shall be present at the hearing, unless the court is satisfied that such person is "medically incapable of being present" or that her presence would not be in her best interest. *Id.* § 1754(3). Though Article 17A does not provide for the right to an attorney, courts have sometimes appointed attorneys in difficult cases. *See*, *e.g.*, *In re Zhuo*, 42 N.Y.S.3d 530, 532 (Sur. Ct. Kings County 2016). To obtain an Article 17A guardianship, a

6 petitioner must present proof that two *6 physicians (or a physician and a psychologist) have certified that (1) the individual has an intellectual or developmental disability that makes managing her own life impractical, (2) the situation is "permanent" or "likely to continue indefinitely," and (3) guardianship is in the individual's best interests. *See* SCPA §§ 1750, 1750-a. Courts have recognized that the "best interests" standard is a lower standard of proof than the clear and convincing evidence standard. *In re Mueller*, 887 N.Y.S.2d 768, 769 (Sur. Ct. Dutchess County 2009). Once a petition is granted, the court retains jurisdiction over the guardianship and may modify it at the request of the ward or anyone acting on her behalf. *See* SCPA §§ 1755, 1758.

2. ***Article 81***

Article 81 governs guardianship proceedings in New York State Supreme Court. Unlike Article 17A, Article 81 is designed primarily to deal with elderly, disabled adults. *In re Lavecchia*, 170 Misc. 3d 211, 213 (Sup. Ct. Rockland County 1996). Article 81 is not limited to individuals diagnosed with specific disabilities, but instead is designed for adults with "functional limitations" that impede their ability to provide for their own personal needs. MHL § 81.02.

7 *7 Article 81 has different requirements than Article 17A. For example, under Article 81 the court must hold a hearing, at which the prospective ward must be present. *Id.* § 81.11(a), (c). At the hearing, the petitioner has the burden of establishing the need for guardianship by "clear and convincing evidence." *Id.* §§ 81.02(b), 81.12(a). And once a petition has been granted, guardians have ongoing disclosure requirements. *See*, *e.g.*, *id.* § 81.31 (requiring the guardian to file an annual report with the supervising court). In sum, Article 81 proceedings contain more checks and oversight than Article 17A proceedings: They require more detailed pleadings, proof, and notice, and they provide appointed counsel, a hearing that the potential ward must attend, ongoing

supervision and reporting, and narrowly tailored guardianship powers. These more robust standards form the basis for DRNY's argument on the merits. **B.** ***Procedural Background***

On September 21, 2016, DRNY brought this action to, *inter alia*, enjoin defendants from appointing legal guardians pursuant to Article 17A. DRNY alleges that Article 17A proceedings, as currently administered, do not meet the standards of due process and equal protection. Rather than citing the circumstances of specific
8 individuals subject to Article 17A proceedings, *8 however, DRNY's complaint relies primarily on a comparison of the two New York State guardianship schemes -- Article 71A of the SCPA and Article 81 of the MHL.

DRNY brought suit pursuant to (1) 42 U.S.C. § 1983, (2) Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794, and (3) Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12132. DRNY asked for a declaration that Article 17A violates the Constitution, the ADA, and the Rehabilitation Act. It also sought an injunction requiring defendants to take certain actions in Article 17A guardianship proceedings, such as providing notice, applying a certain burden of proof, and providing substantive and procedural rights equal to those provided in Article 81 proceedings. App'x at 41-42.

Defendants answered the complaint and moved for judgment on the pleadings. On August 16, 2017, the district court granted defendants' motion on abstention grounds pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974). The district court held that DRNY's claims fell "squarely" under the third of the three categories of cases in which *Younger* principles require a federal court to refuse to
9 exercise its jurisdiction in deference *9 to state courts. *Disability Rights N.Y. v. New York*, No. 16-cv-7363, 2017 WL 6388949, at *2 (S.D.N.Y. Aug. 16, 2017) (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 78 (2013)). The district court also relied on *O'Shea*, holding that the proposed injunction would impose "standards on state court proceedings that 'would require for their enforcement the continuous supervision by the federal court over the conduct of' those proceedings." *Id.* (quoting *O'Shea*, 414 U.S. at 501 (alteration omitted)). DRNY timely appealed.

2 [2] " [A]n order of abstention is considered final for purposes of appeal, at least when the order applies to the entire complaint." *Pathways, Inc. v. Dunne*, 329 F.3d 108, 113 (2d Cir. 2003).

DISCUSSION

DRNY argues that the district court erred in abstaining from exercising its jurisdiction. In particular, DRNY argues that the district court erred in holding that the third *Younger* category applies. It also argues that the district court's reliance on *O'Shea* is misplaced. For the reasons set forth below, we conclude that the district court correctly abstained under *O'Shea*.

I. *Applicable Law*

We review *de novo* the "essentially" legal determination of whether the requirements for abstention have been met. *Diamond "D" Constr.*
10 *Corp. v.* *10 *McGowan*, 282 F.3d 191, 197-98 (2d Cir. 2002); *accord Schlager v. Phillips*, 166 F.3d 439, 441 (2d Cir. 1999).

In general, "federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint*, 571 U.S. at 72. The Supreme Court, however, has recognized "certain instances in which the prospect of undue interference with state proceedings counsels against federal relief." *Id.*

Federal courts must abstain where a party seeks to enjoin an ongoing, parallel state criminal proceeding, to preserve the "longstanding public policy against federal court interference with state court proceedings" based on principles of federalism and comity. *Younger*, 401 U.S. at 43-44. The *Younger* doctrine has been extended beyond ongoing criminal cases to include particular state civil proceedings akin to criminal prosecutions, *see Huffman v. Pursue, Ltd.*, 420

U.S. 592 (1975), or that implicate a state's interest in enforcing the orders and judgments of its courts, *see Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). In *Sprint*, the Supreme Court held that *Younger*'s scope is limited to these three "exceptional" categories -- "ongoing state criminal prosecution," "certain civil enforcement proceedings," and "civil proceedings involving
11 certain orders *11 uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint*, 571 U.S. at 78.

Here, only the third category is at issue: civil proceedings involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions. Civil contempt orders and orders requiring the posting of bonds on appeal fall into this category. *See NOPSI v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (citing *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil Co.*, 481 U.S. at 13). In *Juidice*, the Supreme Court abstained from interfering with the ability of New York state courts to issue contempt decrees because "[t]he contempt power lies at the core of the administration of a State's judicial system," and "stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." 430 U.S. at 335, 336 n.12. In *Pennzoil*, the Supreme Court abstained from interfering with the ability of Texas state courts to require the posting of appeal bonds because of the "importance to the States of enforcing the orders and judgments of their courts." 481 U.S. at 13. We recently followed this line of cases in finding that abstention was appropriate in a case seeking to enjoin New York
12 courts from ordering *12 attorneys' fees in child custody cases. *See Falco v. Justices of Matrimonial Parts of Supreme Court of Suffolk Cty.*, 805 F.3d 425, 428 (2d Cir. 2015).

Although *Younger* mandates abstention only when the plaintiff seeks to enjoin ongoing state proceedings and only in the three instances identified in *Sprint*, the Supreme Court has also held that even where no state proceedings are pending, federal courts must abstain where failure to do so would result in "an ongoing federal audit of state criminal proceedings." *O'Shea*, 414 U.S. at 500. In *O'Shea*, the plaintiffs sought to enjoin state court judges from carrying out allegedly unconstitutional policies and practices relating to bond setting, sentencing, and jury fees in criminal cases. *Id.* at 491-92. The Court held that "an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials" would amount to "nothing less than an ongoing federal audit of state . . . proceedings which would indirectly accomplish the kind of interference that [*Younger*] and related cases sought to prevent." *Id.* at 500. Thus, to avoid effecting "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings," which is "antipathetic to established principles of comity," *id.* at 501-02, federal courts must be constantly mindful of the
13 "special *13 delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law," *id.* at 500 (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). Hence, *O'Shea* is an extension of the principles set forth in *Younger*, and although *Younger* does not apply in the absence of pending proceedings, *see Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) ("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of *Younger* abstention was clearly erroneous." (emphasis in original)), the considerations underlying *Younger* are still very much at play even when a suit is filed prior to the onset of state proceedings, *see O'Shea*, 414 U.S. at 500; *see also Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1072 (7th Cir. 2018) ("While this case does not fit neatly into the *Younger* doctrine, it fits better into the Supreme Court's extension of the *Younger* principles in *O'Shea* . . . .").

Like *Younger*, *O'Shea* has also been applied in certain civil contexts involving the operations of state courts. *See Kaufman v. Kaye*, 466 F.3d 83, 86 (2d Cir. 2006) (abstaining under *O'Shea* from enjoining internal state court judicial assignment procedures). Many of our sister circuits have abstained in similar situations. *See Courthouse*

News Serv., 908 F.3d at 1065-66 (abstaining under *O'Shea*, and the principles of federalism and
14 comity that underly it, from *14 enjoining the Clerk of the Circuit Court of Cook County to release newly filed complaints at the moment of receipt); *Oglala Sioux Tribe v. Fleming*, 904 F.3d 603, 612 (8th Cir. 2018) (abstaining under *O'Shea* from enjoining allegedly unconstitutional child custody proceedings because "[t]he relief requested would interfere with the state judicial proceedings by requiring the defendants to comply with numerous procedural requirements" and "failure to comply with the district court's injunction would subject state officials to potential sanctions"); *Miles v. Wesley*, 801 F.3d 1060, 1064, 1066 (9th Cir. 2015) (abstaining under *O'Shea* from enjoining the Los Angeles Supreme Court from reducing the number of courthouses used for unlawful detainer actions); *Hall v. Valeska*, 509 F. App'x 834, 835-36 (11th Cir. 2012) (per curiam) (abstaining under *O'Shea* from enjoining allegedly discriminatory jury selection procedures); *Parker v. Turner*, 626 F.2d 1, 8 & n.18 (6th Cir. 1980) (providing that *O'Shea* establishes a rule of "near-absolute restraint . . . to situations where the relief sought would interfere with the day-to-day conduct of state trials").

3 [3] While the Supreme Court in *Sprint* made clear that *Younger*'s scope should be limited to the three specified categories, 134 S. Ct. at 591, 594, the Court did not suggest that abstention under *O'Shea* should be circumscribed. Indeed, courts have continued to apply *O'Shea* even after *Sprint*. *See, e.g.*, *Courthouse News Serv.*, 908 F.3d at 1072; *Oglala Sioux Tribe*, 904 F.3d at 612; *Miles*, 801 F.3d at 1064-65.

II. *Application*

DRNY first argues that the third category of *Younger* does not apply to this case because there is no pending, parallel state court action. Indeed, DRNY is not seeking to enjoin any specific pending action, but it is instead seeking to affect the manner in which all Article 17A proceedings -- present and future -- are conducted.[4] Mindful of the Supreme Court's admonition that the three "exceptional" categories under *Younger* are to be narrowly construed, *Sprint*, 571 U.S. at 73, 78, 82 (noting that the three categories "define *Younger*'s scope," that *Younger* extends "no further," and that it has not "applied *Younger* outside these three 'exceptional' categories"), we do not decide whether this case fits within the third *Younger* category, for we conclude that it falls squarely within *O'Shea*'s abstention framework.

4 We note that DRNY's complaint lacks nearly any specificity in its pleading. The complaint itself merely compares the aspects of two pieces of legislation and fails to mention a single individual by name. Indeed, DRNY "tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). As drafted, DRNY's pleading "give[s] no indication of the circumstances that support the conclusory allegation of unlawfulness." *Drimal v. Tai*, 786 F.3d 219, 224 (2d Cir. 2015). --------

Our decision in *Kaufman v. Kaye* is instructive. There, we abstained under *O'Shea* from declaring that New York State's system for assigning cases
16 *16 among panels of appellate judges violated the Constitution and we refused to order the state legislature to establish a new procedure for assigning appeals. *Kaufman*, 466 F.3d at 84-85, 87. Doing so, we held, would "raise compliance issues under the putative federal injunction" as well as claims that "the state court's chosen remedy violated the Constitution or the terms of that injunction," which "would inevitably lead to precisely the kind of piecemeal interruptions of state proceedings condemned in *O'Shea*." *Id.* at 87 (internal quotation marks and ellipsis omitted). A recent decision of the Ninth Circuit is also helpful. In *Miles v. Wesley*, the Ninth Circuit abstained under *O'Shea* from enjoining the Los Angeles Supreme Court from, *inter alia*, eliminating any courthouses that heard unlawful detainer actions. 801 F.3d at 1064. The court held that the requested injunction would result in "heavy federal interference in such sensitive state activities as

administration of the judicial system." *Id*. at 1063 (quoting *L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992)).

In seeking the injunction in this case, DRNY asked the district court (and asks this Court now) to direct the New York State Unified Court System, the Chief Judge of the State of New York, and the Chief Administrative Judge for the Courts of New York to (1) notify all current Article 17A
17 wards of their right to *17 request modification or termination of their guardianship order, (2) hold proceedings that provide augmented substantive and procedural rights "no less than" those of Article 81 proceedings, and (3) cease future Article 17A adjudications "until defendants ensure that the proceedings provide substantive and procedural rights" on par with those of Article 81 proceedings. App'x at 42.

As in *O'Shea*, DRNY's requested relief would effect a continuing, impermissible "audit" of New York Surrogate's Court proceedings, which would offend the principles of comity and federalism. Simply put, DRNY seeks to "control[] or prevent[] the occurrence of specific events that might take place in the court of future state [Article 17A proceedings.]" *O'Shea*, 414 U.S. at 500. With such an injunction in place, anyone seeking or objecting to Article 17A guardianship in the future would be able to "raise compliance issues under the putative federal injunction claiming that the state court's chosen remedy violated the Constitution or the terms of that injunction." *Kaufman*, 466 F.3d at 87; *see also id*. ("[A]ny remedy fashioned by the state would then be subject to future challenges in the district court."). Ongoing, case-by-case oversight of state courts, like the New York Surrogate's Court, is exactly the sort of interference *O'Shea* seeks to avoid. *Kaufman*, 466
18 F.3d at 86 ("[F]ederal courts may not entertain *18 actions . . . that seek to impose 'an ongoing federal audit of state . . . proceedings.'" (quoting *O'Shea*, 414 U.S. at 500)). Indeed, such "monitoring of the operation of state court functions . . . is antipathetic to established principles of comity." *O'Shea*, 414 U.S. at 501-02. Because this Court has "no power to intervene in the internal procedures of the state courts" and cannot "legislate and engraft new procedures upon existing state . . . practices," the district court correctly abstained from exercising jurisdiction in this case. *See Kaufman*, 466 F.3d at 86 (quoting *Wallace v. Kern*, 520 F.2d 400, 404-05 (2d Cir. 1975)).

DRNY argues that federal courts have often found state statutes unconstitutional, including statutes resulting in the issuance of state court orders. It cites landmark decisions such as *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that Michigan's law prohibiting same-sex marriage violated equal protection and due process rights), and *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that Washington's sentencing law violates the Sixth Amendment). But those cases did not implicate *Younger*. Plaintiffs in *Obergefell* challenged substantive state statutes, and plaintiffs in *Blakely* simply appealed a final judgment of the state courts. Here, DRNY seeks a far more substantial invasion of state courts' domain; it would have federal courts conduct a preemptive
19 *19 review of state court procedure in guardianship proceedings, an area in which states have an especially strong interest. *See Falco*, 805 F.3d at 427. Such review would directly impede "the normal course of . . . proceedings in the state courts." *O'Shea*, 414 U.S. at 500; *see also Sprint*, 571 U.S. at 73 (noting that abstention is proper where relief would impede "the state courts' ability to perform their judicial functions." (quoting *NOPSI*, 491 U.S. at 368)).

DRNY also seeks to have Article 17A declared unconstitutional and violative of the Americans with Disability Act and Section 504 of the Rehabilitation Act of 1973. DRNY argues that its request for declaratory relief is not subject to abstention, as a declaratory judgment would not order the state courts to take certain actions. We are not persuaded. In *Samuels v. Mackell*, the Supreme Court held that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid." 401 U.S. 66,

72 (1971); *see also Miles*, 801 F.3d at 1063-64 (noting that where *O'Shea* is implicated, even where plaintiffs narrow their request only to declaratory relief, abstention is proper where the relief sought "would inevitably set up the precise basis for *future intervention* condemned in
20 *O'Shea*" because "the question of defendants' *20 compliance with any remedy imposed could be the subject of future court challenges" (internal citations omitted)); *Kaufman*, 466 F.3d at 85 (abstaining under *O'Shea* from hearing Kaufman's complaint seeking injunctive and declaratory relief). Thus, the district court properly abstained from exercising jurisdiction even as to DRNY's request for declaratory relief.

We conclude by noting that abstention here is supported by the "availability of other avenues of relief." *O'Shea*, 414 U.S. at 504. DRNY may still avail itself of the state courts to challenge the constitutionality of Article 17A proceedings. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) ("State courts are courts of general jurisdiction and are accordingly presumed to have jurisdiction over federally-created causes of action unless Congress indicates otherwise."). DRNY and any aggrieved individuals will be able to obtain sufficient review in state court and, if needed, the Supreme Court of the United States. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980) (noting the Supreme Court's confidence in state courts to adjudicate constitutional issues); *Kaufman*, 466 F.3d at 87-88. Indeed, New York state courts have been diligent in reviewing the sufficiency of Article 17A proceedings, *see*, *e.g.*, *In re Mark C.H.*, 906 N.Y.S.2d 419, 427 (Sur. Ct.
21 New York County 2010); *In re* *21 *D.D.*, 19 N.Y.S.3d 867, 869-71 (Sur. Ct. Kings County 2015), and understand well the differences between Article 17A proceedings and Article 81 proceedings, *see In re Chaim A.K.*, 885 N.Y.S.2d at 584-90.

CONCLUSION

Accordingly, for the reasons set forth above, the judgment of the district court is **AFFIRMED.**

STATE OF NEW YORK

8171--A

2017-2018 Regular Sessions

IN ASSEMBLY

June 1, 2017

Introduced by M. of A. LAVINE, WEINSTEIN -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the surrogate's court procedure act and the judiciary law, in relation to replacing the term intellectually disabled with developmentally disabled; and guardianship and health care decisions of persons with developmental disabilities; and to repeal section 1750-a of the surrogate's court procedure act relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1750 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1750. Guardianship of persons [~~who are intellectually disabled~~] **with developmental disabilities**

1. When it shall appear to the satisfaction of the court that a person is a person [~~who is intellectually disabled~~] **with a developmental disability within the meaning of subdivision twenty-two of section 1.03 of the mental hygiene law, and that such person, as a result of such developmental disability, exhibits significant impairment of general or specific areas of intellectual functioning and/or adaptive behaviors in specified domains as enumerated in subdivision eight of section seventeen hundred fifty-two of this article**, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is [~~in the best interest of~~] **shown by clear and convincing evidence that** the person [~~who is intellectually disabled~~] **with a developmental disability is likely to suffer harm or is unable to provide for personal needs and/or property management needs or cannot adequately understand and appreciate the nature and consequences of such inability, and where the respondent has unmet**

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

LBD10185-05-7

needs. Such appointment shall be made pursuant to the provisions of this article[~~, provided however that the provisions of section seventeen hundred fifty-a of this article shall not apply to the appointment of a guardian or guardians of a person who is intellectually disabled~~]. The nature and duration of the guardianship must bear a reasonable relation to the purpose for which the person is appointed a guardian.

[~~1. For the purposes of this article, a person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely.~~]

2. Every guardianship entered into pursuant to this article prior to the effective date of this subdivision, including orders and decrees pursuant to section seventeen hundred fifty-seven of this article, shall remain in full force and effect thereafter, except as amended pursuant to section seventeen hundred fifty-five of this article or as ordered by the court; and any such guardianship shall be administered consistent with the substantive and procedural requirements set forth in this article.

3. Every [~~such certification pursuant to subdivision one of this section,~~] order and decree made on or after the effective date of this subdivision, shall include a specific determination by [~~such physician and psychologist, or by such physicians,~~] the issuing court as to whether the person [~~who is intellectually disabled~~] with a developmental disability has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself. A determination that the person [~~who is intellectually disabled~~] with a developmental disability has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the person [~~who is intellectually disabled~~] with a developmental disability. The absence of this determination in the case of guardians appointed prior to [~~the effective date of this subdivision~~] March sixteenth, two thousand three, shall not preclude such guardians from making health care decisions. Further, guardians appointed by orders and/or decrees issued prior to the effective date of this subdivision shall have authority in all areas, unless otherwise stated.

§ 2. Section 1750-a of the surrogate's court procedure act is REPEALED.

§ 3. Section 1750-b of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1750-b. Health care decisions for persons [~~who are intellectually disabled~~] with developmental disabilities

1. Scope of authority. As used in this section the term "developmental disability" shall have the same meaning as defined in subdivision twenty-two of section 1.03 of the mental hygiene law. Unless specifically prohibited by the court after consideration of [~~the determination, if any, regarding~~] a person [~~who is intellectually disabled's~~] with a developmental disability's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make

any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the person [~~who is intellectually disabled~~] **with a developmental disability** that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "life-sustaining treatment" means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the person [~~who is intellectually disabled~~] **with a developmental disability** could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty [~~or seventeen hundred fifty-a~~] of this article, a "guardian" shall also mean a family member of a person who [~~(i) has intellectual disability, or (ii)~~] has a developmental disability, as defined in **subdivision twenty-two of** section 1.03 of the mental hygiene law, [~~which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability~~] **and that such person, as a result of such developmental disability, exhibits significant impairment of the ability to make his or her own health care decisions**. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of the office for people with developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the decision of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section.

In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law, a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All

declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the [~~commission on quality of care and advocacy for persons with disabilities~~] **justice center for the protection of people with special needs, as established by article twenty of the executive law**.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of the office for people with developmental disabilities in conjunction with parents, advocates and family members of persons [~~who are intellectually disabled~~] **with developmental disabilities**. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office for people with developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to guardians appointed pursuant to section seventeen hundred fifty [~~or seventeen hundred fifty-a~~] of this article.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the person [~~who is intellectually disabled~~] **with a developmental disability** and, when reasonably known or ascertainable with reasonable diligence, on [~~the person who is intellectually disabled's~~] **such person's** wishes, including moral and religious beliefs.

(b) An assessment of the person [~~who is intellectually disabled's~~] **with a developmental disability's** best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the person [~~who is intellectually disabled's~~] **with a developmental disability's** health;

(iii) the relief of the person [~~who is intellectually disabled's~~] **with a developmental disability's** suffering by means of palliative care and pain management;

(iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the person [~~who is intellectually disabled~~] **with a developmental disability**; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons [~~who are intellectually disabled~~] **with developmental disabilities** are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without [~~an intellectual disability or a~~] developmental [~~disability~~] **disabilities**; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the person [~~who is intellectually disabled's~~] **with a developmental disability's** health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from

a person [~~who is intellectually disabled~~] with a developmental disability:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the person [~~who is intellectually disabled~~] with a developmental disability lacks capacity to make health care decisions. The determination thereof shall be included in the person [~~who is intellectually disabled's~~] with a developmental disability's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the person [~~who is intellectually disabled's~~] with a developmental disability's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the person [~~who is intellectually disabled's~~] with a developmental disability's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office for people with developmental disabilities, or (iii) have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating [~~intellectual disability~~] persons with developmental disabilities. A record of such consultation shall be included in the person [~~who is intellectually disabled's~~] with developmental disability's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the person [~~who is intellectually disabled's~~] with a developmental disability's chart that:

(i) the person [~~who is intellectually disabled~~] with a developmental disability has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's [~~intellectual disability~~] developmental disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's [~~intellectual disability~~] developmental disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's [~~intellectual disability~~] developmental disability; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the person [~~who is intellectually disabled's~~] **with a developmental disability's** attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the person [~~who is intellectually disabled~~] **with a developmental disability**, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the person [~~who is intellectually disabled~~] **with a developmental disability**, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office for people with developmental disabilities, or

C. have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating [~~intellectual disability~~] **developmental disabilities**. A record of such consultation shall be included in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office for people with developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the person [~~who is intellectually disabled~~] with a developmental disability, in the event of an objection to that decision at any time by:

(i) the person [~~who is intellectually disabled~~] with a developmental disability on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the person [~~who is intellectually disabled~~] with a developmental disability; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the person [~~who is intellectually disabled~~] with a developmental disability, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the person [~~who is intellectually disabled's~~] with a developmental disability's medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities) or the commissioner of the office for people with developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the person [~~who is intellectually disabled~~] **with a developmental disability** is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the person [~~who is intellectually disabled~~] **with a developmental disability** to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be

likely to result in the death of the person [~~who is intellectually disabled~~] with a developmental disability, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the person [~~who is intellectually disabled~~] with a developmental disability to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

§ 4. Section 1751 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1751. Petition for appointment; by whom made

(a) A petition for the appointment of a guardian [~~of the person or property, or both,~~] of a person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability pursuant to this article may be made by the person with a developmental disability when such person is eighteen years of age or older, a parent, spouse, sibling, adult child or any other interested person eighteen years of age or older on behalf of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability including a corporation authorized to serve as a guardian as provided for by this article[~~, or by the person who is intellectually disabled or a person who is developmentally disabled when such person is eighteen years of age or older~~].

(b) A person with a developmental disability may knowingly and voluntarily consent to the appointment of a guardian pursuant to this article.

§ 5. The surrogate's court procedure act is amended by adding a new section 1751-a to read as follows:

§ 1751-a. Petition for appointment; where made (venue)

1. A proceeding under this article shall be brought in the surrogate's court within the county in which the person with a developmental disability resides, or is physically present at the time the proceeding is commenced. If the person with a developmental disability alleged to be in need of a guardian is being cared for as a resident in a facility, the residence of that person shall be deemed to be in the county where the facility is located and the proceeding shall be brought in that county, subject to application by an interested party for a change in venue to another county due to inconvenience to the parties or witnesses, or due to the condition of the person alleged to be in need of a guardian.

2. After the appointment of a guardian, any proceeding to modify a prior order shall be brought in the surrogate's court which granted the prior order, unless at the time of the application to modify the order the person with a developmental disability resides elsewhere, in which case the proceeding shall be brought in the county where the person with

a developmental disability resides, without the need for a motion to transfer venue.

§ 6. Section 1752 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1752. Petition for appointment; contents

The petition for the appointment of a guardian shall be filed with the court on forms to be prescribed by the state chief administrator of the courts. Such petition for a guardian of a person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability shall include, but not be limited to, the following information:

1. the full name, date of birth and residence of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability;

2. the name, age, address and relationship or interest of the petitioner to the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability;

3. the names and addresses, if known, of the father, the mother, adult children, adult siblings [~~if eighteen years of age or older,~~] and the spouse [~~and primary care physician if other than a physician having submitted a certification with the petition, if any,~~] of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

4. the name and address of the person [~~with whom the person who is intellectually disabled or a~~] caring for the person [~~who is developmentally disabled~~] with a developmental disability, or with whom the person with a developmental disability resides if other than the parents or spouse;

5. the name and address of any person with significant and ongoing involvement in the life of the person with a developmental disability so as to have sufficient knowledge of their needs, if such persons are known to the petitioner;

6. the name, age, address, education and other qualifications, and consent of the proposed guardian, standby and alternate guardian, if other than the parent, spouse, adult child if eighteen years of age or older or adult sibling if eighteen years of age or older, and if such parent, spouse or adult child be living, why any of them should not be appointed guardian;

[~~6.~~] 7. the estimated value of real and personal property and the annual income therefrom and any other income including governmental entitlements to which the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability is entitled; [~~and~~

~~7. any circumstances which the court should consider in determining whether it is in the best interests of the person who is intellectually disabled or person who is developmentally disabled to not be present at the hearing if conducted.~~]

8. factual allegations forming the basis for the petition, including facts relating to the person's functional limitations which impair his or her ability to provide for personal and/or property management needs, and the person's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;

9. the particular powers being sought under their relationship to the functional level and needs of the person with a developmental disability;

10. an enumeration of the specific domains in which the person with a developmental disability is alleged to be in need of a guardian or a statement that full guardianship is sought. Specific domains may be included which may include:

(i) consent to or refusal to consent to health care or other professional care;

(ii) management of money or other income, assets or property;

(iii) access to confidential and other sensitive information;

(iv) choices involving education, training, employment, supports and services;

(v) requesting advocacy, legal or other professional services;

(vi) choice of residence and shared living arrangements;

(vii) choices as to social and recreational activity;

(viii) decisions concerning travel; and

(ix) application for government-sponsored or private insurance and benefits; and

11. a statement of the alternatives to guardianship considered, including but not limited to the execution of a health care proxy, power of attorney, representative payee, service coordination, and/or other social support services, other available supported or shared decision-making, and surrogate decision-making committee, and reasons for the declination of such alternatives.

