



**Supported Decision-Making Regulations
PROPOSED RULEMAKING REGULATIONS
ADDITION OF 14 NYCRR PART 634, AMENDMENT OF 14
NYCRR PARTS 624, 629, 633, 635, 636, 679,
AND REPEAL OF SECTION 681.13
Effective Date: Upon Adoption**

- **A new Part 634 is added to read as follows:**

634.1 - Applicability

These regulations apply to any person, provider, or agency who provides supported decision-making facilitation services; any person participating in supported decision-making as a facilitator, decision-maker or supporter; and any person, agency, or provider who is bound by a supported decision-making agreement as authorized by article 82 of the Mental Hygiene Law.

634.2 – Background and Intent

This Part establishes minimum requirements for supported decision-making agreements and supported decision-making facilitation services, and for supported decision-making policies adopted and enacted by providers of services operated, certified, funded, authorized, approved, or subject to oversight by Office for People With Developmental Disabilities (OPWDD).

634.3 – Statutory Authority

(a) Sections 82.05, 82.09, 82.11, and 82.12 of the Mental Hygiene Law authorize the commissioner of the OPWDD to adopt rules and regulations defining and prescribing the supported decision-making facilitation process.

(b) Section 82.15 of the Mental Hygiene Law authorizes the commissioner of OPWDD to adopt rules and regulations necessary to enable the use of supported decision-making for adults who receive or are eligible to receive services that are operated, certified, funded, or approved by OPWDD.

(c) Section 82.08 of the Mental Hygiene law authorizes the commissioner of OPWDD to adopt rules and regulations governing supporters under supported decision-making agreements.

(d) Section 13.07 of the Mental Hygiene law sets forth the authority of the commissioner of OPWDD to protect personal and civil rights of persons with developmental disabilities receiving services, care, and treatment.

Note: New material is underlined and deleted material is in [brackets].

(e) Section 13.09 of the Mental Hygiene Law authorizes the commissioner of OPWDD to adopt rules and regulations necessary and proper to implement any matter under the commissioner's jurisdiction.

(f) Section 16.29 of the Mental Hygiene Law authorizes the commissioner of OPWDD to adopt rules and regulations establishing standards for protection from abuse by addressing applicant background verification, supervision of employees and volunteers, reporting and responding to allegations of abuse, removal when a person is at risk, appropriate preventive and remedial actions, and training of both staff and persons receiving services in all certified facilities.

634.4 – Authorized Facilitation Services

(a) Only those parties who have been approved by the commissioner of OPWDD are authorized to act as facilitator for formal supported decision-making agreements.

(b) To act as a facilitator for a formal supported decision-making agreement, a party must:

(1) have undergone an OPWDD-approved facilitator training program;

(2) be authorized by OPWDD to provide facilitation;

(3) participate in facilitation supervision;

(4) avoid conflicts of interest and disclose to the decision-maker and any other relevant parties the existence or possibility of, or possible appearance of, a conflict of interest; and

(5) comply with any additional standards regarding the facilitation process, as set forth by OPWDD.

(c) Supported decision-making agreements that meet the requirements of article 82 of the Mental Hygiene Law but were executed before the date that law was effective, must be given the same legal effect as those supported decision-making agreements that were executed after the enactment of article 82 of the Mental Hygiene Law under the following conditions:

(1) the facilitator who worked with the decision-maker during the facilitation of the agreement meets the qualifications of subdivision (b) of this section and has signed the supported decision-making agreement; or

(2) if the facilitator who worked with the decision-maker during the facilitation of the agreement is unavailable to sign the agreement, or does not meet the qualifications of subdivision (b) of this section, the agreement must be signed by another qualified facilitator who has reviewed the agreement and the circumstances surrounding its execution and has determined that it meets the requirements of article 82 of the Mental Hygiene Law and this Part.

(d) A facilitator may not serve as a supporter under a supported decision-making agreement for which they have served as facilitator. If a decision-maker requests that a

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facilitator instead serve as a supporter and the facilitator agrees, a new facilitator must be engaged to complete the facilitation process and sign the supported decision-making agreement.

(e) No person may be prevented from working with a facilitator or entering into a supported decision-making agreement regardless of diagnosis; type or severity of disability; eligibility for OPWDD operated, certified or funded services; eligibility for Medicaid or other government benefit programs; enrollment in the Home and Community Based Services (HCBS) waiver; immigration status or lack thereof; race; religion; age; gender or gender identity; sexual orientation; national origin, or primary language; or on the basis of the existence of a guardianship order that is not in conflict with the proposed supported decision-making agreement. However, this subdivision does not preclude an authorized facilitator from establishing fees for the provision of facilitation services, nor does it imply that working with an OPWDD-authorized facilitator guarantees OPWDD, State, or federal funding of facilitation services.