§ 7. Section 1753 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1753. Persons to be served and noticed

1. Upon [~~presentation~~] filing of the petition, process shall issue to[~~:~~

~~(a) the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the person who is intellectually disabled or person who is developmentally disabled is married, to the spouse, if their residences are known;~~

~~(b) the person having care and custody of the person who is intellectually disabled or person who is developmentally disabled, or with whom such person resides if other than the parents or spouse; and~~

~~(c) the person who is intellectually disabled or person who is developmentally disabled if fourteen years of age or older for whom an application has been made in such person's behalf.~~

~~2. Upon presentation of the petition, notice of such petition shall be served by certified mail to:~~

~~(a) the adult siblings if the petitioner is a parent, and adult children if the petitioner is a parent;~~

~~(b) the mental hygiene legal service in the judicial department where the facility, as defined in subdivision (a) of section 47.01 of the mental hygiene law, is located if the person who is intellectually disabled or person who is developmentally disabled resides in such a facility;~~

~~(c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the person who is intellectually disabled or person who is developmentally disabled resides in such facility;~~

~~(d) one other person if designated in writing by the person who is intellectually disabled or person who is developmentally disabled; and~~

~~(e) such other persons as the court may deem proper~~] the person with a developmental disability, if the petitioner is other than the person with a developmental disability alleged to be in need of a guardian. Any process served upon the person with a developmental disability shall be accompanied by a simplified, clear and easily readable form statement, developed by the office of court administration, including the right of the person to contest the appointment of the guardian to be present at hearings related to the proceeding, to be represented by an attorney and a statement about the nature and implications of the proceedings.

2. Upon filing of the petition, notice of the petition shall be sent by certified mail to the last known address of the following, except if any of the following is also the petitioner:

(a) parents, spouse, adult children, and adult siblings of the person alleged to be in need of the guardian;

(b) individuals listed in the petition pursuant to section seventeen hundred fifty-two of this article and subdivisions four and five of this section;

(c) mental hygiene legal service in the judicial department where the person with a developmental disability resides;

(d) the director in charge of a facility licensed or operated by an agency of the state of New York, if the person with a developmental disability resides in such facility;

(e) any other person if designated in writing by the person with a developmental disability; and

(f) such other persons as the court may deem proper.

3. Within five days of the filing of the petition, a full copy of said petition shall be served by certified mail to the mental hygiene legal service in the judicial department in which the petition was filed. A copy of proof of mailing shall be thereafter filed with the court.

4. For petitions to modify an existing guardianship pursuant to section seventeen hundred fifty-five of this article and/or to appoint a standby guardian pursuant to section seventeen hundred fifty-seven of this article, written notice must be given to all standby guardians currently in succession for a person with a developmental disability who is the subject of the petition by regular mail unless such standby guardians have consented to the petition. An affidavit of service by mail shall be filed with the court. A copy of such petition to modify shall also be served by certified mail upon the mental hygiene legal service in the judicial department in which the petition was filed.

[~~3.~~] 5. No process or notice shall be necessary to [~~a parent, adult child, adult sibling, or spouse of the person who is intellectually disabled or person who is developmentally disabled who has been declared by a court as being incompetent. In addition, no process or notice shall be necessary to a spouse who is divorced from the person who is intellectually disabled or person who is developmentally disabled, and to~~] a parent, adult child, or adult sibling when it shall appear to the satisfaction of the court, based on evidence submitted to the court, that such person or persons have abandoned the person who [~~is intellectually disabled or person who is developmentally disabled~~] has a developmental disability. In addition, no process or notice shall be necessary to any individual who cannot, after due diligence, reasonably be located. The petitioner shall submit an affidavit to such effect.

§ 8. Section 1754 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1754. [~~Hearing and trial~~] Proceedings upon petition

1. Upon a petition for the appointment of a guardian of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability eighteen years of age or older, the court shall [~~conduct a hearing at which such person shall have the right to jury trial. The right to a jury trial shall be deemed waived by failure to make a demand therefor. The court may in its discretion dispense with a hearing for the appointment of a guardian, and may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility as defined in subdivision (a) of section 47.01 of the mental hygiene law, to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled, provided however, that such application has been made by:~~

~~(a) both parents or the survivor; or~~

~~(b) one parent and the consent of the other parent; or~~

~~(c) any interested party and the consent of each parent.~~], not later than forty-five days following the filing of proof of mailing upon the mental hygiene legal service, schedule an appearance in the matter.

(a) The mental hygiene legal service shall ascertain whether the person with a developmental disability alleged to need a guardian has any objection to the relief sought in the petition and whether the service is unable to represent the interests of the person in the proceeding due to conflict of interest.

(b) If the service reports that the person with a developmental disability alleged to need a guardian objects to the relief sought in the petition, the court shall appoint the service as counsel for the person. If the service is not available to serve as the person's counsel and the person does not otherwise have counsel of his or her own choice, the court shall appoint counsel for the person from among attorneys eligible for such appointment pursuant to section thirty-five of the judiciary law. The court shall ensure that the individual's counsel, whether it be the service or appointed counsel, have demonstrated experience with and knowledge of representing individuals with developmental disabilities. The appointment of such counsel shall be at no cost to the petitioner.

(c) If the service reports that the person with a developmental disability alleged to need a guardian does not object to relief sought in the petition, the person's interests shall continue to be represented by the service, if available. The service shall conduct an examination into the allegations of fact contained in the petition and file with the court and serve upon the petitioner or their counsel, no later than ten days prior to the appearance date, an answer confirming or denying the allegations in the petition and report as to whether the service finds grounds to object to the relief sought in the petition. If appropriate and upon consent of the person with a developmental disability, the service may nominate a person or entity of the respondent's choosing to serve as guardian. The service will otherwise perform its functions consistent with uniform regulations promulgated by the appellate division of the supreme court.

(d) If a person with a developmental disability alleged to need a guardian does not object and does not otherwise appear by the service or other counsel, the court shall appoint a guardian ad litem to such person pursuant to this section and section four hundred three of this act. Any guardian ad litem appointed pursuant to this section shall conduct an investigation into the allegations of fact contained in the

petition and file with the court and serve no later than ten days prior to the appearance date, a report of its findings confirming or disconfirming said allegations, and if appropriate and upon consent of the person with a developmental disability nominate a person or entity of the respondent's choosing to serve as guardian, as well as any other matter which could assist the court's consideration of the matter, and serve a copy of the report upon the petitioner upon consent of the person with the developmental disability.

(e) The service, any other counsel for the person with a developmental disability alleged to need a guardian, or the guardian ad litem may apply to the court for permission to inspect the clinical records pertaining to the person with a developmental disability alleged to need a guardian in accordance with state and federal laws. The service, any other counsel for the person with a developmental disability and the guardian ad litem, if any, shall be afforded access to the person's clinical records without a court order to the extent that such access is otherwise authorized by state and federal laws.

(f) The service, any other counsel for the person with a developmental disability alleged to need a guardian, and the guardian ad litem, if any, may request the court for further evaluation of the person by a physician, psychiatrist or certified psychologist. In the event that further evaluations are required, the court may grant appropriate adjournments of the initial appearance date and may direct, in the case of a person determined to be indigent, that any further court authorized evaluations be paid for out of funds available pursuant to section thirty-five of the judiciary law. Such evaluation shall be at no cost to the petitioner.

2. [~~When it shall appear to the satisfaction of the court that a parent or parents not joining in or consenting to the application have abandoned the person who is intellectually disabled or person who is developmentally disabled or are not otherwise required to receive notice, the court may dispense with such parent's consent in determining the need to conduct a hearing for a person under the age of eighteen. However, if the consent of both parents or the surviving parent is dispensed with by the court, a hearing shall be held on the application~~] At the first appearance, the respondent shall be present unless such presence is excused by the court upon recommendation of the service, respondent's counsel, or the guardian ad litem if the respondent does not have counsel and upon consent of the respondent. The petitioner shall also be present and may be represented by counsel. Any other party required to be served or noticed with process in the matter may be present.

(a) Prior to such appearance, the petitioner, either personally or by counsel, may confer with the service, respondent's counsel and the guardian ad litem if respondent does not have counsel and agree to amend any part of its petition and allegations of fact therein. Any such amended petition shall be filed with the court prior to the date of the first appearance.

(b) At the first appearance, the court shall examine the answer of the service, respondent's counsel, and the report of the guardian ad litem, if any, and shall hear from the petitioner and the service, respondent's counsel and the guardian ad litem, if any, on the contents of the said answer or report and any amended petition filed.

(c) The court may direct that an order and decree of guardianship be issued, including the authority of the guardian to act on behalf of the respondent with respect to any matter in which petitioner, the service,

respondent's counsel, and the guardian ad litem, if any, all agree on the record that the respondent requires the requested relief and does not object to such relief.

(d) In the event that the petition cannot be disposed of by the agreement of the court and all of the parties, the court shall forthwith schedule a hearing on the matter at which the respondent shall be present unless the court determines, based on clear and convincing evidence, that the respondent's presence is medically contraindicated, in that it would be likely to cause harm to the respondent, or that the respondent is completely unable to participate in the hearing or where no meaningful participation will result from the respondent's presence at the hearing. Provided, however, that the respondent's presence shall not be waived over the objection of the service, respondent's counsel, or a guardian ad litem, if any. If the respondent physically cannot come or be brought to the courthouse, or the court determines, based on clear and convincing evidence that the respondent's presence would be harmful to the respondent, the hearing must be conducted where the respondent resides.

3. [~~If a hearing is conducted, the person who is intellectually disabled or person who is developmentally disabled shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the person who is intellectually disabled or person who is developmentally disabled is medically incapable of being present to the extent that attendance is likely to result in physical harm to such person who is intellectually disabled or person who is developmentally disabled, or under such other circumstances which the court finds would not be in the best interest of the person who is intellectually disabled or person who is developmentally disabled~~] If there are any objections to the relief sought by the petitioner, the respondent has a right to a hearing or jury trial, if demanded by the respondent. In addition, the court may conduct a hearing at the request of any party or on its own motion. At any such hearing or trial, the petitioner must establish by clear and convincing evidence any facts alleged in the petition or amended petition which are controverted and are relevant to whether respondent has a developmental disability, and if so, whether appointment of a guardian is required as provided under subdivision one of section seventeen hundred fifty of this article and the scope of the guardian's powers.

4. [~~If either a hearing is dispensed with pursuant to subdivisions one and two of this section or the person who is intellectually disabled or person who is developmentally disabled is not present at the hearing pursuant to subdivision three of this section, the court may appoint a guardian ad litem if no mental hygiene legal service attorney is authorized to act on behalf of the person who is intellectually disabled or person who is developmentally disabled. The guardian ad litem or mental hygiene legal service attorney, if appointed, shall personally interview the person who is intellectually disabled or person who is developmentally disabled and shall submit a written report to the court.~~

~~5. If, upon conclusion of such hearing or jury trial or if none be held upon the application, the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians.~~] If, upon conclusion of such hearing or jury trial, if any, the court is satisfied, based on the standard outlined in this section and in subdivision one of section

seventeen hundred fifty of this article that the respondent has a developmental disability and requires the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians. The court decree shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the respondent in providing for personal needs and/or property management. The powers of the guardian shall be tailored to the needs of the respondent.

5. If the respondent is found to have agreed to the appointment of a guardian and the court determines that the appointment of a guardian is necessary, the court decree shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the respondent in providing for personal needs and/or property management. The powers of the guardian shall be tailored to the needs of the respondent.

6. If the respondent is found to be a person with a developmental disability and the court determines that the appointment of a guardian is necessary, the court decree shall be designed to accomplish the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the respondent in providing for personal needs and/or property management. The powers of the guardian shall be tailored to the needs of the respondent.

7. Where the court directs the appointment of a guardian pursuant to this section, the court shall make the following findings of fact on the record:

(a) the respondent's functional limitations which impair the respondent's ability to provide for personal and/or property management needs;

(b) the respondent's lack of understanding and appreciation of the nature and consequences of his or her functional limitations;

(c) the likelihood that the respondent will suffer harm because of the respondent's functional limitations and inability to adequately understand and appreciate the nature and consequences of such functional limitations;

(d) the necessity of the appointment of a guardian to prevent such harm;

(e) the specific powers of the guardian which constitute the least restrictive form of intervention consistent with the findings of this subdivision; and

(f) the duration of the appointment.

8. If the hearing is conducted without the respondent and the court appoints a guardian, the order of appointment shall set forth the factual basis for conducting the hearing without the presence of the respondent.

9. If the hearing is conducted in the presence of the respondent and the respondent is not represented by counsel, the court shall explain to the respondent, on the record, the purpose and possible consequences of the proceeding, the right to be represented by counsel of the respondent's own choice and the respondent's right to have counsel appointed if the respondent wishes to be represented by counsel and is unable to afford one, and shall inquire of the respondent whether he or she wishes to have an attorney appointed. If the respondent refuses the assistance of counsel, the court may nevertheless appoint counsel for the person from among the attorneys eligible for such appointment pursuant to

section thirty-five of the judiciary law, if the court is not satisfied that the respondent is capable of making an informed decision regarding the appointment of counsel. The appointment of such counsel shall be at no cost to the petitioner. The court shall ensure that the individual's counsel, whether it be the service or appointed counsel, has demonstrated experience with and knowledge of representing individuals with developmental disabilities.

10. The court shall direct that a decree be entered determining the rights of the parties.

11. The order and judgment must be entered and served within ten days of the signing of the order.

12. A copy of the order and decree shall be personally served upon and explained to the respondent in a manner which the respondent can reasonably be expected to understand by the counsel for the person, or by the guardian or the guardian ad litem.

§ 9. The surrogate's court procedure act is amended by adding a new section 1754-a to read as follows:

§ 1754-a. Decision making standard

Decisions made by a guardian on behalf of a person with a developmental disability shall be made in accordance with the following standards.

1. A guardian shall exercise authority only as necessitated by the person with a developmental disability's limitations, and, to the extent possible, shall encourage the person with a developmental disability to participate in decisions and to act on his or her own behalf.

2. A guardian shall consider the expressed desires and personal values of the person with a developmental disability to the extent known and shall afford the person with a developmental disability the greatest amount of independence and self-determination, when making decisions and shall consult with the person with a developmental disability whenever meaningful communication is possible.

3. If the person's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the best interests of the person with a developmental disability as determined by the guardian. In determining the best interests of the person with a developmental disability, the guardian shall afford the person with a developmental disability the greatest amount of independence and self-determination, and shall weigh the reason for and nature of the proposed action; the benefit or necessity of the action, the possible risks and other consequences of the proposed action; and any available alternatives and their risks, consequences and benefits. The guardian shall take into account any other information, including the views of family and friends, that the guardian believes the person with a developmental disability would have considered if able to act for himself or herself.

§ 10. Section 1755 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1755. Modification order

1. Any person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability eighteen years of age or older, or any person on behalf of any person [~~who is intellectually disabled or person who is developmental disabled~~] with a developmental disability for whom a guardian has been appointed, may apply to the court [~~having jurisdiction over the guardianship order~~] pursuant to section seventeen hundred fifty-one-a of this article, requesting modification of such order in order to protect the [~~person who is intel-~~

~~lectually disabled's, or person who is developmentally disabled's~~] person with a developmental disability's financial situation and/or his or her personal interests.

2. The court [~~may~~] shall, upon receipt of any such request to modify the guardianship order, appoint the mental hygiene legal service, assigned counsel, or a guardian ad litem, as provided in paragraphs (a) through (f) of subdivision one of section seventeen hundred fifty-four of this article. The court shall so modify the guardianship order if in its judgment the guardianship is no longer needed or the interests of the guardian are adverse to those of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability or if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability.

3. To the extent that relief sought under this section would terminate the guardianship or restore certain powers to the person with a developmental disability, the burden of proof shall be on the person objecting to such relief. To the extent that relief sought under this section would further limit the powers of the person with a developmental disability, the burden shall be on the person seeking such relief.

§ 11. Section 1756 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1756. Limited [~~guardian of the property~~] purpose and/or limited duration guardianship

1. When it shall appear to the satisfaction of the court that such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability for whom an application for guardianship is made is eighteen years of age or older and is wholly or substantially self-supporting by means of his or her wages or earnings from employment, the court is authorized and empowered to appoint a limited guardian of the property of such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability who shall receive, manage, disburse and account for only such property of said person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability as shall be received from other than the wages or earnings of said person.

The person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability for whom a limited guardian of the property has been appointed shall have the right to receive and expend any and all wages or other earnings of his or her employment and shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.

2. When it shall appear to the satisfaction of the court, either upon a petition for guardianship filed as permitted by sections seventeen hundred fifty-one and seventeen hundred fifty-two of this article or upon a petition filed pursuant to this section in a simplified format to be established by the office of court administration in consultation with the office for people with developmental disabilities and other interested stakeholders, that a person with a developmental disability needs the assistance of a guardian of the person and/or property for the purpose of making a single decision or for a brief stated period of transition in such person's life, the court may appoint a limited-pur-

pose guardian of the person and/or property to effectuate such a decision or transition. In any such case, the provisions of section seventeen hundred fifty-four of this article shall apply, except that the period for the rendering of a report by the mental hygiene legal service or other respondent's counsel may be shortened as may be reasonably necessary to meet the needs of the respondent under the circumstances presented. An order appointing and empowering such a limited-purpose guardian of the person and/or property shall state specifically the duration and scope of such guardian's authority. The nature and duration of the guardianship must bear a reasonable relation to the purpose for which the person is appointed a guardian.

§ 12. Section 1757 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1757. Standby guardian of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability

1. Upon application, a standby guardian of the person or property or both of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability may be appointed by the court. Any such application shall be made upon notice to the mental hygiene legal service. The court may also, upon application, appoint an alternate and/or successive alternates to such standby guardian, to act if such standby guardian shall die, or become incapacitated, or shall renounce. Such appointments by the court shall be made in accordance with the provisions of this article.

2. Such standby guardian, or alternate in the event of such standby guardian's death, incapacity or renunciation, shall without further proceedings be empowered to assume the duties of his or her office immediately upon death, renunciation or adjudication of incompetency of the guardian or standby guardian appointed pursuant to this article, subject only to the filing of an application for confirmation of his or her appointment by the court within one hundred eighty days following assumption of his or her duties of such office. Before confirming the appointment of the standby guardian or alternate guardian, the court may conduct a hearing pursuant to section seventeen hundred fifty-four of this article upon petition by anyone on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability or the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability if such person is eighteen years of age or older, or upon its discretion.

3. Failure of a standby or alternate standby guardian to assume the duties of guardian, seek court confirmation or to renounce the guardianship within sixty days of written notice by certified mail or personal delivery given by or on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability of a prior guardian's inability to serve and the standby or alternate standby guardian's duty to serve, seek court confirmation or renounce such role shall allow the court to:

(a) deem the failure an implied renunciation of guardianship, and

(b) authorize, notwithstanding the time period provided for in subdivision two of this section to seek court confirmation, any remaining standby or alternate standby guardian to serve in such capacity provided (i) an application for confirmation and appropriate notices pursuant to subdivision one of section seventeen hundred fifty-three of this article are filed, or (ii) an application for modification of the guardianship

order pursuant to section seventeen hundred fifty-five of this article is filed.

§ 13. Subdivision 2 of section 1758 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the welfare of such person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability**.

§ 14. Section 1759 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1759. Duration of guardianship

1. Such guardianship shall not terminate at the age of majority or marriage of such person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** but shall continue during the life of such person, **during the period specified in a limited purpose or limited duration guardianship,** or until terminated by the court.

2. A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition for review, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article**, and shall apply all applicable standards outlined in this article, including those outlined in sections seventeen hundred fifty, seventeen hundred fifty-five, seventeen hundred fifty-six and seventeen hundred fifty-seven of this article**.

3. Upon marriage of such person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** for whom such a guardian has been appointed, the court shall, upon request of the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability**, spouse, or any other person acting on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability**, review the need, if any, to modify, dissolve or otherwise amend the guardianship order including, but not limited to, the appointment of the spouse as standby guardian. The court, in its discretion, may conduct such review pursuant to [~~section~~] **the standards laid out in sections seventeen hundred fifty,**seventeen hundred fifty-four**, seventeen hundred fifty-five, seventeen hundred fifty-six and seventeen hundred fifty seven** of this article.

§ 15. Section 1760 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1760. Corporate guardianship

No corporation may be appointed guardian of the person under the provisions of this article, except that a non-profit corporation organized and existing under the laws of the state of New York and having the corporate power to act as guardian of a person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** may be appointed as the guardian of the person only of such person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability**.

§ 16. Section 1761 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1761. Application of other provisions

To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and effect as if an "infant", as therein referred to, were a "person [~~who is intellectually disabled" or "person who is developmentally disabled"~~] **with a developmental disability"** as herein defined, and a "guardian" as therein referred to were a "guardian of the person [~~who is intellectually disabled or a "guardian of a person who is developmentally disabled"~~] **with a developmental disability**" as herein provided for.

§ 17. The surrogate's court procedure act is amended by adding a new section 1762 to read as follows:

§ 1762. Annual report of personal needs guardian

1. For the purposes of this article, the guardian of a person with a developmental disability shall submit a simplified report regarding the status of the person with a developmental disability annually on the anniversary of his or her appointment or at such other interval as ordered by the court.

2. The simplified report shall be on a form prescribed by the office of court administration and shall be reviewed by the court.

3. A corporate guardian appointed pursuant to section seventeen hundred sixty of this article may submit in lieu of the form prescribed by the office of court administration in subdivision two of this section its own internal report provided the information required by the office of court administration to be contained in the report is included in the corporate annual report.

4. The guardianship report form shall be filed with the court and mailed to standby guardians and alternate standby guardians, and, where applicable, the director of mental hygiene legal service in the department in which the person with a developmental disability resides and the director of the residence of the person with a developmental disability or the person with whom the person with a developmental disability resides.

§ 18. Paragraph a of subdivision 1 of section 35 of the judiciary law, as amended by chapter 817 of the laws of 1986, is amended to read as follows:

a. When a court orders a hearing in a proceeding upon a writ of habeas corpus to inquire into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person to or retain him in a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, or when it orders a hearing for the commitment of the guardianship and custody of a child to an authorized agency by reason of the mental illness or [~~mental retardation~~] **developmental disability** of a parent, **or when it orders a hearing for guardianship under article seventeen-A of the surrogate's court procedure act,** or when it orders a

hearing to determine whether consent to the adoption of a child shall be required of a parent who is alleged to be mentally ill or [~~mentally retarded~~] **have a developmental disability**, or when it orders a hearing to determine the best interests of a child when the parent of the child revokes a consent to the adoption of such child and such revocation is opposed or in any adoption or custody proceeding if it determines that assignment of counsel in such cases is mandated by the constitution of this state or of the United States, the court may assign counsel to represent such person if it is satisfied that he is financially unable to obtain counsel. Upon an appeal taken from an order entered in any such proceeding, the appellate court may assign counsel to represent such person upon the appeal if it is satisfied that he is financially unable to obtain counsel.

§ 19. Subdivision 4 of section 35 of the judiciary law, as amended by chapter 706 of the laws of 1975 and as renumbered by chapter 315 of the laws of 1985, is amended to read as follows:

4. In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to **be a person with a developmental disability in need of a guardian pursuant to article seventeen-A of the surrogate's court procedure act,** be mentally ill, mentally defective or a narcotic addict, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall, upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

§ 20. This act shall take effect on the one hundred eightieth day after it shall have become a law.

S T A T E O F N E W Y O R K

4983

2015-2016 Regular Sessions

I N S E N A T E

April 27, 2015

Introduced by Sen. ORTT -- (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 Judiciary

AN ACT to amend the surrogate's court procedure act, in relation to guardianship and health care decisions of persons with developmental disabilities; and to repeal certain provisions of such law relating thereto

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 1750 of the surrogate's court procedure act, as amended by chapter 500 of the laws of 2002, is amended to read as follows:

S 1750. Guardianship of [mentally retarded] persons WITH DEVELOPMENTAL DISABILITIES

1. When it shall appear to the satisfaction of the court that a person is a [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY WITHIN THE MEANING OF SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW AND THAT SUCH PERSON, AS A RESULT OF SUCH DEVELOPMENTAL DISABILITY, EXHIBITS SIGNIFICANT IMPAIRMENT OF GENERAL OR SPECIFIC AREAS OF INTELLECTUAL FUNCTIONING AND/OR ADAPTIVE BEHAVIORS IN SPECIFIED DOMAINS AS ENUMERATED IN SUBDIVISION EIGHT OF SECTION SEVENTEEN HUNDRED FIFTY-TWO OF THIS ARTICLE, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY. Such appointment shall be made pursuant to the provisions of this article[, provided however that the provisions of section seventeen hundred fifty-a of this article shall not apply to the appointment of a guardian or guardians of a mentally retarded person].

[1. For the purposes of this article, a mentally retarded person is a person who has been certified by one licensed physician and one licensed

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

LBD09619-02-5

psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with mental retardation, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature or likely to continue indefinitely.]

2. EVERY GUARDIANSHIP ENTERED INTO PURSUANT TO THIS ARTICLE PRIOR TO THE EFFECTIVE DATE OF THIS SUBDIVISION, INCLUDING ORDERS AND DECREES PURSUANT TO SECTION SEVENTEEN HUNDRED FIFTY-SEVEN OF THIS ARTICLE, SHALL REMAIN IN FULL FORCE AND EFFECT THEREAFTER, EXCEPT AS AMENDED PURSUANT TO SECTION SEVENTEEN HUNDRED FIFTY-FIVE OF THIS ARTICLE OR AS ORDERED BY THE COURT; AND ANY SUCH GUARDIANSHIP SHALL BE ADMINISTERED CONSISTENT WITH THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS SET FORTH IN THIS ARTICLE.

[2.] 3. Every [such certification pursuant to subdivision one of this section,] ORDER AND DECREE made on or after the effective date of this subdivision, shall include a specific determination by [such physician and psychologist, or by such physicians,] THE ISSUING COURT as to whether the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself. A determination that the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY. The absence of this determination in the case of guardians appointed prior to [the effective date of this subdivision] MARCH 16, 2003, shall not preclude such guardians from making health care decisions. FURTHER, GUARDIANS APPOINTED BY ORDERS AND/OR DECREES ISSUED PRIOR TO THE EFFECTIVE DATE OF THIS SUBDIVISION SHALL HAVE AUTHORITY IN ALL AREAS, UNLESS OTHERWISE STATED.

S 2. Section 1750-a of the surrogate's court procedure act is REPEALED.

S 3. Section 1750-b of the surrogate's court procedure act, as added by chapter 500 of the laws of 2002, subdivision 1 as amended by chapter 105 of the laws of 2007, the opening paragraph, paragraphs (a) and (b) of subdivision 1 and the opening paragraph of subdivision 4 as amended by chapter 8 of the laws of 2010, subparagraph (i) of paragraph (a) and clause A of subparagraph (i) of paragraph (e) of subdivision 4 as amended by section 18 of part J of chapter 56 of the laws of 2012, and paragraph (d) of subdivision 5 as added by chapter 262 of the laws of 2008, is amended to read as follows:

S 1750-b. Health care decisions for [mentally retarded] persons WITH DEVELOPMENTAL DISABILITIES

1. Scope of authority. AS USED IN THIS SECTION, THE TERM "DEVELOPMENTAL DISABILITY" IS AS DEFINED BY SUBDIVISION TWENTY-TWO OF SECTION 1.03 OF THE MENTAL HYGIENE LAW. Unless specifically prohibited by the court after consideration of [the determination, if any, regarding a mentally retarded person's] A PERSON WITH A DEVELOPMENTAL DISABILITY'S capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY that such person could make if such person had

capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "life-sustaining treatment" means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty [or seventeen hundred fifty-a] of this article, a "guardian" shall also mean a family member of a person who [(i) has mental retardation, or (ii)] has a developmental disability, as defined in SUBDIVISION TWENTY-TWO OF section 1.03 of the mental hygiene law, [which (A) includes mental retardation, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability] AND THAT SUCH PERSON, AS A RESULT OF SUCH DEVELOPMENTAL DISABILITY, EXHIBITS SIGNIFICANT IMPAIRMENT OF GENERAL OR SPECIFIC AREAS OF INTELLECTUAL FUNCTIONING AND/OR ADAPTIVE BEHAVIORS IN SPECIFIED DOMAINS AS ENUMERATED IN SUBDIVISION EIGHT OF SECTION SEVENTEEN HUNDRED FIFTY-TWO OF THIS ARTICLE. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of [mental retardation and] developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the decision of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section.