634.5 – Supporters

(a) To act as a supporter for a decision-maker with a formal or informal supported decision-making agreement:

(1) a supporter must:

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

(ii) act honestly, diligently, and in good faith (as that term is defined in section 82.02 of the Mental Hygiene Law) with respect to the decision-maker and any third party involved in the effectuation of a decision-maker's decision;

(iii) act within the scope set forth in a formal or informal supported decision-making agreement;

(iv) avoid conflicts of interest and disclose to the decision-maker and any other relevant parties the existence or possibility of, or possible appearance of, a conflict of interest;

(v) ensure that any protected information they obtain in accordance with section 82.05(e) of the Mental Hygiene Law and section 634.8 of this Part is kept privileged and confidential, as applicable, and is not subject to unauthorized access, use, or disclosure; and

(vi) for formal decision-making agreements, participate in the supported decision-making facilitation process if the decision-maker wishes to enter into a formal supported decision-making agreement.

(2) a supporter may not:

(i) make decisions for the decision-maker, except in the following

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circumstances:

(a) when authorized to act pursuant to an advance directive, health care proxy, power of attorney, living will, representative payee, special needs trust or other legal instrument under which the supporter is authorized to act on behalf of the decision-maker;

(b) for decisions to withhold or withdraw life sustaining treatment or artificial nutrition or hydration when permitted under section 1750-b of the Surrogate's Court Procedure Act or article 29-CC of the Public Health Law; or

(c) when otherwise permitted to act as an authorized surrogate under OPWDD regulations, but only:

(1) with respect to types of decisions not provided for in a formal supported decision-making agreement; or

(2) if the person, entity, or agency involved with the effectuation of a decision-maker's decision refuses to honor the decision-maker's decision because they have substantial cause to believe a decision will cause the decision-maker substantial and imminent physical or financial harm.

(ii) exert undue influence (as that term is defined in section 82.02 of the Mental Hygiene Law) upon the decision-maker;

(iii) physically coerce the decision-maker;

(iv) obtain, without the consent of the decision-maker, protected, privileged, or confidential information about the decision-maker that is acquired for a purpose other than assisting the decision-maker in making or effectuating a decision authorized by a formal or informal supported decision-making agreement;

(v) obtain or use the decision-maker's private financial information, personal health information or records, trade secrets, or credit reports, without the express written consent of the decision-maker;

(vi) enter into any form of formal debtor-creditor relationship with the decision-maker;

(vii) communicate a decision-maker's decision to a third party without the participation and presence of the decision-maker. Such presence and participation may be achieved remotely by telephone, videoconferencing, or other electronic means, as long as those means allow for verification of a decision-maker's identity and their active participation; or

(viii) provide consent, signature, or co-signature, for voluntary or informal admission to a psychiatric or developmental center under articles 9 or 15 of the Mental Hygiene Law, or a chemical dependence facility under article

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22 of the Mental Hygiene Law.

(b) A supporter is not a surrogate or substitute decision maker for the decision-maker and does not have the authority to sign legal documents on behalf of the decision-maker or bind the decision-maker to a legal agreement, except to the extent described in subparagraph (a)(2)(i) of this section.

(c) If expressly authorized in a formal or informal supported decision-making agreement, a supporter may provide co-signature together with the decision-maker on documents that function only as acknowledgments of rights and responsibilities.

(d) To resign as a supporter, the supporter must provide notice to the decision-maker in a way the decision-maker can understand.

(e) To be eligible to act as a supporter, the supporter must:

(1) be an adult 18 years of age or older;

(2) be chosen by the decision-maker to serve as supporter;

(3) be willing to adhere to the principles described in subdivision (a) of this section;

(4) not have any legal impediments such as a protective order, restraining order, or other legal process prohibiting the person from working with or on behalf of the decision-maker, not including immigration-related proceedings;

(5) not have any determinations or substantiated findings by any government entity or agency of abuse, neglect, financial exploitation, or physical coercion (as those terms are defined in section 82.02 of the Mental Hygiene Law) against the decision-maker, including, but not limited to, the Justice Center for the Protection of People with Special Needs or a local department of social services.

(f) An employee of an agency that provides services to the decision-maker may act as a supporter, subject to their terms of employment, relative labor law, and employment obligations. The employee must disclose to their employer and the decision-maker any possible conflict of interest or the appearance of a conflict of interest, and must take measures to avoid such conflict of interest or the appearance thereof. An agency that provides services to the decision-maker may prevent an employee from acting as supporter for the decision-maker if it determines that doing so would create conflict of interest, even if the employee's terms of employment do not otherwise preclude the employee from acting as a supporter.

(g) A supporter is not:

(1) a custodian, unless they otherwise meet the criteria in subdivision 624.20(p) of this Title;

(2) a mandated reporter, unless otherwise required by section 413 of the Social Services Law or another provision of law; provided, however, nothing in this section shall relieve a person who is a mandated reporter from such person's mandated reporter obligations;

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(3) a fiduciary, except as otherwise charged under state or federal law;

(4) by virtue of their role as a supporter, a person available, willing, and able to assist the decision-maker responsibly, as those characteristics are described in the context of determinations of eligibility for adult protective services under section 473.1 of the Social Services Law and 18 NYCRR § 457.1.

(h) A supporter is not precluded from acting as a supporter based on citizenship or immigration status.