In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law, a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the

[commission on quality of care and advocacy for persons with disabilities] JUSTICE CENTER FOR THE PROTECTION OF PEOPLE WITH SPECIAL NEEDS, AS ESTABLISHED BY ARTICLE TWENTY OF THE EXECUTIVE LAW.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of [mental retardation and] developmental disabilities in conjunction with parents, advocates and family members of persons [who are mentally retarded] WITH DEVELOPMENTAL DISABILITIES. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office of [mental retardation and] developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to guardians appointed pursuant to section seventeen hundred fifty [or seventeen hundred fifty-a] of this article.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY and, when reasonably known or ascertainable with reasonable diligence, on [the mentally retarded] SUCH person's wishes, including moral and religious beliefs.

(b) An assessment of the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S health;

(iii) the relief of the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S suffering by means of palliative care and pain management;

(iv) the unique nature of [artificially provided] nutrition or hydration PROVIDED BY MEANS OF MEDICAL TREATMENT, and the effect it may have on the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons with [mental retardation] DEVELOPMENTAL DISABILITIES are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without [mental retardation or] developmental disabilities; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a

reasonable degree of medical certainty that the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY lacks capacity to make health care decisions. The determination thereof shall be included in the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S medical record, and shall contain such attending physician's opinion regarding the cause and nature of the [mentally retarded] person's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a [licensed] psychologist, to further confirm the [mentally retarded] person's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

(ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, or

(iii) have been approved by the commissioner of [mental retardation and] developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating [mental retardation] PEOPLE WITH DEVELOPMENTAL DISABILITIES. A record of such consultation shall be included in the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S chart that:

(i) the [mentally retarded] person has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's [mental retardation] DEVELOPMENTAL DISABILITY which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's [mental retardation] DEVELOPMENTAL DISABILITY; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's [mental retardation] DEVELOPMENTAL DISABILITY; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to

the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the [mentally retarded] person, and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, or

C. have been approved by the commissioner of [mental retardation and] developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating mental retardation. A record of such consultation shall be included in the [mentally retarded] person's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of [mental retardation and] developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, in the event of an objection to that decision at any time by:

(i) the [mentally retarded] person on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the [mentally retarded] person; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of [mental retardation and] developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the [mentally retarded person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office [of mental retardation and] FOR PEOPLE WITH developmental disabilities) or the commissioner of [mental retardation and] developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may

commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the [mentally retarded] person WITH A DEVELOPMENTAL DISABILITY, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the mentally retarded person to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be

deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

S 4. Section 1751 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1751. Petition for appointment; by whom made

(A) A petition for the appointment of a guardian [of the person or property, or both,] of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY PURSUANT TO THIS ARTICLE may be made by THE PERSON WITH A DEVELOPMENTAL DISABILITY WHEN SUCH PERSON IS EIGHTEEN YEARS OF AGE OR OLDER, a parent, SPOUSE, SIBLING, ADULT CHILD OR any OTHER interested person eighteen years of age or older on behalf of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY including a corporation authorized to serve as a guardian as provided for by this article[, or by the mentally retarded or developmentally disabled person when such person is eighteen years of age or older].

(B) A PERSON WITH A DEVELOPMENTAL DISABILITY MAY KNOWINGLY AND VOLUNTARILY CONSENT TO THE APPOINTMENT OF A GUARDIAN PURSUANT TO THIS ARTICLE.

S 5. The surrogate's court procedure act is amended by adding a new section 1751-a to read as follows:

S 1751-A. PETITION FOR APPOINTMENT; WHERE MADE (VENUE)

1. A PROCEEDING UNDER THIS ARTICLE SHALL BE BROUGHT IN THE SURROGATE'S COURT WITHIN THE COUNTY IN WHICH THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES, OR IS PHYSICALLY PRESENT AT THE TIME THE PROCEEDING IS COMMENCED. IF THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO BE IN NEED OF A GUARDIAN IS BEING CARED FOR AS A RESIDENT IN A FACILITY, THE RESIDENCE OF THAT PERSON SHALL BE DEEMED TO BE IN THE COUNTY WHERE THE FACILITY IS LOCATED AND THE PROCEEDING SHALL BE BROUGHT IN THAT COUNTY, SUBJECT TO APPLICATION BY AN INTERESTED PARTY FOR A CHANGE IN VENUE TO ANOTHER COUNTY BECAUSE OF THE INCONVENIENCE OF THE PARTIES OR WITNESSES OR THE CONDITION OF THE PERSON ALLEGED TO BE IN NEED OF A GUARDIAN.

2. AFTER THE APPOINTMENT OF A GUARDIAN, ANY PROCEEDING TO MODIFY A PRIOR ORDER SHALL BE BROUGHT IN THE SURROGATE'S COURT WHICH GRANTED THE PRIOR ORDER, UNLESS AT THE TIME OF THE APPLICATION TO MODIFY THE ORDER THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES ELSEWHERE, IN WHICH CASE THE PROCEEDING SHALL BE BROUGHT IN THE COUNTY WHERE THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES, WITHOUT THE NEED FOR A MOTION TO TRANSFER VENUE.

S 6. Section 1752 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1752. Petition for appointment; contents

The petition for the appointment of a guardian shall be filed with the court on forms to be prescribed by the state chief administrator of the courts. Such petition for a guardian of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY shall include, but not be limited to, the following information:

1. the full name, date of birth and residence of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY;

2. the name, age, address and relationship or interest of the petitioner to the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY;

3. the names AND ADDRESSES, IF KNOWN, of the father, the mother, ADULT children, adult siblings [if eighteen years of age or older,] AND the spouse [and primary care physician if other than a physician having submitted a certification with the petition, if any,] of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

4. the name and address of the person [with whom the mentally retarded or developmentally disabled] CARING FOR THE person WITH A DEVELOPMENTAL DISABILITY, OR WITH WHOM THE PERSON WITH A DEVELOPMENTAL DISABILITY resides if other than the parents or spouse;

5. THE NAME AND ADDRESS OF ANY PERSON WITH SIGNIFICANT AND ONGOING INVOLVEMENT IN THE LIFE OF THE PERSON WITH A DEVELOPMENTAL DISABILITY SO AS TO HAVE SUFFICIENT KNOWLEDGE OF THEIR NEEDS, IF SUCH PERSONS ARE KNOWN TO THE PETITIONER;

6. the name, age, address, education and other qualifications, and consent of the proposed guardian, standby and alternate guardian, if other than the parent, spouse, adult child if eighteen years of age or older or adult sibling if eighteen years of age or older, and if such parent, spouse or adult child be living, why any of them should not be appointed guardian;

[6.] 7. the estimated value of real and personal property and the annual income therefrom and any other income including governmental entitlements to which the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY is entitled; and

[7. any circumstances which the court should consider in determining whether it is in the best interests of the mentally retarded or developmentally disabled person not be be present at the hearing if conducted.]

8. AN ENUMERATION OF THE SPECIFIC DOMAINS IN WHICH THE PERSON WITH A DEVELOPMENTAL DISABILITY IS ALLEGED TO BE IN NEED OF A GUARDIAN OR A STATEMENT THAT FULL GUARDIANSHIP IS SOUGHT. SPECIFIC DOMAINS MAY BE INCLUDED WHICH MAY INCLUDE:

(I) CONSENT TO OR REFUSAL TO CONSENT TO HEALTH CARE OR OTHER PROFESSIONAL CARE;

(II) MANAGEMENT OF MONEY OR OTHER INCOME, ASSETS OR PROPERTY;

(III) ACCESS TO CONFIDENTIAL AND OTHER SENSITIVE INFORMATION;

(IV) CHOICES INVOLVING EDUCATION, TRAINING, EMPLOYMENT, SUPPORTS AND SERVICES;

(V) REQUESTING ADVOCACY, LEGAL OR OTHER PROFESSIONAL SERVICES;

(VI) CHOICE OF RESIDENCE AND SHARED LIVING ARRANGEMENTS;

(VII) CHOICES AS TO SOCIAL AND RECREATIONAL ACTIVITY;

(VIII) DECISIONS CONCERNING TRAVEL; AND

(IX) APPLICATION FOR GOVERNMENT-SPONSORED OR PRIVATE INSURANCE AND BENEFITS.

9. A STATEMENT OF THE ALTERNATIVES TO GUARDIANSHIP CONSIDERED, INCLUDING BUT NOT LIMITED TO THE EXECUTION OF A HEALTH CARE PROXY, POWER OF ATTORNEY, REPRESENTATIVE PAYEE, SERVICE COORDINATION, AND/OR OTHER SOCIAL SUPPORT SERVICES, OTHER AVAILABLE SUPPORTED OR SHARED DECISION MAKING, AND SURROGATE DECISION-MAKING COMMITTEE, AND REASONS FOR THE DECLINATION OF SUCH ALTERNATIVES.

S 7. Section 1753 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1753. Persons to be served AND NOTICED

1. Upon [presentation] FILING of the petition, process shall issue to[:

(a) the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the mentally retarded or developmentally disabled person is married, to the spouse, if their residences are known;

(b) the person having care and custody of the mentally retarded or developmentally disabled person, or with whom such person resides if other than the parents or spouse; and

(c) the mentally retarded or developmentally disabled person if fourteen years of age or older for whom an application has been made in such person's behalf.

2. Upon presentation of the petition, notice of such petition shall be served by certified mail to:

(a) the adult siblings if the petitioner is a parent, and adult children if the petitioner is a parent;

(b) the mental hygiene legal service in the judicial department where the facility, as defined in subdivision (a) of section 47.01 of the mental hygiene law, is located if the mentally retarded or developmentally disabled person resides in such a facility;

(c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the mentally retarded or developmentally disabled person resides in such facility;

(d) one other person if designated in writing by the mentally retarded or developmentally disabled person; and

(e) such other persons as the court may deem proper.] THE PERSON WITH A DEVELOPMENTAL DISABILITY, IF PETITIONER IS OTHER THAN THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO BE IN NEED OF A GUARDIAN.

2. UPON FILING OF THE PETITION, NOTICE OF THE PETITION SHALL BE SENT BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED TO THE LAST KNOWN ADDRESS OF THE:

(A) PARENTS, SPOUSE, ADULT CHILDREN, AND ADULT SIBLINGS OF THE PERSON ALLEGED TO BE IN NEED OF THE GUARDIAN;

(B) INDIVIDUALS LISTED IN THE PETITION PURSUANT TO SECTION SEVENTEEN HUNDRED FIFTY-TWO OF THIS ARTICLE AND SUBDIVISIONS FOUR AND FIVE OF THIS SECTION;

(C) MENTAL HYGIENE LEGAL SERVICE IN THE JUDICIAL DEPARTMENT WHERE THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES;

(D) THE DIRECTOR IN CHARGE OF A FACILITY LICENSED OR OPERATED BY AN AGENCY OF THE STATE OF NEW YORK, IF THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES IN SUCH FACILITY;

(E) ANY OTHER PERSON IF DESIGNATED IN WRITING BY THE PERSON WITH A DEVELOPMENTAL DISABILITY; AND

(F) SUCH OTHER PERSONS AS THE COURT MAY DEEM PROPER.

3. WITHIN FIVE DAYS OF THE FILING OF THE PETITION, A FULL COPY OF SAID PETITION SHALL BE SERVED BY CERTIFIED MAIL TO THE MENTAL HYGIENE LEGAL SERVICE IN THE JUDICIAL DEPARTMENT IN WHICH THE PETITION WAS FILED. A COPY OF PROOF OF MAILING SHALL BE THEREAFTER FILED WITH THE COURT.

4. FOR PETITIONS TO MODIFY AN EXISTING GUARDIANSHIP PURSUANT TO SECTION SEVENTEEN HUNDRED FIFTY-FIVE OF THIS ARTICLE AND/OR TO APPOINT A STANDBY GUARDIAN PURSUANT TO SUBDIVISION SEVENTEEN HUNDRED FIFTY-SEVEN OF THIS ARTICLE, WRITTEN NOTICE MUST BE GIVEN TO ALL STANDBY GUARDIANS CURRENTLY IN SUCCESSION FOR A PERSON WITH A DEVELOPMENTAL DISABILITY WHO IS THE SUBJECT OF THE PETITION.

5. No process or notice shall be necessary to [a parent, adult child, adult sibling, or spouse of the mentally retarded or developmentally disabled person who has been declared by a court as being incompetent. In addition, no process or notice shall be necessary to a spouse who is divorced from the mentally retarded or developmentally disabled person, and to a parent, adult child, adult sibling when it shall appear to the satisfaction of the court that such person or persons have abandoned the mentally retarded or developmentally disabled person] ANY INDIVIDUAL WHO CANNOT, AFTER DUE DILIGENCE, REASONABLY BE LOCATED. THE PETITIONER SHALL SUBMIT AN AFFIDAVIT TO SUCH EFFECT.

S 8. Section 1754 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1754. [Hearing and trial] PROCEEDINGS UPON PETITION

1. Upon a petition for the appointment of a guardian of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY eighteen years of age or older, the court shall [conduct a hearing at which such person shall have the right to jury trial. The right to a jury trial shall be deemed waived by failure to make a demand therefor. The court may in its discretion dispense with a hearing for the appointment of a guardian, and may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility as defined in subdivision (a) of section 47.01 of the mental hygiene law, to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the mental retarded or developmentally disabled person, provided however, that such application has been made by:

(a) both parents or the survivor; or

(b) one parent and the consent of the other parent; or

(c) any interested party and the consent of each parent.], NOT LATER THAN FORTY-FIVE DAYS FOLLOWING THE FILING OF PROOF OF MAILING UPON THE MENTAL HYGIENE LEGAL SERVICE, SCHEDULE AN APPEARANCE IN THE MATTER.

(A) THE MENTAL HYGIENE LEGAL SERVICE SHALL ASCERTAIN WHETHER THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN HAS ANY OBJECTION TO THE RELIEF SOUGHT IN THE PETITION AND WHETHER THE SERVICE IS ABLE TO REPRESENT THE INTERESTS OF THE PERSON IN THE PROCEEDING.

(B) IF THE SERVICE REPORTS THAT THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN OBJECTS TO THE RELIEF SOUGHT IN THE PETITION, THE COURT SHALL APPOINT THE SERVICE AS COUNSEL FOR THE PERSON. IF THE SERVICE IS NOT AVAILABLE TO SERVE AS THE PERSON'S COUNSEL AND THE PERSON DOES NOT OTHERWISE HAVE COUNSEL, THE COURT SHALL APPOINT COUNSEL FOR THE PERSON FROM AMONG ATTORNEYS ELIGIBLE FOR SUCH APPOINTMENT PURSUANT TO SECTION THIRTY-FIVE OF THE JUDICIARY LAW.

(C) IF THE SERVICE REPORTS THAT THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN DOES NOT OBJECT TO RELIEF SOUGHT IN THE PETITION, THE PERSON'S INTERESTS SHALL CONTINUE TO BE REPRESENTED BY THE SERVICE, IF AVAILABLE, AND THE SERVICE SHALL CONDUCT AN EXAMINATION INTO THE ALLEGATIONS OF FACT CONTAINED IN THE PETITION AND FILE WITH THE COURT AND SERVE NO LATER THAN TEN DAYS PRIOR TO THE APPEARANCE DATE AN ANSWER CONFIRMING OR DENYING THE ALLEGATIONS IN THE PETITION AND REPORT AS TO WHETHER THE SERVICE FINDS GROUNDS TO OBJECT TO THE RELIEF SOUGHT IN THE PETITION. THE SERVICE WILL OTHERWISE PERFORM ITS FUNCTIONS CONSISTENT WITH UNIFORM REGULATIONS PROMULGATED BY THE APPELLATE DIVISION OF THE SUPREME COURT.

(D) IF A PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN WHO DOES NOT OBJECT DOES NOT OTHERWISE APPEAR BY THE SERVICE OR

OTHER COUNSEL, THE COURT SHALL APPOINT A GUARDIAN AD LITEM PURSUANT TO THIS SECTION AND SECTION FOUR HUNDRED THREE OF THIS ACT. ANY GUARDIAN AD LITEM APPOINTED PURSUANT TO THIS SECTION SHALL CONDUCT AN INVESTIGATION INTO THE ALLEGATIONS OF FACT CONTAINED IN THE PETITION AND FILE WITH THE COURT AND SERVE NO LATER THAN TEN DAYS PRIOR TO THE APPEARANCE DATE, A REPORT OF ITS FINDINGS CONFIRMING OR DISCONFIRMING SAID ALLEGATIONS, AND IF APPROPRIATE AND UPON CONSENT OF THE PERSON WITH A DEVELOPMENTAL DISABILITY NOMINATE A PERSON OR ENTITY OF THE RESPONDENT'S CHOOSING TO SERVE AS GUARDIAN, AS WELL AS ANY OTHER MATTER WHICH COULD ASSIST THE COURT'S CONSIDERATION OF THE MATTER, AND SERVE A COPY OF THE REPORT UPON THE PETITIONER.

(E) THE SERVICE, ANY OTHER COUNSEL FOR THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN, OR THE GUARDIAN AD LITEM MAY APPLY TO THE COURT FOR PERMISSION TO INSPECT THE CLINICAL RECORDS PERTAINING TO THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN IN ACCORDANCE WITH STATE AND FEDERAL LAWS. THE SERVICE, ANY OTHER COUNSEL FOR THE PERSON WITH A DEVELOPMENTAL DISABILITY AND THE GUARDIAN AD LITEM, IF ANY, SHALL BE AFFORDED ACCESS TO THE PERSON'S CLINICAL RECORDS WITHOUT A COURT ORDER TO THE EXTENT THAT SUCH ACCESS IS OTHERWISE AUTHORIZED BY STATE AND FEDERAL LAWS.

(F) THE SERVICE, ANY OTHER COUNSEL FOR THE PERSON WITH A DEVELOPMENTAL DISABILITY ALLEGED TO NEED A GUARDIAN, AND THE GUARDIAN AD LITEM, IF ANY, MAY REQUEST THE COURT FOR FURTHER EVALUATION OF THE PERSON BY A PHYSICIAN, PSYCHIATRIST OR CERTIFIED PSYCHOLOGIST. IN THE EVENT THAT FURTHER EVALUATIONS ARE REQUIRED, THE COURT MAY GRANT APPROPRIATE ADJOURNMENTS OF THE INITIAL APPEARANCE DATE AND MAY DIRECT, IN THE CASE OF A PERSON DETERMINED TO BE INDIGENT, THAT ANY FURTHER COURT AUTHORIZED EVALUATIONS BE PAID FOR OUT OF FUNDS AVAILABLE PURSUANT TO SECTION THIRTY-FIVE OF THE JUDICIARY LAW.

2. [When it shall appear to the satisfaction of the court that a parent or parents not joining in or consenting to the application have abandoned the mentally retarded or developmentally disabled person or are not otherwise required to receive notice, the court may dispense with such parent's consent in determining the need to conduct a hearing for a person under the age of eighteen. However, if the consent of both parents or the surviving parent is dispensed with by the court, a hearing shall be held on the application.] AT THE FIRST APPEARANCE, THE RESPONDENT SHALL BE PRESENT UNLESS SUCH PRESENCE IS EXCUSED BY THE COURT UPON RECOMMENDATION OF THE SERVICE, RESPONDENT'S COUNSEL, OR THE GUARDIAN AD LITEM IF THE RESPONDENT DOES NOT HAVE COUNSEL. THE PETITIONER SHALL ALSO BE PRESENT AND MAY BE REPRESENTED BY COUNSEL. ANY OTHER PARTY REQUIRED TO BE SERVED OR NOTICED WITH PROCESS IN THE MATTER MAY BE PRESENT.

(A) PRIOR TO SUCH APPEARANCE, THE PETITIONER, EITHER PERSONALLY OR BY COUNSEL, MAY CONFER WITH THE SERVICE, RESPONDENT'S COUNSEL AND THE GUARDIAN AD LITEM IF RESPONDENT DOES NOT HAVE COUNSEL AND AGREE TO AMEND ANY PART OF ITS PETITION AND ALLEGATIONS OF FACT THEREIN. ANY SUCH AMENDED PETITION SHALL BE FILED WITH THE COURT PRIOR TO THE DATE OF THE FIRST APPEARANCE.

(B) AT THE FIRST APPEARANCE, THE COURT SHALL EXAMINE THE ANSWER OF THE SERVICE, RESPONDENT'S COUNSEL, OR THE REPORT OF THE GUARDIAN AD LITEM, IF ANY, AND MAY HEAR FROM THE PETITIONER AND THE SERVICE, RESPONDENT'S COUNSEL AND THE GUARDIAN AD LITEM, IF ANY, ON THE CONTENTS OF THE SAID ANSWER OR REPORT AND ANY AMENDED PETITION FILED.

(C) THE COURT MAY DIRECT THAT AN ORDER AND DECREE OF GUARDIANSHIP ISSUE, INCLUDING THE AUTHORITY OF THE GUARDIAN TO ACT ON BEHALF OF THE

RESPONDENT WITH RESPECT TO ANY MATTER IN WHICH PETITIONER, THE SERVICE, RESPONDENT'S COUNSEL, AND THE GUARDIAN AD LITEM, IF ANY, ALL AGREE ON THE RECORD THAT THE RESPONDENT REQUIRES THE REQUESTED RELIEF AND DOES NOT OBJECT TO SUCH RELIEF.

(D) IN THE EVENT THAT THE PETITION CANNOT BE DISPOSED OF BY THE AGREEMENT OF THE COURT AND ALL OF THE PARTIES, THE COURT SHALL FORTHWITH SCHEDULE A HEARING IN THE MATTER AT WHICH THE RESPONDENT SHALL BE PRESENT UNLESS IT SHALL APPEAR TO THE COURT THAT THE RESPONDENT'S PRESENCE IS MEDICALLY CONTRAINDICATED, IN THAT IT WOULD BE LIKELY TO CAUSE HARM TO THE RESPONDENT, OR UNDER SUCH OTHER CIRCUMSTANCES RAISED BY OR ON BEHALF OF THE RESPONDENT AS THE COURT AGREES THAT THE RESPONDENT'S PRESENCE WOULD NOT BE IN HIS OR HER BEST INTERESTS, PROVIDED HOWEVER THAT THE RESPONDENT'S PRESENCE SHALL NOT BE WAIVED OVER THE OBJECTION OF THE SERVICE, RESPONDENT'S COUNSEL, OR A GUARDIAN AD LITEM, IF ANY, IN WHICH CASE THE COURT SHALL CONDUCT THE HEARING WHERE THE RESPONDENT RESIDES, IF THE COURT IS SATISFIED THAT THE RESPONDENT'S PRESENCE WOULD BE HARMFUL TO THE RESPONDENT.

3. [If a hearing is conducted, the mentally retarded or developmentally disabled person shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the mentally retarded or developmentally disabled person is medically incapable of being present to the extent that attendance is likely to result in physical harm to such mentally retarded or developmentally disabled person, or under such other circumstances which the court finds would not be in the best interest of the mentally retarded or developmentally disabled person.] IF THERE ARE ANY OBJECTIONS TO THE RELIEF SOUGHT BY THE PETITIONER, THE RESPONDENT HAS A RIGHT TO A HEARING OR JURY TRIAL, IF DEMANDED BY THE RESPONDENT. IN ADDITION, THE COURT MAY CONDUCT A HEARING AT THE REQUEST OF ANY PARTY OR ON ITS OWN MOTION. AT ANY SUCH HEARING OR TRIAL, THE PETITIONER MUST ESTABLISH BY CLEAR AND CONVINCING EVIDENCE ANY FACTS ALLEGED IN THE PETITION OR AMENDED PETITION WHICH ARE CONTROVERTED AND ARE RELEVANT TO WHETHER RESPONDENT HAS A DEVELOPMENTAL DISABILITY, AND IF SO, WHETHER APPOINTMENT OF A GUARDIAN IS REQUIRED AND THE SCOPE OF THE GUARDIAN'S POWERS. ANY OTHER MATTER MUST BE PROVEN BY THE FAIR PREPONDERANCE OF THE EVIDENCE PRESENTED AND ADMITTED.

4. [If either a hearing is dispensed with pursuant to subdivisions one and two of this section or the mentally retarded or developmentally disabled person is not present at the hearing pursuant to subdivision three of this section, the court may appoint a guardian ad litem if no mental hygiene legal service attorney is authorized to act on behalf of the mentally retarded or developmentally disabled person. The guardian ad litem or mental hygiene legal service attorney, if appointed, shall personally interview the mentally retarded or developmentally disabled person and shall submit a written report to the court.

5. If, upon conclusion of such hearing or jury trial or if none be held upon the application, the court is satisfied that the best interests of the mentally retarded or developmentally disabled person will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians.] IF, UPON CONCLUSION OF SUCH HEARING OR JURY TRIAL, IF ANY, THE COURT IS SATISFIED THAT THE RESPONDENT HAS A DEVELOPMENTAL DISABILITY AND REQUIRES THE APPOINTMENT OF A GUARDIAN OF THE PERSON OR PROPERTY, OR BOTH, IT SHALL MAKE A DECREE NAMING SUCH PERSON OR PERSONS TO SERVE AS SUCH GUARDIANS. THE POWERS OF THE GUARDIAN SHALL BE TAILORED TO THE NEEDS OF THE RESPONDENT.

S 9. The surrogate's court procedure act is amended by adding a new section 1754-a to read as follows:

S 1754-A. DECISION MAKING STANDARD

DECISIONS MADE BY A GUARDIAN ON BEHALF OF A PERSON WITH A DEVELOPMENTAL DISABILITY SHALL BE MADE IN ACCORDANCE WITH THE FOLLOWING STANDARDS.

1. A GUARDIAN SHALL EXERCISE AUTHORITY ONLY AS NECESSITATED BY THE PERSON WITH A DEVELOPMENTAL DISABILITY'S LIMITATIONS, AND, TO THE EXTENT POSSIBLE, SHALL ENCOURAGE THE PERSON WITH A DEVELOPMENTAL DISABILITY TO PARTICIPATE IN DECISIONS AND TO ACT ON HIS OR HER OWN BEHALF.

2. A GUARDIAN SHALL CONSIDER THE EXPRESSED DESIRES AND PERSONAL VALUES OF THE PERSON WITH A DEVELOPMENTAL DISABILITY TO THE EXTENT KNOWN, WHEN MAKING DECISIONS AND SHALL CONSULT WITH THE PERSON WITH A DEVELOPMENTAL DISABILITY WHENEVER MEANINGFUL COMMUNICATION IS POSSIBLE.

3. IF THE PERSON'S WISHES ARE UNKNOWN AND REMAIN UNKNOWN AFTER REASONABLE EFFORTS TO DISCERN THEM, THE DECISION SHALL BE MADE ON THE BASIS OF THE BEST INTERESTS OF THE PERSON WITH A DEVELOPMENTAL DISABILITY AS DETERMINED BY THE GUARDIAN. IN DETERMINING THE BEST INTERESTS OF THE PERSON WITH A DEVELOPMENTAL DISABILITY, THE GUARDIAN SHALL WEIGH THE REASON FOR AND NATURE OF THE PROPOSED ACTION; THE BENEFIT OR NECESSITY OF THE ACTION, THE POSSIBLE RISKS AND OTHER CONSEQUENCES OF THE PROPOSED ACTION; AND ANY AVAILABLE ALTERNATIVES AND THEIR RISKS, CONSEQUENCES AND BENEFITS. THE GUARDIAN SHALL TAKE INTO ACCOUNT ANY OTHER INFORMATION, INCLUDING THE VIEWS OF FAMILY AND FRIENDS, THAT THE GUARDIAN BELIEVES THE PERSON WITH A DEVELOPMENTAL DISABILITY WOULD HAVE CONSIDERED IF ABLE TO ACT FOR HERSELF OR HIMSELF.

S 10. Section 1755 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1755. Modification order

Any [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY eighteen years of age or older, or any person on behalf of any [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom a guardian has been appointed, may apply to the court [having jurisdiction over the guardianship order] PURSUANT TO SECTION 1751-A OF THIS ARTICLE requesting modification of such order in order to protect the [mentally retarded or developmentally disabled person's] PERSON WITH A DEVELOPMENTAL DISABILITY'S financial situation and/or his or her personal interests. The court may, upon receipt of any such request to modify the guardianship order, appoint a guardian ad litem. The court shall so modify the guardianship order if in its judgment the interests of the guardian are adverse to those of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY or if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY.