(i) Nothing in this section prevents any person who is not designated as a supporter, including members of a person's program planning team, health care professionals, family members, or other interested parties, from advising, discussing, expressing an opinion, providing information, or otherwise making suggestions or recommendations to the decision-maker regarding their particular situation or decision.

634.6 – Supported Decision-Making Agreements

(a) Formal supported decision-making agreements are those that have been executed or endorsed following a process of facilitation conducted by an authorized facilitator, and must adhere to the following requirements:

(1) a formal supported decision-making agreement must:

(i) be in writing;

(ii) be dated;

(iii) designate the decision-maker and at least one supporter;

(iv) list the areas of decision-making with which a supporter is authorized to assist the decision-maker;

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

(vi) contain an attestation by the supporter or supporters that they agree to honor the right of the decision-maker to make their own decisions in the ways and areas specified in the agreement, respect the decision-maker's decisions, and that they will not make decisions for the decision-maker;

(vii) state that the decision-maker may change, amend, or revoke the supported decision-making agreement at any time for any reason, subject to the requirements of section 82.06 of the Mental Hygiene Law;

(viii) be signed by all designated supporters;

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

(x) be signed by a facilitator; and

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(xi) include a statement that the supported decision-making agreement was made in accordance with a recognized facilitation process.

(2) a formal supported decision-making agreement may also:

(i) appoint more than one supporter;

(ii) authorize a supporter to obtain personal information as described in section 634.8 of this Part;

(iii) authorize a supporter to share information with any other supporter or others named in the supported decision-making agreement;

(iv) detail any other limitations on the scope of a supporter's role that the decision-maker deems important; and

(v) be supplemented by an additional document summarizing the provisions of the agreement, written in an accessible format that the decision-maker and supporters understand.

(b) Informal supported decision-making agreements are not required to meet the requirements of subdivision (a) of this section, nor involve a facilitator, but will not have the same legal effect as formal supported decision-making agreements, as defined by section 82.11 of the Mental Hygiene Law. Third parties may, but are not required to, recognize decisions made in accordance with informal supported decision-making agreements and are not entitled to the liability protections of subdivisions (b) through (d) of section 82.12 of the Mental Hygiene Law.

(c) Decisions made pursuant to a properly executed formal supported decision-making agreement must be recognized as the decision of the decision-maker and are enforceable in law or equity. Third parties who recognize decisions made in accordance with a formal supported decision-making agreement are entitled to protections from liability pursuant to subdivisions (b) through (d) of section 82.12 of the Mental Hygiene Law.

634.7 – Capacity

(a) Every adult 18 years of age or older is presumed to have capacity to enter into a supported decision-making agreement, regardless of that adult's diagnosis or the manner in which they communicate, unless that adult has a legal guardian, appointed by a court of competent jurisdiction, whose granted authority conflicts with the proposed supported decision-making agreement.

(b) Notwithstanding any other provision in this Title, any adult may make and execute a formal or informal supported decision-making agreement if they understand that they are making and executing an agreement with their chosen supporters and that they are doing so voluntarily. No additional determination or permission by a director or other staff of an OPWDD-operated or certified facility is required.

(c) Notwithstanding any other provision in this Title, an adult who has entered into a formal supported decision-making agreement is not required to separately demonstrate

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an understanding or appreciation of the nature and consequences of a decision made in accordance with such supported decision-making agreement in order to demonstrate their capacity to make such decision on their own behalf.

(d) Any assessment conducted under the provisions of this Title to evaluate the capacity of a person with an informal supported decision-making agreement must take into consideration the supports and accommodations available under such agreement.

(e) Notwithstanding any other provisions of this Title, including those provisions that call for an assessment of a person's capacity or authorize a surrogate to act on behalf of a person who is determined to lack capacity to act on their own behalf, a decision-maker must be permitted to provide or deny consent on their own behalf if their decision to do so is made with the assistance of a supporter or supporters in accordance with a formal supported decision-making agreement, unless:

(1) the person, entity, or agency capturing consent has substantial cause to believe:

(i) the agreement has been revoked;

(ii) the decision-maker is being abused, coerced, unduly influenced, or financially exploited (as those terms are defined in section 82.02 of the Mental Hygiene Law) by the supporter; or

(iii) the decision will cause the decision-maker substantial and imminent physical or financial harm;

(2) the decision-maker has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law whose granted authority empowers them to make decisions related to the consent in question; or

(3) a court of competent jurisdiction overrides the authority of the decision-maker to make for themselves decisions related to the consent in question, provided that upon application to a court, notice is made to the Mental Hygiene Legal Service.

(f) None of the following may be considered evidence that a person lacks capacity to make decisions for themselves, including to provide consent on their own behalf, or to deny them services or benefits to which they are otherwise entitled:

(1) the execution of a supported decision-making agreement;

(2) the interest in or wish to execute a supported decision-making agreement; or

(3) the failure or refusal to execute a supported decision-making agreement.