S 11. Section 1756 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1756. Limited [guardian of the property] PURPOSE AND/OR LIMITED DURATION GUARDIANSHIP

1. When it shall appear to the satisfaction of the court that such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom an application for guardianship is made is eighteen years of age or older and is wholly or substantially self-supporting by means of his or her wages or earnings from employment, the court is authorized and empowered to appoint a limited guardian of the

property of such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY who shall receive, manage, disburse and account for only such property of said [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY as shall be received from other than the wages or earnings of said person.

The [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom a limited guardian of the property has been appointed shall have the right to receive and expend any and all wages or other earnings of his or her employment and shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.

2. WHEN IT SHALL APPEAR TO THE SATISFACTION OF THE COURT, EITHER UPON A PETITION FOR GUARDIANSHIP FILED AS PERMITTED BY SECTIONS 1751 AND 1752 OF THIS ARTICLE OR UPON A PETITION FILED PURSUANT TO THIS SECTION IN A SIMPLIFIED FORMAT TO BE ESTABLISHED BY THE OFFICE OF COURT ADMINISTRATION IN CONSULTATION WITH THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES AND OTHER INTERESTED STAKEHOLDERS, THAT A PERSON WITH A DEVELOPMENTAL DISABILITY NEEDS THE ASSISTANCE OF A GUARDIAN OF THE PERSON AND/OR PROPERTY FOR THE PURPOSE OF MAKING A SINGLE DECISION OR FOR A BRIEF STATED PERIOD OF TRANSITION IN SUCH PERSON'S LIFE, THE COURT MAY APPOINT A LIMITED-PURPOSE GUARDIAN OF THE PERSON AND/OR PROPERTY TO EFFECTUATE SUCH A DECISION OR TRANSITION. IN ANY SUCH CASE, THE PROVISIONS OF SECTION 1754 SHALL APPLY, EXCEPT THAT THE PERIOD FOR THE RENDERING OF A REPORT BY THE MENTAL HYGIENE LEGAL SERVICE OR OTHER RESPONDENT'S COUNSEL MAY BE SHORTENED AS MAY BE REASONABLY NECESSARY TO MEET THE NEEDS OF THE RESPONDENT UNDER THE CIRCUMSTANCES PRESENTED. AN ORDER APPOINTING AND EMPOWERING SUCH A LIMITED-PURPOSE GUARDIAN OF THE PERSON AND/OR PROPERTY SHALL STATE SPECIFICALLY THE DURATION AND SCOPE OF SUCH GUARDIAN'S AUTHORITY.

S 12. Section 1757 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, the section heading as amended by chapter 290 of the laws of 1992, subdivision 2 as amended by chapter 260 of the laws of 2009, subdivision 3 as added by chapter 294 of the laws of 2012, is amended to read as follows:

S 1757. Standby guardian of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY

1. Upon application, a standby guardian of the person or property or both of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY may be appointed by the court. ANY SUCH APPLICATION SHALL BE MADE UPON NOTICE TO THE MENTAL HYGIENE LEGAL SERVICE. The court may also, upon application, appoint an alternate and/or successive alternates to such standby guardian, to act if such standby guardian shall die, or become incapacitated, or shall renounce. Such appointments by the court shall be made in accordance with the provisions of this article.

2. Such standby guardian, or alternate in the event of such standby guardian's death, incapacity or renunciation, shall without further proceedings be empowered to assume the duties of his or her office immediately upon death, renunciation or adjudication of incompetency of the guardian or standby guardian appointed pursuant to this article, subject only to THE FILING OF AN APPLICATION FOR confirmation of his or her appointment by the court within one hundred eighty days following assumption of his or her duties of such office. Before confirming the appointment of the standby guardian or alternate guardian, the court may

conduct a hearing pursuant to section seventeen hundred fifty-four of this article upon petition by anyone on behalf of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY or the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY if such person is eighteen years of age or older, or upon its discretion.

3. Failure of a standby or alternate standby guardian to assume the duties of guardian, seek court confirmation or to renounce the guardianship within sixty days of written notice by certified mail or personal delivery given by or on behalf of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY of a prior guardian's inability to serve and the standby or alternate standby guardian's duty to serve, seek court confirmation or renounce such role shall allow the court to:

(a) deem the failure an implied renunciation of guardianship, and

(b) authorize, notwithstanding the time period provided for in subdivision two of this section to seek court confirmation, any remaining standby or alternate standby guardian to serve in such capacity provided (i) an application for confirmation and appropriate notices pursuant to subdivision one of section seventeen hundred fifty-three of this article are filed, or (ii) an application for modification of the guardianship order pursuant to section seventeen hundred fifty-five of this article is filed.

S 13. Subdivision 2 of section 1758 of the surrogate's court procedure act, as amended by chapter 427 of the laws of 2013, is amended to read as follows:

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the welfare of such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY.

S 14. Section 1759 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1759. Duration of guardianship

1. Such guardianship shall not terminate at the age of majority or marriage of such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY but shall continue during the life of such person, DURING THE PERIOD SPECIFIED IN A LIMITED PURPOSE OR LIMITED DURATION GUARDIANSHIP, or until terminated by the court.

2. A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition for review, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article.

3. Upon marriage of such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY for whom such a guardian

has been appointed, the court shall, upon request of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY, spouse, or any other person acting on behalf of the [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY, review the need, if any, to modify, dissolve or otherwise amend the guardianship order including, but not limited to, the appointment of the spouse as standby guardian. The court, in its discretion, may conduct such review pursuant to section seventeen hundred fifty-four of this article.

S 15. Section 1760 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1760. Corporate guardianship

No corporation may be appointed guardian of the person under the provisions of this article, except that a non-profit corporation organized and existing under the laws of the state of New York and having the corporate power to act as guardian of [mentally retarded or developmentally disabled] persons WITH DEVELOPMENTAL DISABILITIES may be appointed as the guardian of the person only of such [mentally retarded or developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY.

S 16. Section 1761 of the surrogate's court procedure act, as added by chapter 675 of the laws of 1989, is amended to read as follows:

S 1761. Application of other provisions

To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and [affect] EFFECT as if an "infant", as therein referred to, were a "[mentally retarded" or "developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY" as herein defined, and a "guardian" as therein referred to were a "guardian of the [mentally retarded person" or a "guardian of a developmentally disabled] person WITH A DEVELOPMENTAL DISABILITY" as herein provided for.

S 17. The surrogate's court procedure act is amended by adding a new section 1762 to read as follows:

S 1762. ANNUAL REPORT OF PERSONAL NEEDS GUARDIAN

1. FOR THE PURPOSES OF THIS ARTICLE, THE GUARDIAN OF A PERSON WITH A DEVELOPMENTAL DISABILITY SHALL SUBMIT A REPORT REGARDING THE STATUS OF THE PERSON WITH A DEVELOPMENTAL DISABILITY ANNUALLY ON THE ANNIVERSARY OF HIS OR HER APPOINTMENT OR AT SUCH OTHER INTERVAL AS ORDERED BY THE COURT.

2. THE REPORT SHALL BE ON A FORM PRESCRIBED BY THE OFFICE OF COURT ADMINISTRATION.

3. A CORPORATE GUARDIAN APPOINTED PURSUANT TO SECTION 1760 OF THIS ARTICLE MAY SUBMIT IN LIEU OF THE FORM PRESCRIBED BY THE OFFICE OF COURT ADMINISTRATION IN SUBDIVISION TWO OF THIS SECTION ITS OWN INTERNAL REPORT PROVIDED THE INFORMATION REQUIRED TO BE CONTAINED IN THE REPORT IS INCLUDED IN THE CORPORATE ANNUAL REPORT.

4. THE GUARDIANSHIP REPORT FORM SHALL BE FILED WITH THE COURT AND MAILED TO STANDBY GUARDIANS AND ALTERNATE STANDBY GUARDIANS, AND, WHERE APPLICABLE, THE DIRECTOR OF MENTAL HYGIENE LEGAL SERVICE IN THE DEPARTMENT IN WHICH THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES AND THE DIRECTOR OF THE RESIDENCE OF THE PERSON WITH A DEVELOPMENTAL DISABILITY OR THE PERSON WITH WHOM THE PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES.

S 18. This act shall take effect on the one hundred eightieth day after it shall have become a law.

STATE OF NEW YORK

5842

2017-2018 Regular Sessions

IN SENATE

May 2, 2017

Introduced by Sen. HANNON -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the surrogate's court procedure act and the judiciary law, in relation to guardianship and health care decisions of persons with developmental disabilities; and to repeal certain provisions of the surrogate's court procedure act relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1750 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1750. Guardianship of persons [~~who are intellectually disabled~~] **with developmental disabilities**

1. When it shall appear to the satisfaction of the court that a person is a person [~~who is intellectually disabled~~] **with a developmental disability within the meaning of subdivision twenty-two of section 1.03 of the mental hygiene law or a person with traumatic brain injury within the meaning of subdivision one of section two thousand seven hundred forty-one of the public health law, except that no age of origination shall apply for purposes of this article to a person with traumatic head injury, and that such person, as a result of such developmental disability or traumatic brain injury, exhibits significant impairment of general or specific areas of intellectual functioning and/or adaptive behaviors in specified domains as enumerated in subdivision eight of section seventeen hundred fifty-two of this article**, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person [~~who is intellectually disabled~~]. Such appointment shall be made pursuant to the provisions of this article[~~, provided however that the provisions of section seventeen hundred fifty-a of this article shall~~

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

LBD08755-02-7

~~not apply to the appointment of a guardian or guardians of a person who is intellectually disabled.~~

~~1. For the purposes of this article, a person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely~~].

2. Every guardianship entered into pursuant to this article prior to the effective date of this subdivision, including orders and decrees pursuant to section seventeen hundred fifty-seven of this article, shall remain in full force and effect thereafter, except as amended pursuant to section seventeen hundred fifty-five of this article or as ordered by the court; and any such guardianship shall be administered consistent with the substantive and procedural requirements set forth in this article, except that the provisions of section seventeen hundred six-two of this article shall only apply to guardianships entered into on or after the effective date of this subdivision. Further, guardianships entered into prior to the effective date of the chapter of the laws of two thousand seventeen which amended this subdivision, upon petition for amendment pursuant to section seventeen hundred fifty-five and section seventeen hundred fifty-seven of this article, shall not be required to resubmit proof of the continued need for guardianship.

3. Every [~~such certification pursuant to subdivision one of this section,~~] order and decree made on or after the effective date of this subdivision, shall include a specific determination by [~~such physician and psychologist, or by such physicians,~~] the issuing court as to whether the person [~~who is intellectually disabled~~] has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself. A determination that the person [~~who is intellectually disabled~~] has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the person [~~who is intellectually disabled~~]. The absence of this determination in the case of guardians appointed prior to [~~the effective date of this subdivision~~] March sixteenth, two thousand three shall not preclude such guardians from making health care decisions. Further, guardians appointed by orders and/or decrees issued prior to the effective date of the chapter of the laws of two thousand seventeen which amended this subdivision shall have authority in all areas, unless otherwise stated in said order or decree.

§ 2. Section 1750-a of the surrogate's court procedure act is REPEALED.

§ 3. Section 1750-b of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1750-b. Health care decisions for persons [~~who are intellectually disabled~~] with developmental disabilities

1. Scope of authority. As used in this section, the term "developmental disability" is as defined by subdivision twenty-two of section 1.03 of the mental hygiene law and shall also include individuals with traumatic brain injury as defined by subdivision one of section two thousand seven hundred forty-one of the public health law. Unless specifically prohibited by the court after consideration of [~~the deter-~~

~~mination, if any, regarding a person who is intellectually disabled's~~] a person with a developmental disability's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the person [~~who is intellectually disabled~~] with a developmental disability, that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "life-sustaining treatment" means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the person [~~who is intellectually disabled~~] with a developmental disability could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to [~~section seventeen hundred fifty or seventeen hundred fifty-a of~~] this article, a "guardian" shall also mean a family member of a person who [~~(i) has intellectual disability, or (ii)~~] has a developmental disability, as defined in [~~section 1.03 of the mental hygiene law, which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability~~] this subdivision and that such person, as a result of such developmental disability, exhibits significant impairment of general or specific areas of intellectual functioning and/or adaptive behaviors in specified domains as enumerated in subdivision eight of section seventeen hundred fifty-two of this article. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of the office for people with developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the deci-

sion of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section.

In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law, a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the [~~commission on quality of care and advocacy for persons with disabilities~~] **justice center for the protection of people with special needs, as established by article twenty of the executive law**.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of the office for people with developmental disabilities in conjunction with parents, advocates and family members of persons [~~who are intellectually disabled~~] **with developmental disabilities**. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office for people with developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to guardians appointed pursuant to section seventeen hundred fifty [~~or seventeen hundred fifty-a~~] of this article.

2. Decision-making standard. (a) The guardian shall base all advocacy and health care decision-making solely and exclusively on the best interests of the person [~~who is intellectually disabled~~] **with a developmental disability** and, when reasonably known or ascertainable with reasonable diligence, on [~~the person who is intellectually disabled's~~] **such person's** wishes, including moral and religious beliefs.

(b) An assessment of the person [~~who is intellectually disabled's~~] **with a developmental disability's** best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the person [~~who is intellectually disabled's~~] **with a developmental disability's** health **and well being**;

(iii) the relief of the person [~~who is intellectually disabled's~~] **with a developmental disability's** suffering by means of palliative care and pain management;

(iv) the unique nature of [~~artificially provided~~] nutrition or hydration **provided by medical treatment**, and the effect it may have on the person [~~who is intellectually disabled~~] **with a developmental disability**; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons [~~who are intellectually disabled~~] **with a developmental disability** are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without [~~an intellectual disability or a~~] developmental [~~disability~~] **disabilities**; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party**;**

provided, however that the guardian shall have no financial obligation for the care of the person with developmental disabilities.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the person [~~who is intellectually disabled's~~] **with a developmental disability's** health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a person [~~who is intellectually disabled~~] **with a developmental disability**:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the person [~~who is intellectually disabled~~] **with a developmental disability** lacks capacity to make health care decisions. The determination thereof shall be included in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical record, and shall contain such attending physician's opinion regarding the cause and nature of the [~~person who is intellectually disabled's~~] **person's** incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a [~~licensed~~] psychologist, to further confirm the [~~person who is intellectually disabled's~~] **person's** lack of capacity. The attending physician who makes the confirmation, or the physician or [~~licensed~~] psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office for people with developmental disabilities, or (iii) have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating [~~intellectual disability~~] **people with developmental disabilities**. A record of such consultation shall be included in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the person [~~who is intellectually disabled's~~] **with a developmental disability's** chart that:

(i) the person [~~who is intellectually disabled~~] has a medical condition as follows:

A. a terminal condition, as defined in subdivision twenty-three of section twenty-nine hundred sixty-one of the public health law; or

B. permanent unconsciousness; or

C. a medical condition other than such person's [~~intellectual~~] **developmental** disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's [~~intellectual~~] **developmental** disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's [~~intellectual~~] **developmental** disability; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the person [~~who is intellectually disabled's~~] **with a developmental disability's** attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the person [~~who is intellectually disabled~~], and inform the staff responsible for such person's care, if any, of the order; or

(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the person [~~who is intellectually disabled~~] **with a developmental disability**, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office for people with developmental disabilities, or

C. have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three

years experience in treating [~~intellectual disability~~] **persons with developmental disabilities**. A record of such consultation shall be included in the [~~person who is intellectually disabled's~~] **person's** medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office for people with developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the person [~~who is intellectually disabled~~] **with a developmental disability**, in the event of an objection to that decision at any time by:

(i) the person [~~who is intellectually disabled~~] on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the person [~~who is intellectually disabled~~]; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the person [~~who is intellectually disabled~~] **with a developmental disability**, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the person [~~who is intellectually disabled's~~] **with a developmental disability's** medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to a dispute mediation system, established pursuant to section two thousand nine hundred seventy-two of the public health law or similar entity for mediating

disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities) or the commissioner of the office for people with developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the person [~~who is intellectually disabled~~] **with a developmental disability** is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the person [~~who is intellectually disabled~~] **with a developmental disability**, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his

or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the person [~~who is intellectually disabled~~] with a developmental disability to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the person [~~who is intellectually disabled~~] with a developmental disability, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the person [~~who is intellectually disabled~~] with a developmental disability to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

§ 4. Section 1751 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1751. Petition for appointment; by whom made

1. A petition for the appointment of a guardian [~~of the person or property, or both, of a person who is intellectually disabled or a person who is developmentally disabled may be made by a parent, any~~] pursuant to this article may be made by the person with a developmental disability or traumatic brain injury when such person is eighteen years of age or older, a parent, spouse, sibling, adult child or any other interested person eighteen years of age or older on behalf of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability or traumatic brain injury including a corporation authorized to serve as a guardian as provided for by this article[~~, or by the person who is intellectually disabled or a person who is developmentally disabled when such person is eighteen years of age or older~~].

2. A person with a developmental disability or traumatic brain injury may knowingly and voluntarily consent to the appointment of a guardian pursuant to this article.

§ 5. The surrogate's court procedure act is amended by adding a new section 1751-a to read as follows:

§ 1751-a. Petition for appointment; where made (venue)

1. A proceeding under this article shall be brought in the surrogate's court within the county in which the person with a developmental disability resides, or is physically present at the time the proceeding is commenced, subject to an application to change venue pursuant to this subdivision. If the person with a developmental disability alleged to be in need of a guardian is being cared for as a resident in a facility,

the residence of that person shall be deemed to be in the county where the facility is located and the proceeding may be brought in that county, subject to application by an interested party for a change in venue to another county because of the inconvenience of the parties or witnesses or the condition of the person alleged to be in need of a guardian.

2. After the appointment of a guardian, at the option of the petitioner, any proceeding to modify a prior order may be brought in the surrogate's court which granted the prior order, unless at the time of the application to modify the order the person with a developmental disability resides elsewhere, in which case the proceeding may be brought in the county where the person with a developmental disability resides or is physically present at the time the proceeding is commenced, without the need for a motion to transfer venue.

§ 6. Section 1752 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1752. Petition for appointment; contents

The petition for the appointment of a guardian shall be filed with the court on forms to be prescribed by the state chief administrator of the courts. Such petition for a guardian [~~of a person who is intellectually disabled or a person who is developmentally disabled~~] pursuant to this article shall include, but not be limited to, the following information:

1. the full name, date of birth and residence of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability or a traumatic brain injury;

2. the name, age, address and relationship or interest of the petitioner to the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability;

3. the names and addresses, if known of the father, the mother, adult children, adult siblings [~~if eighteen years of age or older, the spouse and primary care physician if other than a physician having submitted a certification with the petition, if any,~~] of the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability or traumatic brain injury and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

4. the name and address of the person with whom the person [~~who is intellectually disabled or a person who is developmentally disabled~~] with a developmental disability or traumatic brain injury resides if other than the parents or spouse;

5. the name and address of any person with significant and ongoing involvement in the life of the person with a developmental disability or traumatic brain injury so as to have sufficient knowledge of their needs, if such persons are known to the petitioner;

6. the name, age, address, education and other qualifications, and consent of the proposed guardian, standby and alternate guardian, if other than the parent, spouse, adult child if eighteen years of age or older or adult sibling if eighteen years of age or older, and if such parent, spouse or adult child be living, why any of them should not be appointed guardian;

[~~6.~~] 7. the estimated value of real and personal property and the annual income therefrom and any other income including governmental entitlements to which the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability or traumatic brain injury is entitled; and

[~~7. any circumstances which the court should consider in determining whether it is in the best interests of the person who is intellectually disabled or person who is developmentally disabled to not be present at the hearing if conducted.~~]

8. An enumeration of the specific domains in which the person is alleged to be in need of a guardian or a statement that full guardianship is sought. Specific domains may include:

(a) informed consent health care or other professional care;

(b) management of money or other income, assets or property;

(c) access to confidential and other sensitive information;

(d) choices involving education, training, employment, supports and services;

(e) requesting advocacy, legal or other professional services;

(f) choice of residence and shared living arrangements;

(g) choices as to social and recreational activity;

(h) decisions concerning travel; and

(i) application for government-sponsored or private insurance and benefits.

9. A statement of the alternatives to guardianship considered, including but not limited to the execution of a health care proxy, power of attorney, representative payee, service coordination, and/or other social support services, other available supported or shared decision making, and surrogate decision-making committee, and reasons for the declination of such alternatives.

§ 7. Section 1753 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1753. Persons to be served and noticed

1. Upon [~~presentation~~] filing of the petition, process shall issue to:

(a) [~~the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the person who is intellectually disabled or person who is developmentally disabled is married, to the spouse, if their residences are known;~~

~~(b) the person having care and custody of the person who is intellectually disabled or person who is developmentally disabled, or with whom such person resides if other than the parents or spouse; and~~

~~(c) the person who is intellectually disabled or person who is developmentally disabled if fourteen years of age or older for whom an application has been made in such person's behalf.~~

~~2. Upon presentation of the petition, notice of such petition shall be served by certified mail to:~~

~~(a) the adult siblings if the petitioner is a parent, and adult children if the petitioner is a parent;~~

~~(b) the mental hygiene legal service in the judicial department where the facility, as defined in subdivision (a) of section 47.01 of the mental hygiene law, is located if the person who is intellectually disabled or person who is developmentally disabled resides in such a facility;~~

~~(c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the person who is intellectually disabled or person who is developmentally disabled resides in such facility;~~

~~(d) one other person if designated in writing by the person who is intellectually disabled or person who is developmentally disabled; and~~

~~(e) such other persons as the court may deem proper.~~

~~3. No process or notice shall be necessary to a parent, adult child, adult sibling, or spouse of the person who is intellectually disabled or person who is developmentally disabled who has been declared by a court as being incompetent. In addition, no process or notice shall be necessary to a spouse who is divorced from the person who is intellectually disabled or person who is developmentally disabled, and to a parent, adult child, adult sibling when it shall appear to the satisfaction of the court that such person or persons have abandoned the person who is intellectually disabled or person who is developmentally disabled.~~] the person with a developmental disability, if petitioner is other than the person with a developmental disability alleged to be in need of a guardian; and

(b) the parent or parents of the individual if the petitioner is other than the parents.

2. Upon filing of the petition, notice of the petition and the citation along with notice of the date, time, and location of the first appearance shall be sent by certified mail, return receipt requested to the last known address of the following, except if any of the following is also the petitioner:

(a) individuals listed in the petition pursuant to section seventeen hundred fifty-two of this article and subdivisions four and five of this section;

(b) the director in charge of a facility licensed or operated by an agency of the state of New York or their designee, if the person with a developmental disability resides in such facility;

(c) any other person if designated in writing by the person with a developmental disability; and

(d) such other persons as the court may deem proper.

3. Within five days of the filing of the petition, a full copy of said petition shall be served by certified mail upon the mental hygiene legal service in the judicial department in which the petition was filed. A copy of proof of mailing shall be thereafter filed with the court.

4. For petitions to modify an existing guardianship pursuant to section seventeen hundred fifty-five of this article and/or to appoint a standby or alternate standby guardian pursuant to subdivision seventeen hundred fifty-seven of this article, written notice must be given to all standby and alternate standby guardians currently in succession for a person with a developmental disability who is the subject of the petition by regular mail unless such standby and alternate standby guardians have consented to the petition. An affidavit of service by mail shall be filed with the court.

5. In addition, no process or notice shall be necessary to any individual who has evinced an intent to forgo his or her relationship to the individual as manifested by his or her failure to visit and communicate with the person alleged to be in need of guardianship, although able to do so and not prevented or discouraged from doing so. No process or notice shall be necessary for any individual who cannot, after due diligence, reasonably be located. The petitioner shall submit an affidavit to such effect.

§ 8. Section 1754 of the surrogate's court procedure act is REPEALED and a new section 1754 is added to read as follows:

§ 1754. Proceedings upon petition

1. Upon a petition for the appointment of a guardian of a person with a developmental disability eighteen years of age or older, the court shall not later than forty-five days following the filing of proof of

mailing upon the mental hygiene legal service, schedule an appearance in the matter.

(a) The mental hygiene legal service shall ascertain whether the person with a developmental disability alleged to need a guardian has any objection to the relief sought in the petition and whether the service is able to represent the interests of the person in the proceeding.

(b) If the mental hygiene service reports that the person with a developmental disability alleged to need a guardian objects to the relief sought in the petition, the court shall appoint the service as counsel for the person. If the service is not available to serve as the person's counsel and the person does not otherwise have counsel, the court shall appoint counsel for the person from among attorneys eligible for such appointment pursuant to section thirty-five of the judiciary law. The court shall ensure that the individual's counsel, whether it be the service or appointed counsel, have demonstrated experience with and knowledge of representing individuals with developmental disabilities. The appointment of such counsel shall be at no cost to the petitioners.

(c) If the mental hygiene legal service reports that the person with a developmental disability alleged to need a guardian does not object to relief sought in the petition, the person's interests shall continue to be represented by the service, if available, and the service shall conduct an examination into the allegations of fact contained in the petition and file with the court and serve upon the petitioner or their counsel no later than ten days prior to the appearance date an answer confirming or denying the allegations in the petition and report as to whether the service finds grounds to object to the relief sought in the petition. If the service objects to the relief sought in the petition, the service shall, along with its answer, serve a copy of its underlying report and findings upon the petitioner and/or their counsel. The service will otherwise perform its functions consistent with uniform regulations promulgated by the appellate division of the supreme court.

(d) If a person with a developmental disability alleged to need a guardian who does not object, does not otherwise appear by the service or other counsel, the court shall appoint a guardian ad litem pursuant to this section and section four hundred three of this act. Any guardian ad litem appointed pursuant to this section shall conduct an investigation into the allegations of fact contained in the petition and file with the court and serve no later than ten days prior to the appearance date, a report of its findings confirming or disconfirming said allegations, and if appropriate and upon consent of the person with a developmental disability nominate a person or entity of the respondent's choosing to serve as guardian, as well as any other matter which could assist the court's consideration of the matter, and serve a copy of the report upon the petitioner and petitioner's counsel. The court shall ensure that the individual's counsel, whether it be the service or appointed counsel, have demonstrated experience with and knowledge of representing individuals with developmental disabilities. The appointment of such guardian ad litem shall be at no cost to the petitioner.

(e) The mental hygiene legal service, any other counsel for the person with a developmental disability alleged to need a guardian, or the guardian ad litem may apply to the court for permission to inspect the clinical records pertaining to the person with a developmental disability alleged to need a guardian in accordance with state and federal laws. The service, any other counsel for the person with a developmental disability and the guardian ad litem, if any, shall be afforded access to

the person's clinical records without a court order to the extent that such access is otherwise authorized by state and federal laws.

(f) The petitioner, the mental hygiene legal service, any other counsel for the person with a developmental disability alleged to need a guardian, and the guardian ad litem, if any, may request the court for further evaluation of the person by a physician, psychiatrist or certified psychologist who has demonstrated experience with and knowledge of persons with developmental disabilities. In the event that further evaluations are required, the court may grant appropriate adjournments of the initial appearance date and may direct, in the case of a person determined to be indigent, that any further court authorized evaluations be paid for out of funds available pursuant to section thirty-five of the judiciary law. Such evaluation shall be at no cost to the petitioner.

2. At the first appearance, the respondent shall be present unless such presence is excused by the court based upon the standard set forth in paragraph (d) of this subdivision and upon recommendation of petitioner and/or petitioner's counsel, the mental hygiene legal service, respondent's counsel, or the guardian ad litem if the respondent does not have counsel. The petitioner shall also be present and may be represented by counsel. Any other party required to be served or noticed with process in the matter may be present.

(a) Prior to such appearance, the petitioner, either personally or by counsel, may confer with the service, respondent's counsel and the guardian ad litem if respondent does not have counsel and agree to amend any part of its petition and allegations of fact therein. Any such amended petition shall be filed with the court prior to the date of the first appearance.

(b) At the first appearance, the court shall examine the answer of the service, respondent's counsel, or the report of the guardian ad litem, if any, and may hear from the petitioner and the service, respondent's counsel and the guardian ad litem, if any, on the contents of the said answer or report and any amended petition filed.

(c) The court may direct that an order and decree of guardianship issue, including the authority of the guardian to act on behalf of the respondent with respect to any matter in which petitioner, the service, respondent's counsel, and the guardian ad litem, if any, all agree on the record that the respondent requires the requested relief and does not object to such relief.

(d) In the event that the petition cannot be disposed of by the agreement of the court and all of the parties, the court shall schedule a hearing in the matter within forty-five days of the first appearance at which the respondent shall be present unless it shall appear to the court that the respondent's presence is medically contraindicated, in that it would be likely to cause harm to the respondent, or under such other circumstances raised by or on behalf of the respondent as the court agrees that the respondent's presence would not be in his or her best interests, provided however that the respondent's presence shall not be waived over the objection of the service, respondent's counsel, or a guardian ad litem, if any, in which case the court shall conduct the hearing where the respondent resides, if the court is satisfied that the respondent's presence would be harmful to the respondent.

3. If there are any objections to the relief sought by the petitioner, the respondent has a right to a hearing or jury trial, if demanded by the respondent. In addition, the court may conduct a hearing at the request of any party or on its own motion. At any such hearing or trial,

the petitioner must establish by clear and convincing evidence any facts alleged in the petition or amended petition which are controverted and are relevant to whether respondent has a developmental disability, and if so, whether appointment of a guardian is required and the scope of the guardian's powers. Any other matter must be proven by the fair preponderance of the evidence presented and admitted.

4. If, upon conclusion of such hearing or jury trial, if any, the court is satisfied that the respondent has a developmental disability and requires the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians. The powers of the guardian shall be tailored to the needs of the respondent.

§ 9. The surrogate's court procedure act is amended by adding a new section 1754-a to read as follows:

§ 1754-a. Decision making standard

Decisions made by a guardian appointed pursuant to this article shall be made in accordance with the following standards:

1. A guardian shall exercise authority only as necessitated by the person with a developmental disability's limitations, and, to the extent possible, shall encourage the person with a developmental disability to participate in decisions and to act on his or her own behalf.

2. A guardian shall consider the expressed desires and personal values of the person with a developmental disability to the extent known, when making decisions and shall consult with the person with a developmental disability whenever meaningful communication is possible.

3. If the person's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the best interests of the person with a developmental disability as determined by the guardian. In determining the best interests of the person with a developmental disability, the guardian shall weigh the reason for and nature of the proposed action; the benefit or necessity of the action, the possible risks and other consequences of the proposed action; and any available alternatives and their risks, consequences and benefits. The guardian shall take into account any other information, including the views of family and friends, that the guardian believes the person with a developmental disability would have considered if able to act for herself or himself.

§ 10. Section 1755 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1755. Modification order

Any person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability eighteen years of age or older, or any person on behalf of any person [~~who is intellectually disabled or person who is developmental disabled~~] with a developmental disability for whom a guardian has been appointed, may apply to the court [~~having jurisdiction over the guardianship order~~] pursuant to section seventeen hundred fifty-one-a of this article requesting modification of such order in order to protect the person [~~who is intellectually disabled's, or person who is developmentally disabled's~~] with a developmental disability's financial situation and/or his or her personal interests. The court may, upon receipt of any such request to modify the guardianship order, appoint a guardian ad litem. Such guardian ad litem shall have demonstrated experience with and knowledge of persons with developmental disabilities. The court shall so modify the guardianship order if in its judgment the interests of the guardian are adverse to those of the person [~~who is intellectually disabled or person~~

~~who is developmentally disabled~~] with a developmental disability or if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability.

§ 11. Section 1756 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1756. Limited [~~guardian of the property~~] purpose and/or limited duration guardianship

1. a. When it shall appear to the satisfaction of the court that such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability for whom an application for guardianship is made pursuant to this article is eighteen years of age or older and is wholly or substantially self-supporting by means of his or her wages or earnings from employment, the court is authorized and empowered to appoint a limited guardian of the property of such person [~~who is intellectually disabled or person who is developmentally disabled~~] who shall receive, manage, disburse and account for only such property of said person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability as shall be received from other than the wages or earnings of said person.

b. The person [~~who is intellectually disabled or person who is developmentally disabled~~] who is developmentally disabled for whom a limited guardian of the property has been appointed shall have the right to receive and expend any and all wages or other earnings of his or her employment and shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.

2. When it shall appear to the satisfaction of the court, either upon a petition for guardianship filed as permitted by sections seventeen hundred fifty-one and seventeen hundred fifty-two of this article or upon a petition filed pursuant to this section in a simplified format to be established by the office of court administration in consultation with the office for people with developmental disabilities and other interested stakeholders, that a person with a developmental disability needs the assistance of a guardian of the person and/or property for the purpose of making a single decision or for a brief stated period of transition in such person's life, the court may appoint a limited-purpose guardian of the person and/or property to effectuate such a decision or transition. In any such case, the provisions of section seventeen hundred fifty-four of this article shall apply, except that the period for the rendering of a report by the mental hygiene legal service or other respondent's counsel may be shortened as may be reasonably necessary to meet the needs of the respondent under the circumstances presented. An order appointing and empowering such a limited-purpose guardian of the person and/or property shall state specifically the duration and scope of such guardian's authority.

§ 12. Section 1757 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1757. Standby guardian of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability

1. Upon application, a standby guardian of the person or property or both of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability may be appointed by

the court. **Any such application shall be made upon notice to the mental hygiene legal service.** The court may also, upon application, appoint an alternate and/or successive alternates to such standby guardian, to act if such standby guardian shall die, or become incapacitated, or shall renounce. Such appointments by the court shall be made in accordance with the provisions of this article**, except that the court shall not require the petitioner to resubmit proof of the need for guardianship**.

2. Such standby guardian, or alternate in the event of such standby guardian's death, incapacity or renunciation, shall without further proceedings be empowered to assume the duties of his or her office immediately upon death, renunciation or adjudication of incompetency of the guardian or standby guardian appointed pursuant to this article, subject only to **the filing of an application for** confirmation of his or her appointment by the court within one hundred eighty days following assumption of his or her duties of such office. Before confirming the appointment of the standby guardian or alternate guardian, the court may conduct a hearing pursuant to section seventeen hundred fifty-four of this article upon petition by anyone on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** or the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** if such person is eighteen years of age or older, or upon its discretion**, except that the court shall not require the petitioner to resubmit proof of the need for guardianship**.

3. Failure of a standby or alternate standby guardian to assume the duties of guardian, seek court confirmation or to renounce the guardianship within sixty days of written notice by certified mail or personal delivery given by or on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** of a prior guardian's inability to serve and the standby or alternate standby guardian's duty to serve, seek court confirmation or renounce such role shall allow the court to:

(a) deem the failure an implied renunciation of guardianship, and

(b) authorize, notwithstanding the time period provided for in subdivision two of this section to seek court confirmation, any remaining standby or alternate standby guardian to serve in such capacity provided (i) an application for confirmation and appropriate notices pursuant to subdivision one of section seventeen hundred fifty-three of this article are filed, or (ii) an application for modification of the guardianship order pursuant to section seventeen hundred fifty-five of this article is filed**, except that the court shall not require the petitioner to resubmit proof of the need for guardianship**.

§ 13. Section 1758 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1758. Court jurisdiction

1. The jurisdiction of the court to hear proceedings pursuant to this article shall be subject to article eighty-three of the mental hygiene law.

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the person [~~who is intellectually disabled or person who is developmentally disabled~~] **with a developmental disability** for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the

welfare of such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability.

§ 14. Section 1759 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1759. Duration of guardianship

1. Such guardianship shall not terminate at the age of majority or marriage of such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability but shall continue during the life of such person, or until terminated by the court.

2. A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition for review, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article except that the court shall not require the petitioner to resubmit proof of the need for guardianship.

3. Upon marriage of such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability for whom such a guardian has been appointed, the court shall, upon request of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability, spouse, or any other person acting on behalf of the person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability, review the need, if any, to modify, dissolve or otherwise amend the guardianship order including, but not limited to, the appointment of the spouse as standby guardian. The court, in its discretion, may conduct such review pursuant to section seventeen hundred fifty-four of this article except that the court shall not require the petitioner to resubmit proof of the need for guardianship.

§ 15. Section 1760 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1760. Corporate guardianship

No corporation may be appointed guardian of the person under the provisions of this article, except that a non-profit corporation organized and existing under the laws of the state of New York and having the corporate power to act as guardian of a person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability, may be appointed as the guardian of the person only of such person [~~who is intellectually disabled or person who is developmentally disabled~~] with a developmental disability. Upon specific request to and approval by the court, such authority of a not-for-profit corporation as guardian of the person with developmental disabilities shall include the authority to establish a supplemental needs trust account for the benefit of the person with a developmental disability, if necessary.

§ 16. Section 1761 of the surrogate's court procedure act, as amended by chapter 198 of the laws of 2016, is amended to read as follows:

§ 1761. Application of other provisions

To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this

article with the same force and effect as if an "infant", as therein referred to, were a "person [~~who is intellectually disabled" or "person who is developmentally disabled~~] with a developmental disability" as herein defined, and a "guardian" as therein referred to were a "guardian of the person [~~who is intellectually disabled" or a "guardian of a person who is developmentally disabled~~] with a developmental disability" as herein provided for.

§ 17. The surrogate's court procedure act is amended by adding a new section 1762 to read as follows:

§ 1762. Annual account and asset verification form

1. A guardian of the property of a person with a developmental disability must, within the counties within the city of New York and within the counties of Nassau, Orange, Suffolk and Westchester, annually within thirty days after the anniversary of his or her appointment and within every other county in the month of January of each year, as long as any of the person with a developmental disability's property of the proceeds thereof remains under the guardian's control, file in the court the model guardianship account and asset verification form annexed hereto. A copy of the annual guardianship account and asset verification form is also to be sent by regular mail to all standby and alternate standby guardians then named in the court's decree to their last known address.

2. The model guardianship account and asset verification form shall be as follows:

GUARDIANSHIP ACCOUNT AND ASSET VERIFICATION FORM

*The original of this form is to be filed with the Surrogate Court Clerk where guardianship was originally obtained. A copy of this form is to be sent to all standby guardians and alternate standby guardians by regular mail.

I. Guardianship Data

GUARDIAN INFORMATION

_____

Guardian's Name Home Phone #: _____

Mobile Phone #: _____

Work Phone#: _____

E-mail Address (if any): _____

Street Address

_____

City State Zip

WARD INFORMATION

_____

Ward's Name & Date of Birth

_____

Street Address

_____

City State Zip

If the Ward lives in a residential facility or other setting under someone's care, please provide the following information:

Name/Address: _____

Contact Person: _____

Phone #: _____

E-mail Address (if any): _____

II. Guardianship Account and Asset Verification Form

Note: Absolutely NO WITHDRAWALS are permitted from a guardianship account without a prior written court order from the _____ County Surrogate's court.

Please have the financial institution complete this section if a Guardianship Account exists for the individual for whom you serve as guardian.
This is to certify that the records of (Name & Address of institution holding assets indicated herein) show that (Name & Address of Guardian), as Guardian of (Name of Ward) had a balance as of December 31, (insert year) of $(Insert amount) in Account # , which is in a Court Restricted Guardianship Account with this Financial Institution.
This account earned interest in the amount of $ in (year), as will be reported on the 1099 for this Account.
In witness whereof, the Financial Institution has hereunto set its hand and corporate seal the day and year noted herein.
By:
Official Title:
****
If you are not holding funds for your Ward, please sign below in the presence of a Notary Public.
I certify under penalty of perjury that I am not holding any funds in any financial institution or otherwise for my Ward, (Name of Ward).
Guardian Signature :
Print Name:
Sworn to and subscribed before me:

Notary Public

§ 18. Paragraph a of subdivision 1 and subdivision 4 of section 35 of the judiciary law, paragraph a of subdivision 1 as amended by chapter 817 of the laws of 1986, subdivision 4 as amended by chapter 706 of the laws of 1975 and as renumbered by chapter 315 of the laws of 1985, are amended to read as follows:

a. When a court orders a hearing in a proceeding upon a writ of habeas corpus to inquire into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person to or retain him in a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, or when it orders a hearing for the commitment of the guardianship and custody of a child to an authorized agency by reason of the mental illness or [~~mental retardation~~] developmental disability of a parent, or when it orders a hearing for guardianship under article seventeen-a of the surrogate's court procedure act or when it orders a hearing to determine whether consent to the adoption of a child shall be required of a parent who is alleged to be mentally ill or [~~mentally retarded~~] have a developmental disability, or when it orders a hearing to determine the best interests of a child when the parent of the child revokes a consent to the adoption of such child and such revocation is opposed or in any adoption or custody proceeding if it determines that assignment of counsel in such cases is mandated by the constitution of this state or of the United States, the court may assign counsel to represent such person if it is satisfied that he is financially unable to obtain counsel. Upon an appeal taken from an order entered in any such proceeding, the appellate court may assign counsel to represent such person upon the appeal if it is satisfied that he is financially unable to obtain counsel.

4. In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to be a person with a developmental disability or traumatic brain injury in need of a guardian pursuant to article seventeen-a of the surrogate's court procedure act, be mentally ill, mentally defective or a narcotic addict, the court which

ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall, upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

§ 19. This act shall take effect on the one hundred eightieth day after it shall have become a law.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DISABILITY RIGHTS NEW YORK

Plaintiff,

-against-

COMPLAINT

CV:

NEW YORK STATE, UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK, Honorable JANET DIFIORE, as Chief Judge of the New York State Unified Court System, Honorable LAWRENCE K. MARKS, as Chief Administrative Judge of the New York State Unified Court System.

Defendants.

PRELIMINARY STATEMENT

1. For decades, individuals with intellectual and developmental disabilities have been deprived of their constitutional rights and discriminated against because of their disabilities by New York State's Unified Court System through the appointment of plenary guardians pursuant to Article 17A of the Surrogate Court Procedure Act (Article 17A).

2. Through the application of Article 17A, defendants permit the termination of all decision making rights including, the right to decide where to live, whom to associate with, what medical treatment to seek and receive, whether to marry and have children, whether to vote, and where to work.

3. DRNY brings this action to defend the rights guaranteed by the United States Constitution, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 for New Yorkers with intellectual disabilities and developmental disabilities.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

5. Plaintiff brings this civil rights action under the United States Constitution and 42 U.S.C. § 1983 to challenge the constitutionality of Article 17A of the Surrogates Court Procedure Act.

6. Plaintiff's additional federal claims are made pursuant to 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and Title II of the Americans with Disabilities Act 42 U.S.C. § 12132.

7. This Court has the authority to grant declaratory and injunctive relief under 28 U.S.C §§ 2201, 2202.

8. Venue is appropriate in this District pursuant to 28 U.S.C. § 1391(b)(1)-(2).

PARTIES

Plaintiff

9. DISABILITY ADVOCATES, INC. is an independent non-profit corporation organized under the laws of the State of New York. It does business and has sued under the name DISABILITY RIGHTS NEW YORK (DRNY).

10. Under the Developmental Disabilities Assistance and Bill of Rights Act (DD Act), Congress gives significant federal funding to states for services to individuals with disabilities, provided that the state establishes a Protection and Advocacy (P&A) system that meets certain specified conditions. 42 U.S.C. § 15041 *et seq*.

11. DRNY is New York State's P&A system. N.Y. Exec. Law § 558(b).

12. DRNY is specifically authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals with intellectual and developmental disabilities. 42 U.S.C. § 15043(a)(2)(A)(i).

13. DRNY has offices located at 25 Chapel Street, Suite 1005, Brooklyn, NY 11201; 725 Broadway, Suite 450, Albany, NY 12208; and, 44 Exchange Blvd, Suite 110, Rochester, NY 14614.

Defendants

14. New York State is a public entity as defined by 42 U.S.C § 12131(1)(A).

15. New York State operates the Unified Court System of the State of New York.

16. The Unified Court System of the State of New York is a program or activity pursuant to 29 U.S.C. § 794(b)(1)(A)

17. The Unified Court System of the State of New York has all the powers and duties set forth in Article VI of the New York State Constitution and as otherwise prescribed by law, statute, rules and regulations.

18. The Unified Court System of the State of New York has Surrogate Courts which have taken, and continue to take, action which plaintiff complains of in this lawsuit.

19. The Unified Court System Office of Court Administration is located at 25 Beaver Street - Rm. 852 New York, NY 10004

20. Janet DiFiore, is the Chief Judge of the State of New York, with all powers and duties set forth in Article VI of the New York State Constitution and as otherwise prescribed by law, statute, rules and regulations.

21. Chief Judge DiFiore serves as the Chief Judicial Officer of the State and the Chief Judge of the Court of Appeals.

22. The Chief Judge of the Unified Court System establishes statewide standards and administrative policies for the Unified Court System in the State of New York.

23. Judge DiFiore is sued in her official capacity.

24. While under Chief Judge DiFiore's control, Surrogate Courts have taken, and continue to take, action which plaintiff complains of in this lawsuit.

25. Lawrence K. Marks, is the Chief Administrative Judge for the Courts of New York State, with all powers and duties set forth in Article VI of the New York State Constitution and as otherwise prescribed by law, statute, rules and regulations.

26. Judge Marks is sued in his official capacity.

27. While under Chief Administrative Judge Marks' control, Surrogate Courts have taken, and continue to take, action which plaintiff complains of in this lawsuit.

28. Pursuant to the powers vested in the Chief Administrative Judge, on August 1, 2016 defendant Marks rescinded eight forms used in Surrogate's Court guardianship proceedings and prescribed eight new forms for use in Surrogate's Court guardianship proceedings in the courts of the State of New York. See http://www.nycourts.gov/courts/7jd/monroe/Surrogate/PDFs/SCPA_Changes_Petition.pdf

FACTUAL ALLEGATIONS

29. The imposition of a guardianship is a significant deprivation of personal liberty.

30. In New York State, guardianship of individuals with intellectual disabilities and developmental disabilities may be sought pursuant to Article 17A or Mental Hygiene Law Article 81 (Article 81).

31. A guardianship proceeding under Article 81 tailors any deprivation of rights to an individual's functional limitations rather than a diagnosis.

32. Article 81 explicitly requires the court to impose the least restrictive form of intervention, taking into account community supports, resources and existing advance directives that render a guardianship unnecessary. See MHL § 81.02 (a) (2); 81.03 (e).

33. By contrast, under Article 17A, the basis for appointing a guardian is diagnosis driven, that is, whether a person has an intellectual or developmental disability.

34. Article 17A provides only for the appointment of a plenary guardianship of the person, property or person and property and it is not individually tailored to meet the individual's needs or provide the least restrictive level of guardianship.

History of MHL Article 81 and SCPA Article 17A

35. In 1990, the Legislature directed the New York State Law Revision Commission to study and re-evaluate Article 17A and committee and conservatorship proceedings under Mental Hygiene Law (MHL) Article 77 and 78 in light of "momentous changes [which] have occurred in the care, treatment, and understanding of individuals [with disabilities]…" L. 1990, ch. 516 § 1

36. A study of Article 17A was conducted but not presented to the Legislature.

37. Instead, the Law Revision Commission submitted a report to the Legislature only on MHL Article 77 and 78.

38. Rejecting global adjudications of incapacity, the Legislature determined that New York's former conservatorship and committee laws, MHL Article 77 and 78, were not flexible enough to meet the diverse and complex needs of persons with disabilities that impact capacity.

39. After the Law Revision Commission's study was completed, the Legislature found that, "Conservatorship which traditionally compromises a person's right only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a

depravation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies." MHL § 81.01

40. In response, the Legislature enacted MHL Article 81 in 1992 declaring, "it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes in account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." MHL § 81.01

41. Article 81 applies to all persons with disabilities which impact capacity.

42. Article 81 does not distinguish between individuals with mental illness, intellectual disabilities, developmental disabilities, or any other disability.

43. Instead, Article 81 requires courts to assess the alleged incapacitated person's "functional limitations which impair the person's ability to provide for personal needs or property management" regardless of the origin of the functional limitation. MHL § 81.02(c)

44. In contrast, Article 17A, which was enacted in 1969, authorizes a Surrogate Judge to appoint a guardian over the person, property or person and property of a person with mental retardation.

45. Article 17A was placed within Surrogate Court Procedures Act (SCPA) Article 17 which governs the appointment of a guardian over a minor child.

46. The practice commentaries for Article 17A state "[t]he guardianship of a mentally retarded or developmentally disabled person is very much like the guardianship of a child…" SCPA § 1761.

47. The term, "mental retardation" was replaced with "intellectual disability" in Article 17A in 2016. SCPA § 1750(2016).

48. Under Article 17A, a "person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to continue indefinitely." SCPA § 1750.

49. In 1986, Article 17A was expanded to include other "developmental disabilities." 1989 N.Y. Sess. Law 675 § 2 (McKinney).

50. For the purposes of Article 17A, "a person who is developmentally disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with developmental disabilities, having qualifications to make such certification, as having an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability and that such condition is permanent in nature or likely to continue indefinitely, and whose disability: (a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury; (b) is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities; or (c) is attributable to dyslexia resulting from a disability described in subdivision one or two of this section or from intellectual disability; and (d) originates before such person attains age twenty-two, provided, however, that no such age of origination shall apply for the purposes of this article to a person with traumatic head injury." SCPA § 1750-a.

51. The practice commentary following MHL § 81.01 describes the significant distinctions between Article 81 and Article 17A:

> Although the enactment of Article 81 has had a profound impact on guardianship law in New York, it has not effected any change in Article 17-A of the Surrogate's Court Procedure Act which governs guardianship for persons with mental retardation or developmental disabilities. Article 17-A is markedly different from Article 81. The proceeding can only be brought in Surrogate's court; it is limited to persons with mental retardation and developmental disabilities; the petition must be accompanied by certificates of one licensed physician and one licensed psychologist or two licensed physicians; the appointment can be made without a hearing or the presence of the person alleged to need a 17A guardian; and it does not provide the same due process protections, the limited or tailored authority of the guardian, nor the detailed accountability of the guardian as Article 81.

See Law Revision Commission Comment MHL § 81.01

52. Unlike, Article 81, Article 17A does not require the court to make any findings of fact with regard to the nature or extent of the powers requested by the petitioner, the allegedly incapacitated person's functional abilities and limitations, alternatives to guardianship, or why it is necessary for a guardian to be appointed.

53. Defendants' Surrogate Judges use Article 17A to grant all-encompassing powers of unlimited duration over the person and property of people with intellectual and developmental disabilities.

54. The appointment of a 17A guardianship limits the fundamental rights of individuals with intellectual and developmental disabilities by removing a person's legal authority and control over their decisions.

New York State's Olmstead Cabinet and Article 17A

55. In October 2013, New York State issued the Report and Recommendations of the Olmstead Cabinet pursuant to Executive Order Number 84. See http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/olmstead-cabinet-report101013.pdf

56. New York's Olmstead Cabinet concluded that "[u]nder Article 17A, the basis for appointing a guardian is diagnosis driven and is not based upon the functional capacity of the person with disability." Id at 28

57. In contrast, MHL Article 81, "imposes guardianship based upon a functional analysis of a person's disability…" Id.

58. To meet the State's responsibility under the American with Disabilities Act, the Olmstead Cabinet recommended that Article 17A be amended to include an examination of functional capacity and consideration of choice and preference in decision making. Id.

59. As of the filing of this action, Article 17A has not been so amended.

Procedural and Substantive Standards for the Appointment of a Guardian

The Petition

60. The pleading requirements of Article 17A and Article 81 differ dramatically.

61. Article 81 requires the petition to include, "a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living." MHL § 81.08(3)

62. Article 81 also requires the petition to include, "specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are

claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs." MHL § 81.08(4)

63. Article 81 further requires the petition to include, "specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management." MHL § 81.08(5)

64. Additionally, Article 81 requires the petition to include, "the particular powers being sought and their relationship to the functional level and needs of the person alleged to be incapacitated." MHL § 81.08(6).

65. In contrast, Article 17A does not require any specific factual allegations about the person's ability to understand the nature and consequences of his or her ability to provide for personal needs or property management.

66. Instead, Article 17A requires that the petition be filed with the court on forms prescribed by the defendants. SCPA § 1752

67. Defendant Marks has issued these forms. See https://www.nycourts.gov/forms/surrogates/guardianship.shtml.

68. The defendants' forms require a petitioner to submit certifications of two physicians or one licensed psychologist and one physician with the petition. Id.

69. The physician or psychologist must opine whether the person is incapable of managing himself or herself and/or his or her affairs by reason of an intellectual or developmental disability and whether such condition is permanent in nature or likely to continue indefinitely. Id.

70. The defendants' forms allow the physician or psychologist to check boxes regarding these fundamental conclusions. Id.

71. The physician or psychologist are not directed to describe in detail how the existence of an intellectual or developmental disability makes the person incapable of managing himself or herself or his or her affairs.

72. Instead, the physician or psychologist must "describe, in detail, the nature, degree and origin of the disability." See http://www.nycourts.gov/courts/7jd/monroe/Surrogate/PDFs/SCPA_Changes_Petition.pdf

73. The defendants' forms specifically permit the courts' use of uncontested affidavits which are attached to the petition.

74. If the alleged incapacitated person is a minor, the physician or psychologist can provide this privileged information without the minor's knowledge or consent.

75. Unlike Article 81, Article 17A does not require a petitioner to state the specific powers requested and the relationship between the powers sought and the individual's functional limitations. See and compare, SCPA §1752 and MHL §81.08.

76. Unlike Article 81, Article 17A does not require a petitioner to state why the person would likely suffer harm if the court did not appoint a guardian. Id.

77. The petition under Article 17A does not put an allegedly incapacitated person on actual notice of the reasons why the guardianship is sought, the extent of the powers sought, the right to contest the proceeding at a hearing, or to be represented by an attorney.

Notice

78. Article 81 requires a notice to the allegedly incapacitated person which includes a clear and easily readable statement of the rights of the person in twelve point or larger bold face double spaced type as follows:

IMPORTANT

> An application has been filed in court by _____ who believes you may be unable to take care of your personal needs or financial affairs. _____ is asking that someone be appointed to make decisions for you. With this paper is a copy of the application to the court showing why _____ believes you may be unable to take care of your personal needs or financial affairs. Before the court makes the appointment of someone to make decisions for you the court holds a hearing at which you are entitled to be present and to tell the judge if you do not want anyone appointed. This paper tells you when the court hearing will take place. If you do not appear in court, your rights may be seriously affected.
>
> You have the right to demand a trial by jury. You must tell the court if you wish to have a trial by jury. If you do not tell the court, the hearing will be conducted without a jury. The name and address, and telephone number of the clerk of the court are:
>
> The court has appointed a court evaluator to explain this proceeding to you and to investigate the claims made in the application. The court may give the court evaluator permission to inspect your medical, psychological, or psychiatric records. You have the right to tell the judge if you do not want the court evaluator to be given that permission. The court evaluator's name, address, and telephone number are:
>
> You are entitled to have a lawyer of your choice represent you. If you want the court to appoint a lawyer to help you and represent you, the court will appoint a lawyer for you. You will be required to pay that lawyer unless you do not have the money to do so. MHL § 81.07.

79. The Article 81 notice must inform the individual of the right to a hearing, to present evidence, call witnesses, cross examine witnesses and be represented by counsel of his or her choice. MHL § 81.07 and MHL § 81.11

80. The Article 81 court must also appoints a person to explain "to the person alleged to be incapacitated, in a manner which the person can reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel." MHL § 81.09

81. Article 17A does not require that the individual with intellectual or developmental disabilities be notified of his or her rights to contest the appointment of a guardianship, be present at a hearing, or be represented by an attorney.

82. Article 17A makes no provision to tailor notice requirements to ensure that the individual with intellectual or developmental disabilities is fully informed of the nature and implications of the proceeding.

Necessity of Guardianship

83. Since the appointment of a guardian results in a deprivation of fundamental rights, there must be a clear and compelling need for the appointment. See Rivers v. Katz, 67 N.Y.2d 485 (1986) *re-argument den.*, 68 N.Y.2d 808 (1986); Addington v. Texas, 441 U.S. 418 (1979).

84. The presence of a particular medical or psychiatric condition does not necessarily preclude a person from functioning effectively. See In re Grinker (Rose), 77 N.Y.2d 703 (1991); Rivers v. Katz, 67 N.Y.2d 485 (1986).

85. Under Article 81, a guardianship can only be imposed when:

a. The person is likely to suffer harm; and

b. The person is unable to provide for personal needs and/or property management; and

c. The person cannot adequately understand and appreciate the nature and consequences of such inability. MHL § 81.02(s)(b)(1)-(2).