634.8 – Information Sharing, Notice, and Reporting

(a) Any notifications, notices or information provided to a decision-maker pursuant to this Title must also be provided to any supporter specified under the supported decision-making agreement as entitled to receive a copy of such notice, provided that the agency, entity, or person responsible for providing such notice has received a copy

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of the applicable supported decision-making agreement. If such notices, notifications or information contain protected health information or other information protected by law, the agency, entity, or person required to provide such notice, notification, or information may require that a release is provided authorizing the specified supporter to obtain the protected information. To the extent practicable, any information provided pursuant to this subdivision shall be provided in an accessible format that the decision-maker can understand.

(b) Any concerned party, including, but not limited to, a supporter, a family member of a decision-maker, or the operator of any facility or service operated or certified by OPWDD, may notify OPWDD or the Mental Hygiene Legal Service when, in their opinion:

(1) a formal supported decision-making agreement does not meet the requirements of section 82.10 of the Mental Hygiene Law or section 634.6 of this Part;

(2) a supporter appointed under a formal supported decision-making agreement is ineligible to serve under the requirements of section 82.08 of the Mental Hygiene Law and section 634.5 of this Part, or has otherwise violated the duties and responsibilities of a supporter in section 82.05 of the Mental Hygiene Law and section 634.5 of this Part;

(3) a person, entity, or agency has violated section 82.11 of the Mental Hygiene Law and section 634.9 of this Part, by refusing to recognize and honor a decision made pursuant to a formal supported decision-making agreement, except where the decision-maker has failed to execute or endorse an appropriate attestation related to that decision or provide to the person, entity, or agency a copy of the supported decision-making agreement; or

(4) a decision made pursuant to a supported decision-making agreement will cause the decision-maker substantial and imminent physical or financial harm.

634.9 – Legal Effect of Decisions Made with Support and Obligations on Third Parties

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

(b) If presented with a copy of a formal supported decision-making agreement, all persons, entities, and agencies, including OPWDD and providers of services operated, certified, funded, authorized, or approved by OPWDD, must honor decisions made in accordance with that formal supported decision-making agreement, even if they have doubts about the decision-maker's capacity to do so, unless:

(1) the person, entity, or agency has substantial cause to believe:

(i) the supported decision-making agreement has been revoked;

Note: New material is underlined and deleted material is in [brackets].

(ii) the decision-maker is being abused, coerced, unduly influenced, or financially exploited (as those terms are defined in section 82.02 of the Mental Hygiene Law) by a supporter; or

(iii) the decision will cause the decision-maker substantial and imminent physical or financial harm;

(2) the decision-maker has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law whose granted authority empowers them to make the decision in question; or

(3) a court of competent jurisdiction overrides the authority of the decision-maker to make the decisions for themselves, provided that upon application to a court, notice is made to the Mental Hygiene Legal Service.

(c) Any person, entity, or agency required to recognize and honor a decision made pursuant to a formal supported decision-making agreement may require the decision-maker to execute or endorse an attestation as provided in section 82.10(d)(3) of the Mental Hygiene Law, as a condition of recognizing and honoring the decision. Such attestation must describe the decision in question and state that it was made by the decision-maker in accordance with the supported decision-making agreement. A facilitator is not required to sign such an attestation, they are only required to sign the formal supported decision-making agreement itself.

634.10 - Responsibilities of Providers of Care Management Services

(a) Providers of care management services such as Comprehensive Health Home Care Management and Basic HCBS Plan Support must ensure that care managers:

(1) are appropriately trained on the development, use, and purpose of formal and informal supported decision-making agreements, and that they:

(i) advise enrollees/members about the availability of supported decision-making;

(ii) counsel enrollees/members in the process of exploring supported decision-making; and

(iii) advise when supported decision-making may be an appropriate alternative to seeking or maintaining legal guardianship or the assistance of an otherwise authorized surrogate or substitute decision-maker;

(2) make appropriate referrals for facilitation services on behalf of enrollees/members who express interest in formal supported decision-making;

(3) provide information and materials about supported decision-making and other alternatives to guardianship whenever an enrollee/member, family member, or other advocate request information about or assistance with obtaining or terminating a legal guardianship for an enrollee/member;

(4) provide information and materials about supported decision-making to members of the program planning team of an enrollee/member who uses

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supported decision-maker to ensure that the team understands the rights of the enrollee/member with respect to the person-centered planning process; and

(5) annually confirm with all enrollees/members with existing supported decision-making agreements that the agreement continues to meet their needs, and the supporters are still available and willing to serve in the role as supporter.

(b) Providers of care management services such as Comprehensive Health Home Care Management and Basic HCBS Plan Support must maintain records of all enrollees/members who have either formal or informal supported decision-making agreements, and ensure that copies of any supported decision-making agreements are:

(1) included in the enrollee/member's care management record;

(2) uploaded to the enrollees/member's electronic health record, to the extent possible;

(3) updated annually to reflect any changes to the supported decision-making agreements made by the enrollee/member or resignations by supporters, and confirm that all contact information contained therein is current; and

(4) brought to the attention of any care managers, care manager supervisors, or other staff responsible for coordinating services for enrollee/members.