86. Even if the alleged incapacitated person is found to lack capacity, Article 81 mandates a showing of unmet needs before a guardian can be appointed. MHL §§ 81.02(a)(1) and (2); 81.03(d).

87. Under Article 81, a guardian may be appointed only where it has been established by clear and convincing evidence that a guardian is needed and there are no lesser restrictive options. See MHL § 81.02; 81.03(d)(e).

88. In contrast with Article 81, Article 17A specifically directs that where "the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians." SCPA § 1754(5).

89. Surrogate Courts routinely terminate an individual's decision making authority in every aspect of life and deprive the individual of fundamental liberty interests simply because the court has determined it is in the person's "best interest" to do so.

The Hearing and Presence of a Person Subject to Guardianship

90. Article 17A directs the court to conduct a hearing but also permits the court, "in its discretion to dispense with a hearing for the appointment of a guardian" where the application has been made by (a) both parents or the survivor; or (b) one parent and the consent of the other parent; or (c) any interested party and the consent of each parent. SCPA § 1754 (1)(a)-(c).

91. Indeed, SCPA § 1752 (7) and the forms promulgated by defendants direct the petitioner to identify "any circumstances which the court should consider in determining whether it is in the best interest of the [alleged incapacitated] person … to not be present at the hearing."

92. The statutory standard for determining whether a person subjected to an Article 17A proceeding must be present are delineated in SCPA § 1754(3) which states:

> If a hearing is conducted, the person who is intellectually disabled or person who is developmentally disabled shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the person who is intellectually disabled or person who is developmentally disabled is medically incapable of being present to the extent that attendance is likely to result in physical harm to such person who is intellectually disabled or person who is developmentally disabled, or under such other circumstances which the court finds would not be in the best interest of the person who is intellectually disabled or person who is developmentally disabled.

93. By contrast, Article 81 requires the court to conduct a hearing before the appointment of a guardianship; the hearing may be waived only if the alleged incapacitated person consents to the appointment of a guardian. MHL §§ 81.11, 81.02(a)(2).

94. Under Article 81, "the hearing must be conducted in the presence of the person alleged to be incapacitated…so as to permit the court to obtain its own impression of the person's incapacity. If the person alleged to be incapacitated physically cannot come or be brought to the courthouse, the hearing must be conducted where the person alleged to be incapacitated resides unless…all information before the court clearly establishes that (i) the person alleged to be incapacitated is completely unable to participate in the hearing or (ii) no meaningful participation will result from the person's presence at the hearing." MHL § 81.11(c)

95. The Law Revision Commission stressed the importance of having the person present at the hearing because "seeing the person allowed the court to draw a carefully crafted and nuanced order which takes into account the person's dignity, autonomy and abilities, because the judge has had the opportunity to learn more about the person as an individual rather than a case description in a report." The Law Revision Commission Comment MHL § 81.11.

Evidentiary Standard For Appointment of Guardian

96. Article 17A does not specifically set forth any evidentiary standards for the appointment of a guardian.

97. Surrogate Courts apply the preponderance of the evidence standard in Article 17A proceedings.

98. By contrast, MHL Article 81 expressly requires courts to apply a clear and convincing evidence standard of proof, with the burden of proof on the petitioner. MHL § 81.12(a)

Right to Counsel

99. Article 17A makes no provision for the appointment of an attorney to represent the alleged incapacitated person.

100. Instead, Article 17A states that a court, "may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility… to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled." SCPA § 1754(1).

101. Article 81 requires the appointment of a court evaluator rather than a guardian ad litem. MHL § 81.09(a).

102. The court evaluator has a duty to ensure the alleged incapacitated person understands petition and the nature and potential consequences of the proceeding. MHL § 81.09

103. The court evaluator must also educate the person about their legal rights and assess whether legal counsel should be appointed. MHL §81.09

104. In addition, the court evaluator is required to conduct a thorough investigation to aid the court in reaching a determination about the person's capacity, the availability and reliability of alternative

resources, and assigning the proper powers to the guardian, and selecting the guardian. MHL § 81.09 (a); See also Law Revision Commission comment MHL § 81.10.

105. The appointment of a court evaluator is mandatory in every case, with one exception. The court may dispense with or suspend the appointment of the court evaluator only when the court appoints counsel under MHL § 81.10.

106. Article 81 also grants the alleged incapacitated person "the right to choose and engage legal counsel of the person's choice." MHL § 81.10(a).

107. MHL Article 81 requires the appointment of an attorney when the alleged incapacitated person : (1) requests counsel; (2) wishes to contest the proceeding; (3) does not consent to the authority requested in the petition; or when (4) the petition alleges the person is in need of major medical or dental treatment; (4) is being transferred to a nursing home or other residential facility; or (5) where the court determines that a possible conflict exists between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated. MHL § 81.10(c)

108. In Article 81 proceedings, where the person is indigent, the state, or its appropriate subdivision, is required to pay for assigned counsel. MHL § 81.10(f); See also Matter of St. Luke's-Roosevelt Hosp. Ctr., 89 N.Y.2d 889, 892 (1996)

109. The Law Revision Commission explained why the appointment of counsel is absolute, and the difference between the appointment of a guardian ad litem and an attorney: "[i]n the past it often has not been clear whether the guardians ad litem appointed pursuant to Article 77 and 78 were acting as advocates for the person who was the subject of the proceeding or as a neutral "eyes and ears" of the court. In order to alleviate the confusion, Article 81 distinguishes between the two roles of counsel and that of guardian ad litem, now known as court evaluator, and creates separate rules to govern each…The role of counsel…is to represent the person alleged to be incapacitated and ensure that the point of view of

the person alleged to be incapacitated is presented to the court. At minimum that representation should include conducting personal interviews with the person; explaining to the person his or her rights and counseling the person regarding the nature and consequences of the proceeding; securing and presenting evidence and testimony; providing vigorous cross-examination; and offering arguments to protect the rights of the allegedly incapacitated person." Law Revision Commission comment under MHL § 81.10(f)

Powers of the Guardian: Plenary or Limited

110. The defendants' Unified Court Administration's guidance on Article 17A states, "[a]n Article 17A Guardianship is very broad and covers most decisions that are usually made by a parent for a child such as financial and healthcare decisions." See www.nycourts.gove/courthelp/Guardianship/17A.shtml.

111. The defendants' guidance states that the Surrogate's Court can appoint a guardian of the person, the property or both person and property. Id.

112. The defendants' guidance states that "a guardian of the person can make life decisions for the ward like health care, education and welfare decisions." Id.

113. The defendants' guidance states that "a guardian of the property handles decisions about the ward's money, investments and savings." Id.

114. The defendants' guidance states that a "guardian of the person and property has responsibility of both the ward's life decisions and the ward's property." Id.

115. Under Article 17A there is no provision for a lesser restrictive option than the appointment of a plenary guardian of the person.

116. Article 17A makes for provision for the Surrogate Court to limit or tailor the guardianship.

117. By contrast, Article 81 requires the court to limit or tailor the guardianship to "the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management." MHL § 81.16(c)(2).

118. The Legislature specifically declared that the purpose of Article 81 was to create a "guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individuals needs of that person which…affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life." MHL § 81.01.

119. The order from the court for an Article 81 guardianship must accomplish, "the least restrictive form of intervention by appointing a guardian with powers limited to those which the court has found necessary to assist the incapacitated person in providing for personal needs and/or property management." MHL § 81.16(c)(2).

120. Article 17A, in contrast, simply provides "[i]f the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians." SCPA § 1754(5).

121. The State's Olmstead Cabinet found that "Article 17A does not limit guardianship rights to the individual's specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead. Once guardianship is granted, Article 17A instructs the guardian to make decisions based upon the 'best interests' of the person with a disability and does not require the guardian to examine the choice and preference of the person with a disability." Olmstead Report p. 28

Selection of Guardian; Powers and Oversight

122. Article 17A permits any person over the age of 18 not otherwise subjected to guardianship to be appointed as a guardian. SCPA § 1752 (5).

123. By contrast, Article 81 provides detailed consideration for who should be appointed a guardian, including consideration of the alleged incapacitated person's preferences and nomination. MHL § 81.19.

124. Article 81 requires the court to consider:

a. Any appointment or delegation made by the person alleged to be incapacitated;

b. The social relationship between the incapacitated person and the proposed guardian;

c. The care and services being provided to the incapacitated person at the time of the proceeding;

d. The educational, professional and business experience of the proposed guardian;

e. The nature of the financial resources involved;

f. The unique requirements of the incapacitated person; and

g. Any conflicts of interests between the person proposed as guardian and the incapacitated person.

MHL § 81.19(d)

Eligibility and Qualification of Guardian

125. Article 81 requires court-appointed guardians to visit the person under guardianship a minimum of four times per year, MHL § 81.20(a)(5), but Article 17A does not.

126. The purpose of this requirement is to assist the guardian in her capacity as a person who is obligated to exercise care and diligence in actions on behalf of the person under the guardianship.

127. The Law Revision Commission stated: "Decision making is a fundamental part of the guardian's role. In order to carry out this responsibility in the most careful and diligent manner, the guardian should develop a personal relationship to the ward, in the event one does not exist, so that the guardian can understand the decision's impacted from the incapacitated person's perspective and involve the incapacitated person in the decisions to the greatest extent possible." Law Revision Comments under MHL § 81.20,

Reporting and Review

128. Article 81 imposes rigorous reporting and oversight provisions upon the appointment of a guardian. See MHL §§ 81.30, 81.31, 81.32, 81.33.

129. The court is also required under Article 81 to specifically enumerate the powers regarding both property management and personal needs, with which the guardian will be vested. See MHL §§ 81.21, 81.22.

130. In contrast, Article 17A contains no requirement that guardians report annually as to the personal or property status of the person under guardianship.

131. Reporting requirements such as those contained in MHL §§ 81.30 and 81.31, allow the court to determine whether a guardian is fulfilling his or her fiduciary responsibility, and to ensure that the individual's autonomy is being preserved to the maximum extent possible.

132. MHL §§ 81.30 and 81.31 require the guardian to submit written initial and annual reports describing, "the social and personal services that are to be provided for the welfare of the incapacitated person," [MHL § 81.30(c)(2)] and "information concerning the social condition of the incapacitated person, including: the social and personal services currently utilized by the incapacitated person; the social skills of the incapacitated person; and the social needs of the incapacitated person." MHL § 81.31(b)(6)(iv).

133. The reporting requirement of Article 81 also includes information concerning the incapacitated person's medical and residential needs, and requires the guardian to submit in his or her report any and all facts indicating a need to terminate, or modify the terms of the guardianship. Preservation of the alleged incapacitated person's autonomy to the fullest extent possible is one of the avowed purposes of the reporting requirements. See Law Revision Commission Comments MHL § 81.31

Modification, Termination & Restoration of Rights

134. Under Article 17A, a guardianship continues over the entire life of the person under guardianship; there is no limit on duration or subsequent review of the need for continued guardianship. SCPA § 1759(1)

135. Modification or termination of an Article 17A guardianship requires the person under guardianship or another person on behalf of the person under guardianship to petition the court to modify, dissolve or amend the guardianship order. SCPA § 1759(2)

136. This proceeding is subject to the same limitations as set forth in SCPA § 1754 which permits the court to dispense with the hearing at the request of the parent.

137. Article 17A is silent as to the evidentiary standard for when a guardianship is to be modified; however, Surrogate Courts apply the preponderance of the evidence standard to the proceedings.

138. Article 17A is silent as to which party has the burden when petitioning for modification or dissolution of the guardianship and thus Surrogate Courts place this burden on the party moving for the modification.

139. MHL Article 81, by contrast, specifically contemplates removal of the guardian or powers where the guardian or the power is no longer necessary. MHL § 81.36 (a).

140. Article 81 requires a hearing when a petition for modification or termination is initiated, as well as the right to a jury trial upon request. MHL § 81.36(c)

141. Significantly, under Article 81, the party opposing the termination of guardianship bears the burden of proving by clear and convincing evidence that the grounds for guardianship continue to exist. MHL § 81.36(d)

142. Under Article 81, where a petition seeks to increase the powers of a guardian, the petitioner has the burden of proving by clear and convincing evidence that such an increase in power in necessary. MHL § 81.36 (d)

Right to Vote

143. Anyone who has been adjudicated incompetent by order of a court of competent judicial authority loses the right to register for or vote at any election in New York State. See NY Elec. Law 5-106

144. The imposition of a plenary guardianship pursuant to Article 17A adjudicates a person as incompetent without a specific finding that the person is incapable of voting.

CLAIMS FOR RELIEF

First Claim for Relief – 42 U.S.C. § 1983 - Substantive Due Process

145. Plaintiff reasserts and incorporates paragraphs 1 to 144 as though fully set forth herein.

146. The Fifth and Fourteenth Amendments of the U.S. Constitution provide that neither the federal nor state government shall deprive any person "of life, liberty, or property without due process of law."

147. The Supreme Court has defined liberty broadly to include "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God…and generally enjoy those privileges long

recognized…as essential to the orderly pursuit of happiness by free men." Roth v. Board of Regents, 408 U.S. 564, 572 (1972) citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

148. The appointment of a plenary guardianship of the person under Article 17A deprives persons of the power to make decisions about where they live, with whom they associate, whether to seek and receive medical treatment, whether to marry and have children, and where they work. See In re Mark C.H., 28 Misc. 3d 765, 776 (N.Y. Surr. Ct. 2010) citing Matter of Chaim A.K., 26 Misc. 3d 837 (N.Y. Surr. Ct. 2009); In re D.D., 50 Misc. 3d 666 (N.Y. Surr. Ct. 2015).

149. Substantive Due Process under the Fifth and Fourteenth Amendments of the U.S. Constitution forbid the government from infringing on a fundamental liberty interest where the matter is not narrowly tailored to serve a compelling governmental interest.

150. Guardianship imposed under Article 17A infringes on a person's fundamental rights, liberties and privileges, including:

a. a fundamental right to privacy to engage in personal conduct without intervention from state government. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

b. a fundamental right to refuse unwanted medical treatment. Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990); and

c. a fundamental right to make personal decisions regarding marriage, procreation, contraception, family relationships, child rearing, and education. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851, (1992) citing Casey v. Population Services International, 431 U.S. 678, 685 (1977).

151. Where personal liberty is being deprived courts must apply only the least restrictive form of intervention consistent with the clinical condition of a given individual. See Jackson v. Indiana, 406 U.S. 715, 738 (1972).

152. Article 17A is unnecessarily broad because it imposes a plenary guardianship of the person, property or person and property that terminates all decision making authority without conducting a functional assessment of the person's ability to care for himself and without narrowly tailoring the guardian's powers to those areas of need.

153. There is no compelling governmental interest to continue to allow the imposition of Article 17A guardianships.

Second Claim for Relief – 42 U.S.C. § 1983 - Procedural Due Process

154. Plaintiff reasserts and incorporates paragraphs 1 to 153 as though fully set forth herein.

155. The Fifth and Fourteenth Amendments of the U.S. Constitution provide that neither the federal nor state government shall deprive any person "of life, liberty, or property without due process of law."

156. The continued authorization of Article 17A guardianships violates a person's right to procedural due process.

157. Courts look at three factors to determine whether a taking of liberty or property violated a person's rights to procedural due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

158. The appointment of a guardianship over people with disabilities pursuant to Article 17A is an official action of State of New York through the Unified Court System.

159. The risk of erroneously depriving individuals with disabilities of liberty and property interests through the process of an Article 17A guardianship proceeding is high because,

a. the notice afforded the person does not reasonably ensure the person is informed of the nature and possible consequences of the proceeding or the right to contest the proceeding;

b. the person is not entitled to legal representation;

c. the certifications of two physicians or a physician and psychologist is the primary evidence relied to determine if guardianship should be imposed;

d. said certifications can be obtained without the knowledge or consent of persons who are minors;

e. the guardianship is imposed without considering the functional capacity of the person to make decisions;

f. the court may dispense with the person's presence in court;

g. the court may dispense with the hearing;

h. the decision is made upon a mere preponderance of the evidence;

i. the statute only permits the appointment of a plenary guardianship;

j. the court does not need to examine lesser restrictive alternatives to plenary guardianship;

k. the statute does not require reporting and review of the need for the guardianship;

l. there are no procedures for the regular review of guardianships or even the termination of the guardianship; and

m. the process for removal of guardianship places the burden on a person seeking to remove the guardianship.

160. Further, the probative value of additional or substitute procedural safeguards is high as demonstrated by the due process protections afforded by Article 81 including:

a. the notice must inform the allegedly incapacitated person of the nature and possible consequences of the proceeding and the right to contest the proceeding;

b. the person is entitled to legal representation;

c. appointment of guardianship based upon the functional capacity of the person to make decisions;

d. procedures for ensuring the person's presence at the hearing;

e. the court may not dispense with the hearing without the allegedly incapacitated individual's consent;

f. a decision made upon clear and convincing evidence;

g. the court must examine lesser restrictive alternatives to guardianship;

h. the statute directs that if a guardian is appointed it is tailored to the person's needs;

i. procedures for the regular review of guardianships and the termination of the guardianship;

j. requires reporting and review of the need for the guardianship; and

k. the process for removal of guardianship places the burden on a person seeking to continue the guardianship.

161. Individuals with disabilities subject to Article 17A guardianship orders routinely go their entire lives without anyone reviewing the continued necessity for the guardianship order.

162. The nature and duration of the guardianship must bear some reasonable relation to the purpose for which the individual is committed to guardianship. See Jackson v. Indiana, 406 U.S. 715, 731(1972) (Supreme Court has held that a law permitting indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial violates the guarantee of proper procedural due process).

163. The Government's interest for appointing guardianship over a person under Article 17A is to protect the person with a disability. The appointment of guardianship without procedural due process protections is contrary to this governmental interest.

164. One of New York State's courts administered by defendants Chief Judge DiFiore and Chief Administrative Judge Marks has already concluded that the failure to periodically review Article 17A guardianships is unconstitutional. See In re Mark C.H., 28 Misc.3d 765 (N.Y. Surr. Ct. 2010) (holding that periodic reporting is required so that " . . . the court can ascertain whether the deprivation of liberty resulting from guardianship is still justified by the ward's disabilities, or whether she has progressed to a level where she can live and function on her own.")

165. The New York State Unified Court System is already equipped to provide the procedural protections needed to address the lack of due process in Article 17A because the Supreme Courts, which defendants Chief Judge DiFiore and Chief Administrative Judge Marks also administers, already provide procedural due process protections to persons with developmental and intellectual disabilities brought under MHL Article 81.

Third Claim for Relief - 42 U.S.C. § 1983 – Equal Protection

166. Plaintiff reasserts and incorporates paragraphs 1 to 165 as though fully set forth herein.

167. Under the Fourteenth Amendment of the U.S. Constitution, individuals subjected to Article 17A guardianship proceedings are entitled to Equal Protection of the laws and should not be subject to a statute which denies them Equal Protection in comparison to others similarly situated.

168. The Fourteenth Amendment requires that where a person's fundamental rights and liberties are implicated, "classification which might invade or restrain them must be closely scrutinized and carefully confined." See Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966).

169. Fundamental liberty interests protected by the U.S. Constitution encompass "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children ... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

170. Courts within New York State's Unified Court System have already ruled that guardianship constitutes a significant taking of liberty which implicates fundamental freedoms. See In re Mark C.H., 28 Misc. 3d 765, 775-777 (N.Y. Surr. Ct. 2010); In re D.D., 50 Misc. 3d 666, 668 (N.Y. Surr. Ct. 2015).

171. In cases involving deprivations of personal liberty, courts are required to impose only the least restrictive form of intervention consistent with the clinical condition of a given individual. See Jackson v. Indiana, 406 U.S. 715, 738 (1972); See also Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 165 (1973) ("To subject a person to a greater deprivation of his personal liberty than necessary to achieve the purpose for which he is being confined is, it is clear, violative of due process"); Carter v. Beckwith, 128 N.Y. 312, 319 (1891) ("[The] exercise of the jurisdiction of the court to deprive a person of his liberty and property on the ground of lunacy, however necessary, is, nevertheless, the exercise of a supreme power, and should be surrounded by all reasonable safeguards to prevent mistake or fraud…").

172. Guardianship proceedings for individuals living with intellectual or developmental disabilities may, under current law, be brought either pursuant to Article 17A or Article 8l.

173. MHL Article 81:

a. limits the appointment of guardianship even if the person is found to be incapacitated;

b. ensures sufficient notice is provided to reasonably inform the alleged incapacitated person of the nature and potential consequences of the proceeding and the right to a hearing and counsel;

c. applies the clear and convincing standard for the appointment of guardianship;

d. provides access to legal representation;

e. mandates an evidentiary hearing be held to allow for the greatest participation of the alleged incapacitated person;

f. mandates periodic reporting on the status of the guardianship;

g. prescribes a mechanism for termination of guardianship;

h. places the burden for the continuation of the guardianship on the party seeking to continue the guardianship;

i. specifically directs that guardianship must be administered in the least restrictive manner after consideration of all other alternatives.

174. In stark contrast, Article 17A

a. relies exclusively on the best interest standard for appointment of guardianship;

b. applies a lesser evidentiary standard (preponderance of the evidence) for the appointment of guardianship;

c. fails to provide notice reasonably certain to inform the allegedly incapacitated person of the nature and consequences of the proceeding;

d. lacks any procedure for the appointment of legal counsel;

e. permits hearings to be waived with the consent of a petitioner;

f. permits the presence of the alleged incapacitated person at the hearing to be waived;

g. places the burden on the person with a disability to modify or terminate the guardianship;

h. specifically directs that all guardianships are plenary without consideration for any other lesser restrictive alternatives.

175. There is no compelling or legitimate governmental interest for applying greater protections for appointing a guardianship over a person with an intellectual or developmental disability in one court proceeding (Article 81) and applying a totally different and lesser standard over a person with an intellectual or developmental disability in another court (Article 17A).

Fourth Claim for Relief – ADA claim under 42 U.S.C. § 12132

176. Plaintiff reasserts and incorporates paragraphs 1 to 175 as though fully set forth herein.

177. Under the Americans with Disabilities Act (42 U.S.C.A. § 12132) ("ADA"), a qualified individual with a disability may not be subject to discrimination for reason of his disability by any state entity or program receiving federal support. 42 U.S.C.A. § 12132.

178. A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).

179. The definition of disability must be construed in favor of broad coverage of individuals under the ADA. 42 U.S.C. § 12102(4)(A).

180. A "qualified individual with a disability" is defined as "an individual with a disability who … meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." United States v. Georgia, 546 U.S. 151, 153–54 (2006) (quoting 42 U.S.C. § 12131(2)).

181. Individuals with intellectual disabilities and developmental disabilities qualify as having disabilities under New York Law. See SCPA §§ 1750-1750-a

182. The New York Unified Court System is the judicial arm of the New York State Government.

183. Individuals with disabilities who are subjected to an Article 17A proceeding do not have a choice of forum for the guardianship proceeding. The petitioner seeking the guardianship elects the forum.

184. Individuals with intellectual and developmental disabilities are placed under Article 17A guardianships because of their disabilities.

185. Failure to afford qualified individuals with disabilities the procedures and protections afforded to other individuals with disabilities through Article 81 – including consideration of the least restrictive form of intervention in determining the need for a guardian - has a discriminatory effect.

186. Individuals with disabilities must not be subjected to a different guardianship standard which presents greater barriers to their full participation in society or enjoyment of their rights and liberties.

187. In order to avoid a discriminatory outcome, defendants must make reasonable modifications.

188. The defendants recognize the discriminatory impact of the strict application of Article 17A but have not taken steps to reasonably modify the practice of appointing guardianships.

Fifth Claim for Relief –Section 504, 29 U.S.C. § 794

189. Plaintiff reasserts and incorporates paragraphs 1 to 188 as though fully set forth herein.

190. Section 504 of the Rehabilitation Act requires that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a).

191. A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 29 U.S.C. § 705(9)(B) *citing* 42 U.S.C. § 12102(1)(A).

192. The definition of disability must be construed in favor of broad coverage of individuals under Section 504. See 42 U.S.C. § 12102(4)(A).

193. Individuals with intellectual disabilities and developmental disabilities qualify as having disabilities under New York Law. SCPA § 1750-1750-a.

194. The term "program and activity means all the operations of a department, agency, special purpose district, or other instrumentality of a State." 29 U.S.C. § 794(b)(1)(A)

195. The New York Unified Court System is the judicial arm of the State of New York.

196. New York State received federal financial assistance to operate programs and activities in New York State.

197. The New York State Unified Court System receives federal assistance in the form of grants which it distributes to programs it administers and is therefore a covered public entity under Section 504. See NY State Unified Court System, Fiscal Year 2016-2017 Budget at https://www.nycourts.gov/admin/financialops/Budgets.shtml.

198. Individuals with disabilities who are subjected to an Article 17A proceeding do not have a choice of forum for the guardianship proceeding. The petitioner seeking the guardianship elects the forum.

199. Individuals with qualifying disabilities are placed under Article 17A guardianships because of their disabilities.

200. Failure to afford qualified individuals with disabilities the procedures and protections afforded to other individuals with disabilities through MHL Article 81 – including consideration of the least restrictive form of intervention in determining the need for a guardian - has a discriminatory effect.

201. Individuals with intellectual and developmental disabilities must not be subjected to a different guardianship standard which presents greater barriers to their full participation in society or enjoyment of their rights and liberties.

202. In order to avoid a discriminatory outcome defendants must make reasonable modifications.

203. The defendants recognize the discriminatory impact of the strict application of Article 17A but have not taken steps to reasonably modify the practice of appointing guardianships.

RELIEF REQUESTED

THEREFORE, Plaintiff respectfully ask that this Court grant the following relief against defendants, including:

1) Entering a declaratory judgment, pursuant to Rule 57 of the Federal Rules of Civil Procedure, stating that

   a. Article 17A violates the United States Constitution;

   b. Article 17A violates the Americans with Disabilities Act; and

   c. Article 17A violates Section 504 of the Rehabilitation Act of 1973.

2) Entering a permanent injunction requiring defendants to

   a. notify all people who are currently subject to guardianship orders pursuant to Article 17A of their right to request modification or termination the guardianship order; and

   b. upon defendants receiving such a request, to promptly hold a proceeding regarding termination or modification of the order, at which the burden of proof by clear and convincing evidence shall be on the party opposing the termination or modification of the order, and which provides substantive and procedural rights to the allegedly

incapacitated person that are no less than the substantive and procedural rights of an allegedly incapacitated person in an MHL Article 81 proceeding.

3) Permanently enjoining defendants from adjudicating incapacity and appointing guardians pursuant to SCPA Article 17A, until defendants ensure that the proceedings provide substantive and procedural rights that do not violate the United States Constitution, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, and which are not inferior to the substantive and procedural rights enjoyed by allegedly incapacitated persons in MHL Article 81 proceedings.

4) Awarding reasonable costs and attorneys' fees, and awarding any and all other relief, according to proof, that may be necessary and appropriate.

DATED: September 21, 2016

Albany, New York

Respectfully submitted,

Jennifer J. Monthie

DISABILITY RIGHTS NEW YORK
Attorneys for Plaintiff

TIMOTHY A. CLUNE
Bar Roll No. TC1506

JENNIFER J. MONTHIE
Bar Roll No. JM4077

725 Broadway, Suite 450
Albany, New York 12207
(518) 432-7861 (telephone)
(518) 427-6561 (fax) (not for service)

Report and Recommendations of the Olmstead Cabinet

A Comprehensive Plan for Serving New Yorkers with Disabilities in the Most Integrated Setting

OLMSTEAD
Community Integration for Every New Yorker

Andrew M. Cuomo
Governor

Roger Bearden
Special Counsel for Olmstead

"People with disabilities have the right to receive services and supports in settings that do not segregate them from the community; it is a matter of civil rights."

—Governor Andrew M. Cuomo

REPORT AND RECOMMENDATIONS OF THE OLMSTEAD CABINET

A Comprehensive Plan for Serving People with Disabilities in the Most Integrated Setting

New York State

Andrew M. Cuomo, Governor

October 2013

TABLE OF CONTENTS

Introduction

Under Governor Andrew M. Cuomo, New York is reclaiming its leadership role in serving people with disabilities. In 2011, the Governor directed a landmark redesign of the state's Medicaid program in order to improve care coordination and the delivery of cost-effective, community-based care. The Governor also established the Justice Center for the Protection of People with Special Needs (Justice Center), which provides the strongest protections from abuse and neglect for people with disabilities in the nation.

To further safeguard the rights of people with disabilities, in November 2012, Governor Cuomo issued Executive Order Number 84 to create the Olmstead Development and Implementation Cabinet (Olmstead Cabinet). The Olmstead Cabinet was charged with developing a plan consistent with New York's obligations under the United States Supreme Court decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999) (Olmstead). Olmstead held that the state's services, programs, and activities for people with disabilities must be administered in the most integrated setting appropriate to a person's needs.

To examine New York's compliance with Olmstead, the Olmstead Cabinet employed a broad and inclusive process. The Olmstead Cabinet received public comment through four public forums and through a dedicated page on the Governor's website. The cabinet met with over 160 stakeholder organizations and received over 100 position papers. Hundreds of state agency personnel across a dozen agencies providing services to people with disabilities participated in multiple discussions and provided data regarding New York's service systems for people with disabilities.

The results of the Olmstead Cabinet's work are contained in this report. This report identifies specific actions state agencies responsible for providing services to people with disabilities will take to serve people with disabilities in the most integrated setting. These actions will:

- Assist in transitioning people with disabilities out of segregated settings and into community settings;
- Change the way New York assesses and measures Olmstead performance;
- Enhance the integration of people in their communities; and
- Assure accountability for serving people in the most integrated setting.

Together, the actions described in this report will ensure that New York is a leader in providing services to people with disabilities in the most integrated setting, consistent with their fundamental civil rights.

Report and Recommendations

I. The Olmstead Mandate

The Olmstead decision addressed the rights of two women who had been confined in a Georgia state psychiatric hospital for five and seven years beyond the time at which they had been determined ready for community discharge. The United States Supreme Court held that the failure to provide community placement for these people constituted discrimination under the Americans with Disabilities Act. The court also held that states are required to provide community-based services to people with disabilities when: (a) such services are appropriate; (b) the affected persons do not oppose community-based treatment; and (c) community-based services can be reasonably accommodated, taking into account the resources available to the state and the needs of others who are receiving disability services from the state.[1]

The Olmstead case itself concerned people in a psychiatric hospital. Subsequent cases have addressed developmental centers, board and care homes, and people at-risk of institutional care. Most recently, the Olmstead mandate has been extended to segregated employment services for people with disabilities. Given the breadth and continuing evolution of the Olmstead mandate, in order to develop its specific recommendations, the Olmstead Cabinet sought the views of a broad set of stakeholders regarding the areas in which the cabinet should focus its attention. Through this stakeholder engagement, four areas of focus emerged:

1. The need for strategies to address specific populations in unnecessarily segregated settings, including:
    a. People with intellectual and developmental disabilities in developmental centers, intermediate care facilities (ICFs), and sheltered workshops;
    b. People with serious mental illness in psychiatric centers, nursing homes, adult homes, and sheltered workshops; and
    c. People in nursing homes.
2. The need to increase opportunities for people with disabilities to live integrated lives in the community;
3. The need to develop consistent cross-systems assessments and outcomes measurements regarding how New York meets the needs and choices of people with disabilities in the most integrated setting;
4. The need for strong Olmstead accountability measures.

The following sections of this report discuss each of these areas of focus in turn.

[1] *Olmstead v. L.C.*, 527 U.S. 581. (1999).

II. Transitioning People with Disabilities from Segregated Settings to the Community

In collaboration with state agencies providing services to people with disabilities and a broad set of stakeholders, the Olmstead Cabinet sought to identify specific strategies to assist people with disabilities residing in segregated settings to transition to community-based settings. The specific settings and strategies are described in the sections that follow.

A. People with Intellectual and Developmental Disabilities in Developmental Centers, Intermediate Care Facilities, and Sheltered Workshops

In April 2013, Governor Cuomo announced a comprehensive transformation plan for serving people with intellectual and developmental disabilities in the most integrated setting.[2] The plan addresses the approximately 1,000 people who resided in developmental centers as of April 2013. The Office for People With Developmental Disabilities (OPWDD) closed its West Seneca Developmental Center in May 2011 and the Staten Island Multiple Disabilities Unit in June 2012, with the individuals residing at these facilities moving to community-based residential services. In addition, OPWDD will close the Monroe and Taconic developmental centers by December 2013, and the 155 people residing at those centers will move to community-based residential settings.

The transformation plan includes the closure of four additional developmental centers in the next four years: Oswald D. Heck (by March 2015); Brooklyn (by December 2015); Broome (by March 2016); and Bernard M. Fineson (by March 2017). It is projected that OPWDD will retain capacity for 150 individuals to receive short-term intensive treatment services in the remaining developmental centers. In addition, over the next few months, OPWDD will finalize its timeline for additional community transition opportunities for other people with intellectual and developmental disabilities residing in community-based ICFs and nursing homes.

OPWDD is also changing the nature of its service system by developing consistent, person-centered intake practices through its Front Door initiative, a comprehensive, person-centered needs assessment process with enhanced, person-centered planning, a fuller menu of community-based supports to better meet a person's needs in community-based settings, and quality oversight that examines individual outcomes as well as systems measures.[3]

Under its transformation plan, OPWDD will also be exploring new options for community-based housing and has begun participating in the New York State Money Follows the Person (MFP) demonstration. Within the MFP demonstration, people with intellectual and developmental disabilities will transition from institutional settings (developmental centers, community-based ICFs, and nursing homes) to community-based independent housing, supported housing, or supervised residences of four or fewer unrelated people, as appropriate. With this range of housing options and smaller residential service settings, OPWDD anticipates that the people transitioning from institutional settings will lead more integrated lives.

OPWDD's participation in the MFP demonstration began in April 2013. Over the next four years, OPWDD will assist 875 people with developmental disabilities who currently reside in institutional settings to move to community-based settings. This demonstration will require OPWDD to identify people who wish to move to the community and to work with those people to develop transition plans and identify community-based service options to meet their needs in community settings,

---

[2] New York. Office for People With Developmental Disabilities. (April 2013). *Road to Reform: Putting People First*. Retrieved from http://www.opwdd.ny.gov/opwdd_about/commissioners_page/OPWDD_Road_to_Reform_April2013.

[3] Additional information about OPWDD's Front Door imitative is available at http://www.opwdd.ny.gov/welcome-front-door/home.

and to facilitate that transition. OPWDD will utilize peer outreach to identify potential MFP demonstration participants, provide accurate information and referral, and effectively address concerns of participants and family members. Contracted transition coordinators will work closely with OPWDD regional staff to transition MFP demonstration participants to the community through Home and Community-Based Services (HCBS) waiver enrollment.

OPWDD will track all participants' experiences in the MFP demonstration using the Quality of Life Survey to measure the community integration outcomes. This survey will be administered prior to MFP demonstration participants' transition to the community, at 11 months post transition, and at 24 months post transition. This survey measures key integration outcomes for people transitioning from institutional to community-based settings, including living situation, choice and control, access to personal care, respect/dignity, community integration/inclusion, overall life satisfaction, and health status.[4]

OPWDD will also promulgate regulatory amendments to align OPWDD regulations and requirements with the federal Centers for Medicare & Medicaid Services' (CMS) proposed standards for HCBS settings.[5] These requirements, which largely mirror existing OPWDD regulations, will be implemented throughout OPWDD's service delivery system and will further define the characteristics of a community-based setting that must be present wherever HCBS services are delivered. In addition to the regulations, OPWDD will adopt implementation guidelines and integrate these enhanced standards into its oversight activities.

An important goal of the transformation of the service system for people with intellectual and developmental disabilities is implementation of a self-directed approach in which MFP demonstration participants and/or their designated representatives will be given the option of self-directing by employer authority and budget authority or, at the preference of the individual, either employer authority or budget authority. As part of this effort, OPWDD will offer increased education to all stakeholders by providing a standard curriculum on self-direction to at least 1,500 people and their designated representatives per quarter beginning on April 1, 2013. As a result, OPWDD has set a goal of enabling 1,245 new people to self-direct their services by March 31, 2014.

Recognizing the need to build additional community capacity to support people with developmental disabilities and their families in the community, OPWDD is piloting the national Systemic, Therapeutic, Assessment, Respite, and Treatment (START) program model to provide emergency crisis services and limited therapeutic respite services.[6] This program will begin as a pilot in the Finger Lakes and Taconic regions, where OPWDD plans to close its developmental centers in 2013.

---

[4] Additional information about the Money Follows the Person Quality of Life Survey can be found at http://apply07.grants.gov/apply/opportunities/instructions/oppCMS-1LI-13-001-cfda93.791-cidCMS-1LI-13-001-013945-instructions.pdf.

[5] State Plan Home and Community Based Services under the Act," Proposed Rulemaking. *Federal Register,* 77:86, (May 3, 2012) p. 26361.

[6] Additional information about the Systemic, Therapeutic, Assessment, Respite, and Treatment program can be found at http://www.centerforstartservices.com/community-resources/newyorkpublic.aspx.

OPWDD is also increasing integrated employment opportunities for people with developmental disabilities. On May 31, 2013, New York provided CMS with a baseline count of the number of enrollees receiving supported employment services and the number of enrollees engaged in competitive employment. As of July 1, 2013, OPWDD no longer permits new admissions to sheltered workshops. By October 1, 2013, New York will increase the number of people with developmental disabilities in competitive employment by no fewer than 250 people. Only integrated, gainful employment at minimum wage or higher will be considered competitive employment. New York submitted a draft plan to CMS for review on October 1, 2013, and will submit a final plan no later than January 1, 2014, on its transformation toward a system that better supports competitive employment for people with developmental disabilities.[7]

B. People with Serious Mental Illness in Psychiatric Centers, Nursing Homes, Adult Homes and Sheltered Workshops

The New York State Office of Mental Health (OMH) is implementing the Olmstead mandate in several ways. First, the development of behavioral health managed care will enhance community integrated health and mental health plans of care. Second, the development of Regional Centers of Excellence (RCE) will reorient OMH's state psychiatric center system to focus on high quality, intensive treatment with shorter lengths of stay and enhanced treatment and support in the community.[8] Third, the implementation of two settlement agreements will assist people in moving from nursing homes and adult homes to integrated community apartments supported by services that focus on rehabilitation, recovery, and community inclusion.

Under Medicaid redesign for managed behavioral health care, New York will create special needs Health and Recovery Plans (HARPs): distinctly qualified, specialized, and integrated managed care programs for people with significant behavioral health needs. Mainstream managed care plans may qualify as HARPs only if they meet rigorous standards or if they partner with a behavioral health organization to meet those standards.[9] HARPs will include plans of care and care coordination that are person centered and will be accountable for both in-plan benefits and non-plan services. HARPs will interface with social service systems and local governmental units to address homelessness, criminal justice, and employment related issues, and with state psychiatric centers and health homes to coordinate care. HARPs will include specialized administration and management appropriate to the populations/services, an enhanced benefit package with specialized medical and social necessity/utilization review approaches for expanded recovery-oriented benefits, integrated health and behavioral health services, additional quality metrics and incentives, enhanced access and network standards, and enhanced care coordination expectations.

To support the extension of outpatient services to people in their homes and communities, OMH will seek federal approval to provide mental health outpatient services outside of facility-based locations. Providing mobile services will increase access and effectiveness of care for people who cannot or will not access facility-based services. More accessible, consistent, and effective treatment is expected to reduce the need for inpatient care, and will instead serve people with psychiatric disabilities in the most integrated setting.

---

[7] The workplan is available at: http://www.opwdd.ny.gov/opwdd_services_supports/employment_for_people_with_disabilities/draft-plan-increase-employment-opps.

[8] Additional information about the Regional Centers of Excellence is available at http://www.omh.ny.gov/omhweb/excellence/rce/.

[9] New York. Department of Health. (June 18, 2013). *MRT Behavioral Health Managed Care Update*. (PowerPoint slides). Retrieved from http://www.health.ny.gov/health_care/medicaid/redesign/docs/2013-6-18_mc_policy_planning_mtg.ppt.

Complementing its transformation of community-based services, in July 2013, OMH announced its plan to transform New York's inpatient psychiatric hospitals into regional centers of excellence (RCEs).[10] RCEs will be regionally-based networks of inpatient and community-based services, each with a specialized inpatient hospital program located at its center with geographically dispersed community service "hubs" overseeing state-operated, community-based services throughout the region. The RCE plan reduces the number of state psychiatric centers from 24 to 15, eliminating 655 inpatient beds in favor of community services. Over the next year, OMH will pursue a regional planning process to guide the development of its RCEs. This planning process will include the assessment of existing community capacity within its five state regions and recommendations for the development of additional community capacity to prevent unnecessary hospitalization and to transition people currently residing in psychiatric hospitals back to their communities. These recommendations will be prepared by December 2013.

Coupled with its community capacity evaluation, OMH will focus on transitioning long-stay patients currently residing at psychiatric hospitals back into the community. OMH has steadily reduced its inpatient psychiatric population from 43,803 in 1973 to 3,876 in 2012 by creating appropriate community placements and supports. As of July 1, 2013, the total number of non-forensic patients in New York's state psychiatric centers was 2,980, 1,328 of whom have stayed longer than one year. Over the next two years, OMH has established a goal to reduce this number of long-stay patients by 10 percent by transitioning these people to appropriate community housing and services.[11]

In addition to its inpatient psychiatric reforms, in September 2011, New York settled a federal class action lawsuit, *Joseph S. v. Hogan*, concerning people with serious mental illness discharged or at risk of discharge to nursing homes from state-operated psychiatric centers and psychiatric wards of general hospitals. All remedy class members capable of and willing to live in the community will be provided with, or otherwise obtain, community housing and community supports by November 2015. In July 2012, OMH awarded contracts for 200 units of supported housing in order to increase the housing available for qualified people transitioning out of nursing homes. An initial community transition list of remedy class members was developed in December 2012 and will continue to be revised through November 2014. In addition, New York revised its pre-admission screen and resident review process for people with serious mental illness proposed for admission to nursing homes to further prevent unnecessary admissions to these facilities.[12]

New York has also pursued a comprehensive strategy to provide community housing for people with serious mental illness residing in transitional adult homes.[13] In 2012, New York awarded contracts for 1,050 supported housing opportunities for residents of transitional adult homes. In 2012, the Department of Health (DOH) and OMH finalized regulations regarding residents of

---

[10] New York. Office of Mental Health. (July 11, 2013). *OMH Regional Centers of Excellence: Today Begins a New Era in New York's Behavioral Health System.* Retrieved from http://www.omh.ny.gov/omhweb/excellence/rce/docs/rceplan.pdf.

[11] Non-forensic patients are those not on the following statuses: felony defendants found incompetent to stand trial (CPL §730); defendants found not responsible for criminal conduct due to mental disease or defect (CPL §330.20); pre-trial detainees in local correctional facilities in need of inpatient care (CL §508); inmates sentenced to state and local correctional facilities in need of inpatient care (CL §402); civil patients transferred to a forensic facility (14NYCRR §57.2); and people committed to sex offender treatment programs within a secure treatment facility (MHL Art. 10).

[12] *Joseph S. v. Hogan.* No. 06-cv-01042, ECF 232 (E.D.N.Y. Sept. 7, 2011).

[13] Transitional adult homes are defined in regulations as adult homes with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are people with serious mental illness. See 18 NYCRR §487.13 for more information.

transitional adult homes to assist in their movement to more integrated settings. These regulations were based on a 2012 OMH clinical advisory, which found that such homes "are not clinically appropriate settings for the significant number of people with serious mental illness who reside in such settings, nor are they conducive to the rehabilitation or recovery of such people."[14]

In July 2013, New York reached a settlement with the plaintiffs in longstanding litigation concerning 23 adult homes in New York City serving people with serious mental illness. Over the next five years, New York will provide integrated supported housing to at least 2,000 adult home residents along with appropriate community-based services and supports. The agreement also will ensure that adult home residents have the information they need to make an informed choice about where to live. As these adult home residents choose to move to supported housing, they will participate in a person-centered, transition planning process.

Since January 2011, OMH has shifted its reliance on sheltered workshops to integrated, competitive employment for people with psychiatric disabilities who desire to work. As of December 31, 2013, all OMH funding of community-based sheltered workshops will be converted to funding of programs that support integrated and competitive employment. Agencies received technical support through New York State Rehabilitation Association and the Medicaid Infrastructure Grant to develop sound business plans to transition individuals served in sheltered workshops into integrated, competitive employment. Local government units played integral roles in developing and reviewing plans that were submitted to OMH for review and approval, and agencies operating sheltered workshops were able to reinvest this sheltered workshop funding into one of several alternatives, including assisted competitive employment, transitional employment program, affirmative business, and transitional business programs.[15]

C. People in Nursing Homes

New York has pursued a number of policies to support community living for people with disabilities residing in, or at risk of placement in, nursing homes. These include the MFP demonstration, the Nursing Home Transition and Diversion Waiver, the Traumatic Brain Injury Waiver, the Long-Term Home Health Care Plan, and the Care at Home I and II waivers. All of these alternatives provide access to community-based supports for people who meet the criteria for nursing home level of care.

Through its Medicaid redesign initiatives, over the next several years, New York will include all Medicaid-eligible nursing home residents in mandatory managed care. The mandatory "care management for all" initiative is well underway for people receiving Medicaid only, as well as for people who are dually-eligible (Medicaid and Medicare), over the age of 21, and who require at least 120 days of community-based care. New populations and benefits are expected to steadily phase in to mainstream managed care and managed long-term care over the next few years.

Building on the care management for all initiative, reforms in the 2012-2013 budget removed the financial incentives that may have encouraged nursing home placement. Previously, nursing home costs were "carved out" of managed care rates and were instead covered by the state. This policy had the potential to encourage managed care plans to pressure high-cost people served in community-based settings to enter nursing homes. Budget reforms will include the full cost of nursing home care in managed care rates, which is expected to encourage these plans to seek lower cost, community-based services.

---

[14] L.I. Sederer, MD, memorandum, August 8, 2012, available at http://www.omh.ny.gov/omhweb/advisories/Clinical_Advisory_Adult.pdf.

[15] Definitions of these programs are available at http://www.omh.ny.gov/omhweb/cbr/fy09/section_30.html.

For certain people with significant disabilities, the cost of community-based care will exceed that of nursing home care. For these people, New York is developing financing structures that will permit these people to continue to reside in the community or transition from nursing home to the community, as well as avoid clustering people with significant disabilities in certain plans with preferred benefits. These financing structures will likely include the development of a funding pool to provide supplemental payment to plans serving these people to support their high-cost needs in the community.

To complement these initiatives, DOH is currently exploring mechanisms to enhance existing transition and diversion efforts for people currently residing in nursing homes. DOH will develop and adopt Olmstead performance measures which will be incorporated into its managed care contracts. These measures will evaluate the extent to which plans encourage the transition of people from nursing homes to the community; maintain people in the community; prevent nursing home placement; offer consumer-directed services as the first option for plan enrollees; support the use of assistive technologies; and encourage consumer choice and control.

Additionally, DOH has committed to reduce the long-stay population in nursing homes.[16] As of December 31, 2012, the total number of nursing home residents in New York was 119,987, of which 92,539 have stayed 90 days or more.[17] DOH has set a goal of reducing the long-stay population by 10 percent over the next five years. This target will be coupled with a home and community-based services and housing investment strategy to increase the availability of appropriate community-based housing and services.

[16] Here, long stay is defined as residence in a nursing facility for 90 days or longer, for other than a rehabilitative stay.

[17] Data were derived from the Minimum Data Set 3.0 and include all payment sources. Data include continuing care retirement communities and pediatric facilities, but excludes transitional care Units and four non-Medicaid facilities.

III. Assessment and Outcomes Strategies to Advance Community Integration

In addition to identifying strategies to transition people with disabilities from segregated to community-based settings, the Olmstead Cabinet examined the methods by which the state agencies providing services to people with disabilities understand the needs and choices of the people they serve and how those agencies measure whether those needs and choices are being met in the most integrated setting. The Olmstead Cabinet found inconsistencies in these outcome measures and recommends that state agencies providing services to people with disabilities develop or improve their assessment instruments and processes and Olmstead outcomes measures.

Over the past several years, New York has increasingly standardized its assessments of needs and choice for people with disabilities within its service systems. DOH consolidated eight separate assessment instruments previously used in its home care programs into a single instrument, called the Uniform Assessment System-New York (UAS-NY).[18] OPWDD is developing the Coordinated Assessment System-New York (CAS-NY) for all people served within its service system.[19] Significantly, the CAS-NY shares a common core of clinical items with the UAS-NY, which will permit OPWDD and DOH to assure no-wrong-door access to services and programs administered by these two agencies.

Building upon this initiative, OMH will develop an assessment for its community-based mental health system that shares a common core with both the UAS-NY and CAS-NY. OMH will then explore extending this assessment tool to its inpatient psychiatric hospitals.

Similarly, the State Office for the Aging (SOFA) will revise its Comprehensive Assessment for Aging Network Community Based Long Term Care Services (COMPASS) tool to share a common core with the UAS-NY, CAS-NY, and OMH's revised assessment tool. Currently, while the people and families served by SOFA programs are at high risk of spending down to Medicaid eligibility levels, SOFA's current assessment is not interoperable with the UAS-NY and the Minimum Data Set 3.0, used to assess residents of nursing homes. As a result, opportunities for strategic investment in non-Medicaid services to avoid institutionalization may not be readily identified. The development of consistent, cross-systems core assessments of the service needs and choices of people with disabilities of all ages will address this deficiency. Further, technological interfaces between SOFA and DOH data systems will help facilitate meeting cross-systems needs of people and enhance the ability to follow an individual through different systems and determine their progress in meeting their care plans, goals, and objectives.

The process for conducting assessments will also change. To enhance person-centered planning, New York will implement the Community First Choice Option (CFCO) as an amendment to its Medicaid State Plan. The assessment process will be expected to assess for "community first" service options as the default mechanism, so that every person with a disability is offered services in the most integrated setting and only receives services in a more restrictive setting when necessary. Under CFCO, New York will examine and revise existing assessment processes to ensure that service plans will reflect the services and supports important to the individual, identified through an assessment of functional need and preferences for the delivery of such services and

[18] For more information on the Uniform Assessment System-New York, see http://www.health.ny.gov/health_care/medicaid/redesign/uniform_assessment_system/.

[19] For more information on the Coordinated Assessment System-New York, see http://www.opwdd.ny.gov/people_first_waiver/coordinated_assessment_system/.

supports. This revised assessment process will also seek to minimize conflicts of interest by requiring the assessments be conducted independent of the service delivery system.

Building upon interoperable assessment tools and processes, the agencies providing services to people with disabilities will examine and revise their current outcome measures to incorporate Olmstead measures. To achieve community integration for people with disabilities, New York's service systems must measure whether these services maximize the opportunity for people with disabilities to lead integrated lives. These measures should include whether people with disabilities have control over their own day, whether they control where and how they live, whether they have the opportunity to be employed in non-segregated workplaces for a competitive wage, and whether they have the opportunity to make informed choices about services and supports.

Through design teams and workgroups associated with the People First Waiver, OPWDD explored the best practices for measuring the outcomes that are most important to people with developmental disabilities. After this review, OPWDD selected the Council on Quality and Leadership's Personal Outcome Measures (CQL POMs).[20] The 21 measures of the CQL POMs identify the areas of greatest importance to a person receiving supports and the support areas in which improvements may be needed.[21] OPWDD will incorporate the CQL POMs into the new managed care infrastructure for the developmental disabilities service system.

As part of the implementation of Medicaid managed care, DOH, OMH, OPWDD, and the Office of Alcoholism and Substance Abuse Services (OASAS) are establishing common quality measures across all managed care plan types. Similar to the CQL POMs, these measures will include whether people with disabilities have control over their own day, whether they control where and how they live, whether they have the opportunity to be employed in integrated workplaces for a competitive wage, and whether they have the opportunity to make informed choices about services and supports. These measures will be developed in time for the planned June 2014 implementation of the behavioral health managed care initiative.

In addition, state agencies will enhance the comprehensiveness of their assessment tools. For people with disabilities, true community integration involves the ability to access integrated housing, employment, transportation, and support services. In revising their assessment tools, state agencies will jointly identify relevant items that include these domains and incorporate these items into their assessment tools.

Reforms to New York's assessment of needs and choice and Olmstead outcomes measurement will be sustained by investments made under the federal Balancing Incentive Program (BIP).[22] Participation in the BIP will reinforce New York's ongoing efforts to improve access to home and community based long-term care services for those with physical, behavioral health, and/or

[20] Additional information about the Council on Quality and Leadership's Personal Outcome Measures is available at http://www.opwdd.ny.gov/opwdd_services_supports/people_first_waiver/documents/POMs_fact_Sheet_clean.

[21] In addition to personal outcomes, the CQL POMs measure community integration outcomes, such as whether the person is connected to natural support networks, has intimate relationships and friends, chooses where and with whom they live, chooses where they work, lives in integrated environments, interacts with other members of the community, performs different social roles, chooses services, chooses and realizes personal goals, and participates in the life of the community.

[22] New York received an award letter from CMS on March 15, 2013, to participate in the federal Balancing Incentive Program authorized under the Affordable Care Act. For more information about this program, see http://www.health.ny.gov/health_care/medicaid/redesign/balancing_incentive_program.htm.

intellectual and developmental disabilities throughout the state. Through improved access to information and assistance, people with disabilities will be able to make informed choices regarding services, settings, and related issues. To achieve these goals, New York will implement the three structural changes required under BIP. Specifically, New York will enhance the existing New York Connects network to assure a no wrong door/single point of entry for long-term care services and supports, implement a standardized assessment instrument, and assure conflict-free case management services.[23,24]

[23] New York Connects is currently operational in 54 counties and serves as an information and assistance system for long term care services. Additional information about New York Connects is available at www.nyconnects.ny.gov/.

[24] Conflict-free case management is defined by the Balancing Incentive Program as eligibility determination independent of service provision; case managers and evaluators not related to service recipients; robust monitoring and oversight; accessible grievance process; measurement of consumer satisfaction; and meaningful stakeholder engagement. For more information, see http://www.balancingincentiveprogram.org/resources/what-design-elements-does-conflict-free-case-management-system-include.

IV. Supporting Community Integration for People with Disabilities

The Olmstead mandate addresses not only the movement of people with disabilities from segregated to community-based settings, but also the ability of those people to lead integrated lives. Therefore, the Olmstead Cabinet's review sought to identify how New York can further support the integration of people with disabilities in their communities and worked with state agencies to develop policies that would improve community integration.

A. Housing Services

New Yorkers with disabilities need affordable, accessible housing to lead integrated lives. New York has long been a leader in the development of a continuum of housing options for people with disabilities, which include congregate and scattered-site supportive housing, tenant-based rental assistance that enables people with disabilities to lease housing in integrated developments, and apartments specifically set aside for people with various disabilities in mainstream, multi-family housing developments. New York invests over $900 million annually in supportive housing initiatives, and in the past two years, New York has invested an additional $161 million in supportive housing as part of Medicaid redesign.

The Medicaid Redesign Team Affordable Housing Work Group is a cross-agency body composed of representatives from multiple state agencies administering and/or funding supportive housing programs, including OMH, OPWDD, OASAS, DOH, Homes and Community Renewal (HCR), and the Office of Temporary and Disability Assistance (OTDA).[25] This work group has achieved $161 million in supportive housing investments over the last two years for high-cost Medicaid recipients. The work group will reconvene in October 2013 to consider further collaborations to increase the number of available and affordable housing options and community supports to increase the availability of integrated housing.

HCR facilitates the availability of community-based supportive housing for people with disabilities through early decision, scoring, and financing incentives for multi-family housing projects. Housing projects may be jointly funded by HCR and a state human service agency, such as OPWDD, OMH, or OASAS. In 2013 (as in past years) early decision incentives are available for multi-family, supportive housing projects that set aside a percentage of units for low-income veterans with special needs and people with intellectual and developmental disabilities. Project developers must also show that they have entered into agreements with human service providers to operate and fund community-based support services. HCR also awards developers applying for New York State low-income housing tax credits additional points in its scoring system for projects which reserve a percentage of units for people with mobility and sensory impairments, and for those that give preference in tenant selection for people with special needs. Additional tax credits, tax-exempt bond financing, and funding in excess of usual program limits are also available for multi-family housing projects with units set aside for special needs populations, depending on ownership and financing circumstances. Beginning in its 2013 annual funding round, HCR will examine new project applications to assess whether new developments are consistent with Olmstead principles.[26]

---

[25] For more information about the Medicaid Redesign Team Affordable Housing Work Group, see http://www.health.ny.gov/health_care/medicaid/redesign/affordable_housing_workgroup.htm.