634.99 – Definitions

(a) Decision-maker.

An adult 18 years of age or older who uses, or is seeking to use, supported decision-making to make decisions about their own life, including through the use of a supported decision-making agreement, whether formal or informal.

(b) Facilitation.

As used in reference to supported decision-making agreements throughout this Chapter, a process in which an authorized facilitator works with a person who uses or is seeking to use supported decision-making (known as a decision-maker). The facilitator seeks to help the decision-maker understand how decisions are made, educate them about the steps that go into making a considered decision, and—together with the decision-maker's chosen supporter or supporters—guide the decision-maker through the steps necessary to create a formal supported decision-making agreement, including identifying in which areas the decision-maker feels they need support, what kinds of support they desire, and from whom they wish to receive that support. The facilitator's role is to educate and stimulate reflection and discussion between the decision-maker and their supporter or supporters to empower the decision-maker to design and implement a decision-making process in specific areas of their life that reflects the decision-maker's wishes and needs for assistance in those areas.

(c) Supported decision-making.

A way by which a person (known as a decision-maker) utilizes support from trusted persons in their life in order to make their own decisions about their life, including, but

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not limited to, decisions related to where and with whom the decision-maker wants to live; decisions about finances; the services, supports, and health care the decision-maker wants to receive; decisions about work; and decisions to consent or object to any plan of service.

(d) Supported decision-making agreement, formal.

A written agreement governed by article 82 of the Mental Hygiene Law entered into by a person (known as a decision-maker) and one or more of their designated supporters that describes how the decision-maker uses supported decision-making to make their own decisions. Formal supported decision-making agreements must be in a form that complies with section 82.10 of the Mental Hygiene Law; be the product of a facilitation process, as provided by this Part; and be signed by a facilitator. Formal supported decision-making agreements meet the requirements of section 82.09 of the Mental Hygiene Law and are entitled to full legal effect pursuant to sections 82.11 and 82.12(b) through (d) of the Mental Hygiene Law, and section 634.9 of this Part. A decision or request made or communicated by a decision-maker with a formal supported decision-making agreement with the assistance of a supporter in accordance with the provisions of the agreement, must be recognized as the decision or request of the decision-maker themselves, and must be honored by any party, entity, or agency that receives the agreement, unless the party, entity, or agency, has substantial cause to believe the agreement has been revoked, or that the decision-maker is being abused, coerced, unduly influenced or financially exploited by the supporter, or that the decision will cause the decision-maker substantial and imminent physical or financial harm. (See sections 634.6 and 634.9 of this Part.)

(e) Supported decision-making agreement, informal.

An agreement, either written or unwritten, governed by article 82 of the Mental Hygiene Law, between a person (known as a decision-maker) and one or more of their designated supporters that provides the decision-maker a means by which to use supported decision-making to make their own decisions. Informal supported decision-making agreements are not required to be written, however a written agreement that complies with section 82.10 of the Mental Hygiene Law may allow the decision-maker to define clearer limits regarding the scope of supporters' respective roles, and may allow supporters more opportunity to provide the decision-maker assistance in the communication and implementation of their decisions.

(f) Supporter.

An adult 18 years of age or older who has voluntarily entered into a supported decision-making agreement, either formal or informal, by agreeing to assist the person with the supported decision-making agreement (known as the decision-maker) in making their own decisions as prescribed by the supported decision-making agreement, and who is not ineligible to be a supporter under section 82.08 of the Mental Hygiene Law or section 634.6 of this Part.

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AMENDMENTS TO EXISTING REGULATIONS

- **Existing subparagraph 624.5(a)(3)(i) is amended to read as follows:**

(i) Upon commencement of service provision, and annually thereafter, an agency must offer to make available written information developed by OPWDD in collaboration with the Justice Center, and a copy of the agency's policies and procedures, to persons receiving services [who have the capacity to understand the information] and to their parents, guardians, correspondents (see glossary, section 624.20 of this Part) or advocates (see glossary, section 624.20 of this Part), unless a person is a capable adult who objects to their notification. This information must, upon request, also be provided in an accessible format. If the person receiving services has a supported decision-making agreement (see Part 634 of this Title) that provides that a supporter is entitled to receive a copy of such notice made to the person, that supporter must also be provided the notification described herein. The agency must also offer to make available a copy of OPWDD's Part 624 regulations. In order to satisfy this requirement the agency shall:

- **Existing paragraph 624.6(f)(1) is amended to read as follows:**

(1) The agency must provide telephone notice to the person receiving services, and at least one of the following: a person's guardian, parent, spouse, adult child, or adult sibling. If the person receiving services has a supported decision-making agreement (see Part 634 of this Title) that provides that a supporter is entitled to receive a copy of such notice made to the person, that supporter must also be provided such notice.

- **Existing paragraph 624.6(f)(2) is amended to read as follows:**

(2) However, the agency must not provide such notice to a party in the following situations:

(i) if the guardian, parent, spouse, adult child, [or]adult sibling, or supporter is the alleged abuser;

(ii) if there is written advice from the guardian, parent, spouse, adult child, [or]adult sibling, or supporter that [he or she]they object[s] to receiving such notification. The notice must then be provided to another party who is a guardian, parent, spouse, adult child, [or]adult sibling, or supporter if one exists; or

(iii) if the person receiving services is a capable adult who objects to such notification being made. If the capable adult objects to notification of all parties (guardian, parent, spouse, adult child, [or]adult sibling, or supporter), the capable adult [must be provided]may specify another party to receive the notice described in this subdivision.

- **Existing paragraph 624.6(f)(6) is amended to read as follows:**

(6) If the person does not have a guardian, parent, spouse, adult child, [or]adult sibling, or applicable supporter, or if such parties are not reasonably available, or if there is written advice that such parties do not want to be notified; the agency must provide

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notice to the following parties in the manner (and subject to the same limitations) specified in this subdivision:

(i) the person receiving services, if the person has not already been notified[is a capable adult]; and

(ii) the person's advocate or correspondent (if one exists), unless the advocate or correspondent is the alleged abuser.

- **Existing clause 624.6(f)(7)(i)(a) is amended to read as follows:**

(a) Requests may be made for a copy of the initial incident/occurrence report by the person receiving services (or who formerly received services), guardian, parent(s), supporter (if so authorized by the supported decision-making agreement), or correspondent/advocate.

- **New paragraph 629.1(c)(5) is added as follows:**

(5) If the person requesting a determination of eligibility under this section has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the person, that supporter must also be provided any notification made to the person under this section, unless the person or the supporter specifies to the DDRO verbally or in writing that they do not wish the supporter to receive such notice.

- **New subparagraph 633.4(a)(4)(xxviii) is added to read as follows:**

(xxviii) the opportunity to utilize supported decision-making, either formally or informally, in accordance with Part 634 of this Title and article 82 of the Mental Hygiene Law.

- **Existing paragraph 633.4(a)(8) is amended to read as follows:**

(8) Each person, and their parent(s), guardian(s), or correspondent, prior to or upon admission to a facility and subsequent to any changes that occur thereafter, shall be notified of their rights at the facility and rules governing conduct, unless the person is a capable adult who objects to such notification to a parent or correspondent. If notification is made to a person with a supported decision-making agreement, and such supported decision-making agreement provides that a supporter is to receive a copy of any such notice made to the person, notification must also be provided to that supporter. Such information shall be conveyed in the person's and/or the parent's, guardian's, supporter's, or correspondent's primary language if necessary to facilitate comprehension. There shall be agency/facility or sponsoring agency policies/procedures to implement this process as well as the process whereby people receiving services can be made aware of and understand, to the extent possible, the rights to which they are entitled, how such rights may be exercised and the obligations incurred upon admission to and participation in the programs offered by the facility. (Note: Also see paragraph (b)(4) of this section.)

- **Existing paragraph 633.4(b)(1) is amended to read as follows:**

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(1) There are written policies/procedures on notifying people receiving services and/or their parents, guardians, supporters, or correspondents of the person's rights:

- **Existing paragraph 633.4(b)(2) is amended to read as follows:**

(2) OPWDD shall verify (see glossary) that the following information was provided to each [individual]person receiving services and/or their parents, guardians, supporter(s) entitled to notice under a supported decision-making agreement, or correspondents (unless the person is a capable adult and objects to such information being provided to a parent, [or]correspondent, or supporter):

- **Existing subparagraph 633.10(a)(2)(i) is amended to read as follows:**

(i) An assessment of functional capacity, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement.

- **New subparagraph 633.10(a)(7)(v) is added to read as follows:**

(v) Any determination of capacity made by the attending physician, and any corresponding confirmation made in consultation with a qualified practitioner, as described in paragraph (a) of subdivision (4) of SCPA section 1750-b, must consider the supports and accommodations available under an existing supported decision-making agreement, whether formal or informal. If the person with a developmental disability has executed a formal supported decision-making agreement that includes provisions related to health care decision-making, end-of-life decision-making, or areas that could reasonably be interpreted to include a decision whether to withhold or withdraw life sustaining treatment or artificial nutrition or hydration, then any determination of capacity made by the attending physician, and any corresponding confirmation made in consultation with a qualified practitioner, may not be based solely on the person's developmental disabilities unless it can be determined to a reasonable degree of medical certainty that in the time since the formal supported decision-making agreement was executed, the person's developmental disabilities have progressed or changed such that the person no longer has the capacity to make health care decisions, even with the supports and accommodations available under the formal supported decision-making agreement.

- **Existing subclause 633.11(a)(1)(iii)(a)(8) is amended to read as follows:**

(8) a surrogate [decision making] decision-making committee (SDMC) (see section 633.99 of this Part) or a court of competent jurisdiction.