[26] For more information on the Homes and Community Renewal Annual Funding Round RFP, see http://www.nyshcr.org/Funding/UnifiedFundingMaterials/2013/RFP_MultiFamilyPrograms.pdf.

As part of its monitoring of completed projects, HCR verifies that project units set aside for people with disabilities are occupied by the special needs population intended, as provided for in the developer's regulatory agreement and affirmative marketing plan. In instances where a service provider is unable to provide qualified applicants or has discontinued operations, HCR requires that an acceptable replacement provider be identified and may allow a different special needs population to be targeted.

OTDA engages in a variety of housing initiatives to support the state's implementation of its Olmstead Plan. The agency's Bureau of Housing and Support Services (BHSS) administers both capital and housing programs that are focused on providing supportive housing for homeless people with disabilities and their families in the least restrictive environment possible. OTDA's Homeless Housing and Assistance Program (HHAP), created in 1983, was the first state-funded program in the country to develop supportive housing units for homeless people with disabilities and their families. Among those for whom such housing is provided are homeless people with serious and persistent mental illness, including those with co-occurring substance abuse disorders; people living with HIV/AIDS; people with cognitive impairments such as those caused by traumatic brain injury; and people with other mental and/or physical disabilities. In addition, OTDA's New York State Supportive Housing Program (NYSHHP) provides funding for housing retention services and other supports for formerly homeless people with disabilities who are living in supportive housing programs throughout the state. Many of these supportive housing programs are located in "mixed use" apartment buildings which house people with disabilities along with other community members. Finally, OTDA's Solutions to End Homelessness Program (STEHP) contracts with local not-for-profit agencies to provide eviction prevention services to prevent people at risk of homelessness, including those with disabilities, from losing their housing. STEHP also provides short-term rental assistance and other supports to homeless individuals, including those with disabilities and their families in order to obtain housing available in the general rental market. All of OTDA's housing efforts are aimed at assisting homeless people, including those with disabilities, to obtain and retain housing of their own choosing within the community.

In addition to these programs and incentives, the Olmstead Cabinet examined opportunities for expansion of integrated housing models that will support people with disabilities leaving institutions or at serious risk of institutional care. The Frank Melville Supportive Housing Investment Act of 2010 authorized Section 811 Project Rental Assistance (PRA), specifically designed to support Olmstead implementation efforts by funding developments and subsidizing rental housing with the availability of supportive services for very low income people with disabilities.[27] State-level housing (i.e., HCR) and health and human services agencies (e.g., OPWDD, OMH, DOH) partner to meet the housing and support needs of the target population. The health care agency develops a policy for referrals, tenant selection, and service delivery to ensure that this highly-integrated housing is targeted to a population most in need. Through an interagency partnership, New York will develop and submit an application for PRA when the request for proposals (RFP) is released. Subject to the RFP's guidance, this application will target low income people with disabilities transitioning from institutions or at serious risk of institutional placement.

Additionally, New York has expanded the information available to people with disabilities through the www.NYHousingSearch.gov website. HCR maintains this website as a free service to list and find affordable, accessible housing in New York. To expand the listings of affordable housing, HCR requires that owners and managers of multi-family projects developed since 2006 list all adaptable and adapted apartments, as well all special needs/supportive services apartments. Further, HCR requires developers of new multi-family projects to list all units adapted or set aside for people with

[27] For more information about Section 811 Project Rental Assistance, see http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/progdesc/disab811.

disabilities when advertising new units or accepting tenant applications.

B. Employment Services

The continued strengthening of New York's economic development strategies will help to assure an adequate supply and breadth of jobs available to people with disabilities. Certain reforms implemented under Governor Cuomo's Spending and Government Efficiency (SAGE) Commission have aligned workforce development programs more closely with the New York's economic development efforts. The Department of Labor (DOL) will build upon these reforms for people with disabilities by coordinating disability workforce strategies and assuring that these initiatives are aligned with New York's economic development strategies, such as Regional Economic Development Council priorities.[28]

DOL will coordinate with state agencies serving people with disabilities (e.g., OMH, OPWDD, OASAS, State Education Department's Adult Career Continuing Education Services – Vocational Rehabilitation (ACCES-VR), and New York State Commission for the Blind (NYSCB)), to better align DOL's disability workforce strategies with the vocational rehabilitation and employment programs administered by those agencies. DOL will increase coordination of disability workforce initiatives by establishing a stronger linkage between disability resource coordination (DRC) activities at One-Stop Career Centers and ACCES-VR. Specifically, DOL regional business services teams, responsible for coordinating One-Stop Career Center business services with regional business strategies and regional labor market information, will include ACCES-VR services in its coordination activities.[29] Further, DOL will use disability resource coordinators, established under a federal Disability Employment Initiative pilot program, to provide specialized services designed to increase employment opportunities for people with disabilities through skills upgrading (e.g., on-the-job training, obtaining industry-recognized credentials, entrepreneurial training, and customized training) and community partnerships with agencies that support people in employment, life coaching, and asset development.[30]

This increased employment coordination will build upon the comprehensive employment supports coordination and data system called the New York Employment Services System (NYESS).[31] NYESS provides New Yorkers of all abilities with a central point of access to all employment-related services and supports offered by DOL, ACCES-VR, NYSCB, OMH, OPWDD, OASAS, and SOFA. This system connects to the New York State Job Bank, where approximately 90,000 job openings are currently listed each month by employers. Increasing the number of providers and customers in NYESS will allow for comprehensive data analysis of the talent pipeline of people with disabilities. This analysis will include the educational attainment, employment status, and career sectors in which people with disabilities are represented, which will better enable New York to strategically implement effective policy around employment services for people with disabilities.

---

[28] For more information about New York's 10 Regional Economic Development Council priorities, see http://regionalcouncils.ny.gov/.

[29] For more information about the Department of Labor regional business services teams, see http://www.labor.ny.gov/workforcenypartners/ta/ta10-12.pdf.

[30] For more information about the federally-funded Disability Employment Initiative in New York, see http://www.labor.ny.gov/workforcenypartners/dpn_dei.shtm.

[31] For more information about the New York Employment Services System, see http://www.nyess.ny.gov/.

DOL and other partner staff will continue to engage Supplemental Security Income (SSI)/Social Security Disability Insurance (SSDI) beneficiaries with benefits advisement and work incentive counseling in an effort to increase the assignment of tickets to the state under the Social Security Administration's (SSA) Ticket to Work (TTW) program. For people eligible for the TTW program, DOL, ACCES-VR, OPWDD, OMH, and NYSCB will develop a cross-systems assessment protocol to assess each individual's vocational rehabilitation and employment service needs. This protocol will assure that an individual's ticket assignment options are based on individual needs to achieve competitive employment, consistent with the unique strengths, abilities, interests, and informed choice of the individual. This cooperative approach will provide a broad range of employment and career services options for people with disabilities.

Engaging community employers around the benefits of hiring people with disabilities would also improve the opportunities for competitive, integrated employment. Efforts such as the "Think Beyond the Label" advertising campaign help to raise awareness among employers across the state about the benefits of hiring people with disabilities. New York will market various tax credits and incentives, such as the Workers with Disabilities Tax Credit and the Work Opportunity Tax Credit to encourage community employers to hire people with disabilities.

C. Transportation Services

In addition to New York's housing and employment services, transportation services are also fundamental to community living for people with disabilities. New York has conducted a variety of self-evaluation exercises to review its disability transportation strategies (e.g., assessments conducted by the Department of Transportation, Most Integrated Setting Coordinating Council (MISCC), and New York Makes Work Pay[32,33,34]) in recent years. These reports, and the Olmstead Cabinet's review, show a continued need for coordination of disability transportation services.

A federal executive order was issued in 2004 supporting coordinated transportation planning.[35] A cornerstone of such efforts is the establishment of mobility management, a strategic approach to service coordination and customer service to enhance the ease of use and accessibility of transportation networks. Mobility management meets the unique set of transportation needs in each local area by acting as a functional point of coordination for each community's public and private human services organizations and public transportation providers. Mobility management forms and sustains effective partnerships among transportation providers in a community by providing a single, localized source for coordinating and dispatching the full range of available transportation resources to customers. The partnerships formed by mobility management are meant to increase the available travel services for riders and create resource and service efficiencies for transportation providers.

---

[32] For more information about the Department of Transportation review of transportation services, see https://www.dot.ny.gov/programs/adamanagement/ada-management-plan/appendix.

[33] For more information about the Most Integrated Setting Coordinating Council review of transportation services, see http://www.opwdd.ny.gov/node/784.

[34] To access the New York Makes Work Pay report, see http://www.nymakesworkpay.org/docs/Transportation_PWDs_NYS_032010.pdf.

[35] Exec. Order No. 13330. 69 FR 9185-9187. (2004). Retrieved from http://www.gpo.gov/fdsys/pkg/FR-2004-02-26/pdf/04-4451.pdf.

Under Medicaid redesign, New York implemented a transportation management system, through state-managed contracts, to improve coordination and cost effectiveness for non-emergency Medicaid transportation.[36] Non-emergency Medicaid transportation is only available to access medical care covered by Medicaid. Therefore, there remains a need for enhanced coordination of transportation resources to assure the availability of services for people with disabilities who need transportation to work or engage in other non-medical activities.

Prior to Medicaid redesign, a number of local transportation providers had begun to implement mobility management programs for both non-emergency Medicaid and non-medical transportation. New York will review the impacts of Medicaid redesign on these local mobility management efforts. This review will evaluate the cost effectiveness and availability of non-emergency Medicaid and non-medical transportation resources for people with disabilities. Based upon this analysis, New York will consider a pilot program to expand the existing Medicaid transportation management system to non-medical trips.

D. Children's Services

Children with disabilities in residential care and those at risk of placement require strategies capable of specifically addressing their personal, familial, and educational resource needs. New York has long recognized the unique relationships between children and families, the roles of multiple agencies in addressing children's needs, and the need to plan for transitions from childhood to adulthood.

The decision that a student needs out-of-home placement in a residential school must be based on the Committee on Special Education's determination that there is no appropriate alternative available to meet the educational needs of the student. New York adopted Chapter 600 of the Laws of 1994, which was intended to discourage unnecessary out-of-home placements by increasing the connection between families and children at risk of placement with local support services.[37] Recognizing that a single system cannot meet all the needs of children with disabilities and their families, CSE membership includes, with the consent of the parent (or student if age 18 or older), representatives from local social service departments, state agencies (e.g., OMH, OPWDD), and local school districts. CSEs provide families with information about in-home and community support services available as alternatives to out-of-home placement to address the unique needs of the child and family. CSEs also consider post-secondary goals and transition services for older students. In 2011, the State Department of Education strengthened its review of proposed out-of-state educational placements to assure adherence with the law.[38]

The Coordinated Children's Services Initiative (CCSI) is another mechanism for serving children with disabilities in the most integrated setting. This initiative began in the 1990s and is currently operated by the Council on Children and Families. CCSI is an approach to developing individual/family-, county- and state-level mechanisms to identify individual and family needs, coordinate multiple service systems, address barriers to coordinated service delivery, and assure that funding is available to prevent out-of-home placement of children with disabilities.[39]

---

[36] For more information about the Medicaid transportation management initiative, see http://www.health.ny.gov/funding/rfp/inactive/1103250338/.

[37] For more information about the changes to New York's Social Services and Education Law as a result of Chapter 600, see http://www.p12.nysed.gov/specialed/publications/policy/chap600.pdf.

[38] For more information about the updated procedures, forms, and policy regarding a school district's responsibilities under Chapter 600 of the Laws of 1994, see http://www.p12.nysed.gov/specialed/publications/outofstateplacementsEIP.htm.

[39] For more information about the Coordinated Children's Services Initiative, see http://ccf.ny.gov/CCSI/index.cfm.

Recent Medicaid redesign initiatives have further sought to coordinate the unique service needs of children with disabilities and their families to prevent out-of-home placements. In 2011, the Medicaid Redesign Team Children's Work Group was created to redesign behavioral health services for children. This work group focused on early identification of trauma and behavioral health needs via primary care, collaborative, multi-system care models of treatment, specialty care treatment capacity (including clinical and wrap-around services), family engagement, cross-systems care coordination, and funding and administrative alignment.

The children's work group determined that the Medicaid Children's Behavioral Health Care system, currently funded through Medicaid fee-for-service, should be transitioned to Medicaid managed care. Under Medicaid managed care, physical health, behavioral health, and community support services will be coordinated through person- and family-centered care plans. Olmstead outcome measures will be incorporated into managed care plans, and will seek to ascertain whether services for children maximize the opportunity for children with disabilities to lead integrated lives. The transition to this reformed children's managed care system is planned for January 2016.

E. Aging Services

In addition to the Medicaid redesign initiatives to assist people with disabilities residing or at risk of placement in nursing homes, the Olmstead Cabinet reviewed non-Medicaid services for older adults that may delay or prevent institutionalization, hospital utilization, and Medicaid spend down. Federal, state, and local funds sustain a variety of non-medical, long-term services and supports targeted at older people at risk of nursing home placement and Medicaid spend-down, with the goal of avoiding higher levels of care and public financing of such care. In particular, the Expanded In-home Services for the Elderly Program provides case management and non-medical, in-home and ancillary services for people who need assistance with activities of daily living and instrumental activities of daily living.[40,41,42] Other services, such as congregate and home delivered meals, transportation, and caregiver services, supported through federal, state, and local funds, also assist older New Yorkers to remain in their homes and communities.

As previously noted, SOFA will revise its COMPASS tool to share a common core with the UAS-NY, CAS-NY, and OMH's revised assessment. This revision will help identify opportunities for strategic investment in non-Medicaid services to avoid institutionalization. Further, technological interfaces between SOFA and DOH data systems will help meet cross-systems needs of people with disabilities and enhance the ability to follow a person through different service systems and determine his/her progress in meeting care plan goals and objectives.

SOFA also administers New York Connects, the state's federally-designated Aging and Disability Resource Center to serve as a no wrong door/single point of entry to long-term supports and services for people of all ages with disabilities.[43] Using BIP funds, New York Connects will be strengthened to provide better information to people with disabilities and older adults about both private and public community-based services and supports available to meet their needs. This resource center will also provide options counseling to assist with decision making. These services

[40] For more information about the Expanded In-home Services for the Elderly Program, see http://www.health.ny.gov/health_care/medicaid/program/longterm/expand.htm.

[41] Self-care activities are activities that a person tends to do every day, including feeding, bathing, toileting, dressing, and grooming.

[42] In addition to activities of daily living, a person must be able to perform instrumental activities in order to live independently, including shopping, transportation, and housekeeping.

[43] For more information about New York Connects, see http://www.nyconnects.ny.gov/nyprovider/consumer/indexNY.do.

are expected to enhance a person's ability to receive the right service at the right time in the right setting for the right cost.

Further, SOFA will strengthen its Long-Term Care Ombudsman Program to assist residents of nursing homes and adult homes to transition to community-based services and supports.[44] Ombudsmen currently help residents understand and exercise their rights in facilities and work to resolve problems between residents and facility staff/administrators. Ombudsmen will be trained to assist nursing home and adult home residents to exercise their rights to community placement and to facilitate linkages to community resources, consistent with proposed federal guidelines regarding long-term care ombudsmen.[45]

F. Criminal Justice

The Olmstead Cabinet examined two criminal justice issues concerning people with disabilities and the Olmstead mandate. First, the cabinet sought to assure that people with disabilities who leave correctional facilities are able to access needed community-based services. Second, the cabinet reviewed current state policies to assure that people with disabilities are not unnecessarily incarcerated for minor offenses that are a result of their disability.

Under Medicaid redesign, New York has enhanced its ability to voluntarily engage people with significant behavioral health needs in services and provide strong follow-up upon discharge from institutional settings. For the limited number of people who do not voluntarily access services, the New York Secure Ammunition and Firearms Enforcement (SAFE) Act strengthened assisted outpatient treatment.[46]

OMH works closely with the Department of Corrections and Community Supervision to implement robust statewide policies for screening people in prisons for mental illness, provide mental health services in prisons, and facilitate reentry from prisons to the community. OMH also offers in-reach services to link prisoners with community-based services and employs pre-release coordinators in prisons throughout the state. These coordinators link mentally ill prisoners with appropriate services in the community and assist, where appropriate, in applying for entitlements such as Medicaid and SSI/SSDI.[47]

County-based services for mentally ill jail inmates are supplemented with state funding through the Medication Grant Program to pay for psychotropic medications for released inmates while their Medicaid application is pending. In addition, OMH provides over $4 million annually to support transition programming in local jails.

The majority of services to divert people with disabilities from the criminal justice system and transition mentally ill inmates back into the community, however, are administered at a local level.

---

[44] For more information about the Long-Term Care Ombudsman program, see http://www.ltcombudsman.ny.gov/.

[45] "State Long-Term Care Ombudsman Program, Proposed Rules." *Federal Register*, 78:117. (June 18, 2013) p. 36449-36469. Retrieved from http://www.gpo.gov/fdsys/pkg/FR-2013-06-18/html/2013-14325.htm.

[46] Information about the impact of the New York Secure Ammunition and Firearms Enforcement Act on mental health services can be found at http://www.omh.ny.gov/omhweb/safe_act/.

[47] Recipients of services at OMH forensic facilities are almost always discharged to an OMH civil psychiatric center prior to transitioning back to the community. Residents in OMH secure treatment facilities are transitioned back into the community through the Strict and Intensive Supervision and Treatment program, established by MHL Art. 10.

These local services include law enforcement, courts, jails, and community supervision. Examples of pre-arrest diversion programs that exist across the state are crisis intervention teams, emotionally disturbed people response teams, and mobile crisis teams. In addition, there are currently 28 mental health courts throughout the state, and the Mental Health Connections program shares current mental health court resources with counties that do not have an established mental health court.

A number of recent reforms will further support the diversion of people with disabilities from the criminal justice system and facilitate reentry from the criminal justice system. Notably, OMH has significantly increased the number of supported housing units for parolees with serious mental illness. It also has partnered with the Center for Urban Community Services (CUCS) to develop the Reentry Coordination System in New York City, which operates as a forensic single point of entry for services, including housing, intensive case management, assertive community treatment, and outpatient clinic services. In addition, OMH has collaborated with the New York City Department of Health and Mental Hygiene and with CUCS to establish the Academy for Justice-Informed Practice to cross-train mental health and criminal justice practitioners on best practices for working with justice-involved, mental health service recipients.[48]

The Division of Criminal Justice Services (DCJS) oversees the operation of 19 county reentry task forces and provides $3 million annually through performance-based contracts with localities to support the reentry of people returning from state prisons. DCJS also provides specialized training to police officers to address the needs of people with mental illness.

DCJS was recently awarded a grant from the Bureau of Justice Assistance to provide training and technical assistance to up to 10 localities with high crime rates and high per member per month Medicaid spending to address the needs of people with serious mental illness in the criminal justice system and coordinate with community-based treatment and supports. Using the Sequential Intercept Model, DCJS will work collaboratively with OMH to assist localities in conducting countywide mapping of mental health and criminal justice resources for planning purposes.[49] DCJS and OMH also will provide training and technical assistance to identify local service gaps and develop strategies to address unmet need at each interception point. These strategies will help counties address the needs of people with serious mental illness involved in the criminal justice system and connect them to community-based treatment and supports, which is expected to decrease crime rates and the burden on local jails while improving mental health outcomes for the people served. Initial outcome measures for this initiative will seek to identify probationers screened for mental illness, probationers supervised through the joint probation/mental health case management model, probationers with mental illness successfully completing probation supervision, the number of jail admissions screened for mental illness, and the number of police officers completing crisis intervention training.

G. Legal Reform

To promote the full integration of people with disabilities in the community, the Olmstead Cabinet examined legal and regulatory barriers that impact the ability of people with disabilities to achieve

---

[48] For more information about the Center for Urban Community Services and the Academy for Justice-Informed Practice, see http://www.cucs.org/training-and-consulting/training/nyc-training-program.

[49] The Sequential Intercept Model, developed by SAMHSA's GAINS Center for Behavioral Health and Justice Transformation, identifies five key points within the criminal justice system where people with serious mental illness can be intercepted and diverted to community-based alternatives: (1) law enforcement, (2) initial detention/initial court hearings, (3) jails/courts, (4) re-entry, and (5) community corrections. For more information, see http://gainscenter.samhsa.gov/pdfs/integrating/GAINS_Sequential_Intercept.pdf.

community integration. The Olmstead Cabinet identified two issues requiring legal reform: access to health-related task assistance in community settings and guardianship laws for people with intellectual and developmental disabilities.

A barrier to community integration for many people with disabilities is their ability to access community-based assistance with health-related tasks, including medication management, medication administration, and other home health treatments. Recognizing these barriers, current law authorizes people with disabilities served by certain programs to receive assistance with these tasks from non-nursing personnel. People receiving home care services under the Consumer Directed Personal Assistance Program (CDPAP) may direct another individual to provide them with health-related task assistance.[50] Additionally, people with intellectual and developmental disabilities residing in OPWDD certified residences can utilized trained and certified direct care staff for medication, tube feedings, and insulin administration, as well as for other health-related tasks under the supervision of a registered professional nurse.[51]

However, for people with disabilities not served by these programs, facility-based care is often the only option for receiving needed assistance with these health-related tasks. For example, while a person with a developmental disability residing in a group home certified by OPWDD may receive assistance with medication administration by an unlicensed direct care staff member, the same person could not receive this level of assistance in an independent apartment. Likewise, people with physical disabilities enrolled in the CDPAP program can receive the assistance of an unlicensed aide in their own homes if they or a designee assumes full responsibility for hiring, training, supervising, terminating the employment of people providing the services, but could not make use of an unlicensed aide if they wish to direct another in the provision of health-related task assistance, but do not wish to assume all responsibilities associated with the CDPAP program. Similar barriers exist for other people with disabilities who need assistance with health-related tasks to live successfully in the community.

In order to fully support community integration for people with disabilities, current restrictions on community-based health-related task assistance require reform. A broader application of the current self-direction exemption of the Nurse Practice Act for CDPAP enrollees should be explored to cover all people with disabilities who are capable of directing others to provide health-related task assistance. For people not capable of directing others to provide this assistance, a broader application of the exemption within the Nurse Practice Act for certified settings, as currently implemented by OPWDD, should be explored to cover all integrated, community-based housing for people with disabilities.

The Olmstead Cabinet also recommends reform to law governing guardianship over people with developmental disabilities. Community integration includes the ability of people with disabilities to make their own choices to the maximum extent possible. Guardianship removes the legal decision-making authority of an individual with a disability and should, consistent with Olmstead, only be imposed if necessary and in the least restrictive manner. New York maintains two separate systems of guardianship for people with disabilities. Article 17A of the Surrogate Court's Procedure Act, adopted in 1969, applies to people with developmental disabilities. Article 81 of Mental Hygiene Law, adopted in 1987, applies to all other people with disabilities.

---

[50] For more information about Consumer Directed Personal Assistance Program requirements, see http://www.health.ny.gov/health_care/medicaid/program/longterm/cdpap.htm.

[51] To access the Office for Mental Retardation and Developmental Disabilities and State Education Department's joint Memorandum of Understanding #2003-01 for registered nursing supervision of unlicensed direct care staff in certified residential facilities, see http://www.op.nysed.gov/prof/nurse/nurse-omrddadminmemo2003-1.htm.

Under Article 17A, the basis for appointing a guardian is diagnosis driven and is not based upon the functional capacity of the person with disability. A hearing is not required, but if a hearing is held, Article 17A does not require the presence of the person for whom the guardianship is sought. Additionally, Article 17A does not limit guardianship rights to the individual's specific incapacities, which is inconsistent with the least-restrictive philosophy of Olmstead. Once guardianship is granted, Article 17A instructs the guardian to make decisions based upon the "best interests" of the person with a disability and does not require the guardian to examine the choice and preference of the person with a disability.

In contrast, Article 81 imposes guardianship based upon a functional analysis of a person's disability, requires a hearing, requires the presence of the person over whom guardianship is sought at the hearing, requires guardianship to be tailored to the person's functional incapacities, and requires the guardian to consider the person's choice and preference in making decisions. The Olmstead Cabinet recommends that Article 17A be modernized in light of the Olmstead mandate to mirror the more recent Article 81 with respect to appointment, hearings, functional capacity, and consideration of choice and preference in decision making.

In addition to reforming guardianship law, New York should build upon current OPWDD regulations that recognize certain actively involved family members as surrogates for people who cannot provide their own consent.[52] By extending the authority of these people, OPWDD has minimized those instances in which guardianship is pursued. This outcome could be beneficial to all other people with disabilities to support decision-making activities without pursuing guardianship.

[52] Among other things, actively-involved family members may give informed consent for major medical procedures on behalf of individuals residing in OPWDD facilities who lack the "capacity to understand appropriate disclosures regarding proposed professional medical treatment" (14 NYCRR 633.11(a)(1)(iii)(a) and (b)), may approve service plans (14 NYCRR 681.13), object to OPWDD-related services on behalf of such individuals (14 NYCRR 633.12), may provide informed consent for behavior support plans that include restrictive/intrusive interventions (14 NYCRR 633.16(g)(6)(i)and (iii)), and make end-of-life decisions on behalf of individuals with developmental disabilities. (Surrogate's Court Procedure Act § 1750-b [1] [a]; see also 14 NYCRR 633.10 [a] [7] [iv]).

V. Ensuring Accountability for Community Integration

Although this report provides the foundation for New York's compliance with the Olmstead mandate, effective oversight is required in order to protect the rights of person with disabilities to live in the community on an ongoing basis.

Since 2011, New York has undertaken significant initiatives to ensure the protection of people with disabilities and other special needs. In June 2013, Governor Cuomo established the Justice Center to investigate and prosecute cases of abuse and neglect against people with disabilities and to provide oversight and monitoring of the systems of care serving these people. Governor Cuomo also designated Disability Rights New York as the state's federally-funded Protection and Advocacy and Client Assistance Program to provide independent oversight of these systems. Additionally, New York initiated independent ombudsman functions through Medicaid redesign to assist people with disabilities served in the Medicaid managed care system. Finally, the Governor created the Olmstead Development and Implementation Cabinet and designated a representative of the Governor's Office to direct its activities. Together, these measures strengthen the oversight of providers and service systems and provide access to independent advocacy to protect the rights of people with disabilities to live in the community.

New York's sustained attention to serving people with disabilities in the community requires continued leadership from the Governor's Office. The legislature created the MISCC in 2002 as the statutory body intended to develop New York's Olmstead plan and hold state agencies accountable.[53] As designed, MISCC had a rotating chairmanship among the commissioners of four state agencies. This model has proved challenging because one state agency commissioner does not have the authority to command other state agency commissioners. The creation of the Olmstead Cabinet, with a chair from the Governor's Office, was intended to provide leadership from the Governor's Office in the development of a plan for Olmstead compliance. To sustain this leadership over time and to hold state agencies accountable for Olmstead compliance, a representative of the Governor's Office will continue to provide leadership to the MISCC. MISCC meetings will be a continuing means of public accountability for the state's accomplishment of Olmstead goals.

In addition, the Governor's Office will develop and maintain a dashboard to monitor Olmstead compliance. This dashboard will contain key agency Olmstead initiatives and metrics to measure New York's progress in serving people with disabilities in the most integrated setting. The Governor's Office will also maintain a dedicated website, http://www.governor.ny.gov/olmstead/home. This website will provide relevant information regarding New York's implementation of Olmstead and a mechanism for the public to provide feedback regarding New York's Olmstead Plan.

[53] Additional information about past MISCC Olmstead proceedings is available at http://www.opwdd.ny.gov/opwdd_community_connections/miscc/press_releases_and_important_documents.

Conclusion

This report and recommendations, developed by the Olmstead Cabinet, provide the framework for New York to serve people with disabilities in the most integrated setting appropriate to their needs and desires. Through implementation of these recommendations, New York will:

- Assist in transitioning people with disabilities into the community from developmental centers, ICFs, sheltered workshops, psychiatric centers, adult homes, and nursing homes;
- Reform the assessment of the needs and choices of people with disabilities;
- Adopt new Olmstead outcome measures for people with disabilities;
- Enhance integrated housing, employment, and transportation services available to people with disabilities;
- Improve services to children, seniors, and people with disabilities involved with the criminal justice system;
- Remove legal barriers to community integration; and
- Assure continuing accountability for serving people with disabilities in the most integrated setting.

The effective implementation of these recommendations will safeguard the fundamental civil rights of New Yorkers with disabilities to lead integrated lives.

www.governor.ny.gov/olmsteadplan