- **Existing clause 633.11(a)(1)(iii)(b) is amended to read as follows:**

(b) If a person is 18 years of age or older, but lacks capacity to understand appropriate disclosures regarding proposed professional medical treatment, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, or a determination of insufficient capacity has been made pursuant to clause (g) of this subparagraph, informed consent to such

Note: New material is underlined and deleted material is in [brackets].

proposed professional medical treatment shall be obtained from one of the surrogates listed, in the order stated:

(1) a guardian lawfully empowered to give such consent or the person's duly appointed health care agent or alternative agent (see section 633.20 of this [p]Part and [A]article 29-C of the Public Health Law);

(2) an actively involved spouse;

(3) an actively involved parent;

(4) an actively involved adult child;

(5) an actively involved adult sibling;

(6) an actively involved adult family member;

(7) the Consumer Advisory Board (see section 633.99 of this [p]Part) for the Willowbrook Class (only for class members it fully represents);

(8) the Informed Consent Committee (see section 633.16 of this Part), convened by a person's residential provider, for the limited purpose of providing consent for a COVID-19 vaccine; or

(9) a surrogate [decisionmaking]decision-making committee (SDMC) or a court of competent jurisdiction.

- **Existing subclause 633.11(a)(1)(iii)(g)(2) is amended to read as follows:**

(2) obtain an independent written opinion and analysis of the individual's capacity to understand appropriate disclosures regarding proposed professional medical treatment and to give or withhold informed consent thereto. Such consultant shall be either a New York State licensed psychologist, or a psychiatrist holding current and appropriate licensure, shall have experience in treating those with developmental disabilities, and shall not be an employee of the facility. After considering the opinion of such consultant, the chief executive officer shall determine whether the person possesses or lacks capacity to understand appropriate disclosures regarding proposed professional medical treatment and to give or withhold informed consent thereto, and whether to proceed in accordance with the other provisions of this section. Both the consultant's opinion and the chief executive officer's decision shall be documented in the person's record and communicated to the that person and his or her parent, other nearest relative, guardian or correspondent. If the person has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the person, such supporter must also be provided any notification or communication made to the person under this paragraph, unless the person or the supporter specifies verbally or in writing that they do not wish for the supporter to receive such notification.

- **New clause 633.11(a)(1)(iii)(h) is added as follows:**

(h) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634

Note: New material is underlined and deleted material is in [brackets].

of this Title, and such supported decision-making agreement includes provisions related to medical decision-making, then informed consent for a proposed medical treatment shall only be obtained from the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian of the person under article 17-A of the Surrogate's Court Procedure Act, or a guardian empowered to make medical decisions for the person under article 81 of the Mental Hygiene Law;

(2) the person has a health care agent or alternative agent whose authority under article 29-C of the Public Health Law has commenced, except that any determination of incapacity for the purposes of empowering a health care agent or alternative agent must not have been because of mental illness or developmental disability;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) a court of competent jurisdiction overrides the authority of the person to make medical decisions for themselves, provided that upon application to a court, notice is made to the Mental Hygiene Legal Service.

- **New paragraph 633.12(a)(13) is added as follows:**

(13) If a person receiving notice under this section has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the person, that supporter must also be provided any notification made to the person under this section, unless the person or the supporter specifies verbally or in writing that they do not wish for the supporter to receive such notification.

- **Existing subclause 633.13(a)(2)(i)(b)(1) is amended to read as follows:**

(1) If a participant has sufficient capacity to give informed consent, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, the decision of the participant shall be honored, and consent or objection by a surrogate shall not be considered.

- **New clause 633.13(a)(3)(i)(g) is added as follows:**

(g) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to participation in research or medical decision-making generally, then informed consent for participation in any research shall only be obtained from the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to research;

Note: New material is underlined and deleted material is in [brackets].

(2) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(3) a court of competent jurisdiction specifically authorizes the research under the provisions of this section and notice is given to the Mental Hygiene Legal Service.

- **Existing clause 633.13(a)(3)(ii)(a) is amended to read as follows:**

(a) For research [which]that involves no more than minimal risk, and with the approval of the chief executive officer, the IRB may permit the researcher to assess the potential subject's capacity to consent. The IRB and/or the chief executive officer may require parties other than the researcher to assess a participant's capacity to consent. If there is a doubt about a participant's capacity to give informed consent in relation to a specific research project which involves no more than minimal risk, an assessment of capacity to consent shall be made by the chief executive officer of the facility or [his or her]their designee. However, notwithstanding any assessment of capacity performed by the IRB or the chief executive officer or their designee, if the potential subject has a formal supported decision-making agreement that has been facilitated under the terms of Part 634 of this Title, consent to participate in the research shall only be obtained from the potential subject themselves with the assistance of a supporter or supporters under the supported decision-making agreement, subject to the provisions of clause (a)(3)(i)(g) of this section; and if a potential subject has or desires an informal supported decision-making agreement, any assessment of capacity performed under this subparagraph shall include due consideration of the supports and accommodations available under the informal supported decision-making agreement.

- **Existing clause 633.13(a)(3)(ii)(b) is amended to read as follows:**

(b) If a participant lacks the capacity to consent, and the research involves no more than minimal risk, consent may be obtained from a party authorized under clause (a)(3)(iii)(b) of this section. In the absence of a party from this list, consent may be obtained from a court of competent jurisdiction, [or from a party recommended by the IRB and appointed by the facility or entity's (see glossary) governing body (by whatever title known), for the purpose of acting as a surrogate in the consent process on behalf of a person who lacks the capacity to consent.

(1) This party shall have no interest that conflicts with the interest of the person being represented and shall have knowledge and skills that insure adequate representation of the person.

(2) The party appointed by the governing body shall not be associated in any way (except in this role or as a non-affiliated member of the IRB) with the research, the researcher(s) or the facility or entity.]

- **Existing clause 633.13(a)(3)(iii)(a) is amended to read as follows:**

(a) For research [which]that involves more than minimal risk, the assessment of a person's capacity to consent (see glossary) to a particular research project shall be made by the person's program planning team, in consultation with the researcher, and

Note: New material is underlined and deleted material is in [brackets].

shall include consideration of supports and accommodations available under an informal supported decision-making agreement. If doubt exists about the person's capacity to consent, the following provisions shall apply:

(1) The chief executive officer of a facility or entity shall obtain, from a consultant, an independent written opinion and analysis of a person's capacity to give or withhold informed consent to participate in the research project. The consultant shall be a New York State licensed psychologist or physician, or a psychiatrist holding appropriate licensure in New York State; have experience in treating persons with developmental disabilities; and shall not be an employee of the facility or entity.

(2) After considering the opinions of the consultant, the program planning team, and the researcher, the chief executive officer shall then determine whether the participant lacks the capacity to consent.

(3) The opinions of the program planning team, the researcher and the consultant, together with the chief executive officer's decision, shall be documented in the person's clinical record. The chief executive officer's decision shall be communicated to the person and [his/her]their parent, other nearest relative, guardian or correspondent.

- **New clause 633.13(a)(3)(iii)(c) is added as follows:**

(c) Notwithstanding any assessment of capacity performed under clause (a) of this subparagraph, or the availability of a party identified from the list in clause (b) of this subparagraph, if the potential subject has a formal supported decision-making agreement that has been facilitated under the terms of Part 634 of this Title, consent to participate in the research shall only be obtained from the potential subject themselves with the assistance of a supporter or supporters under the supported decision-making agreement, subject to the provisions of clause (a)(3)(i)(g) of this section; and if a potential subject has or desires an informal supported decision-making agreement, any assessment of capacity performed under this subparagraph shall include consideration of supports and accommodations available under an informal supported decision-making agreement.

- **Existing paragraph 633.16(b)(13) is amended to read as follows:**

(13) Consent, informed.

(i) For the purposes of this section, informed consent shall mean the effective knowing consent by a person (or [his/her]their legally authorized surrogate) with sufficient capacity, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, to consent and so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion. Such consent shall be in writing, except in the case of the short-term use of medication pursuant to subparagraph (j)(5)(v) of this section and as provided in paragraph (g)(1) of this section.

Note: New material is underlined and deleted material is in [brackets].

(ii) The basic elements of information necessary to such informed consent include:

(a) a fair explanation to the person or surrogate, and the person's supporter or supporters under an applicable supported decision-making agreement, of the procedures to be followed, and their purposes;

(b) a description of any potential discomforts and risks which may reasonably be expected;

(c) a description of any benefits to the participant which may reasonably be expected;

(d) a disclosure of appropriate alternative procedures, if any; and

(e) an instruction that the person or surrogate is free to withdraw [his or her]their consent at any time without prejudice.

(iii) No informed consent shall include any language through which the person or surrogate waives, or appears to waive, any legal right, including the release of any party, institution, agency, or any agents thereof, from liability from negligence.

(iv) Information about planned interventions must be presented in a manner that permits a knowledgeable evaluation and decision to be made. It must be presented in simple terms, in whatever language the party giving informed consent reads or understands most easily and clearly (e.g., English, Spanish, Mandarin), and in whatever manner [he or she]they understand[s] most easily and clearly (e.g., sign language, communications board, computer assisted technology, Braille). Consent, when given by a surrogate, should only be given if, in doing so, this will be in the person's best interest and takes into consideration, to the extent possible, the person's opinions, beliefs and wishes.

(v) If a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement can be reasonably construed to address the procedures or plan for which informed consent is sought, then informed consent shall only be obtained from the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(i) the person has a guardian of the person under article 17-A of the Surrogate's Court Procedure Act, or a guardian empowered to provide consent for the person in the applicable circumstances under article 81 of the Mental Hygiene Law;

(ii) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

Note: New material is underlined and deleted material is in [brackets].

(iii) a court of competent jurisdiction overrides the authority of the person to provide informed consent for themselves, provided that upon application to a court notice is made to the Mental Hygiene Legal Service.

- **Existing subparagraphs 633.16(g)(6)(ii) and (iii) are amended to read as follows:**

(ii) If a person is 18 years of age or older and has capacity to give informed consent, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, the plan shall be initiated only upon the person's informed consent. If the person withholds consent, see subdivision (h) of this section.

(iii) If a person is 18 years of age or older, but lacks the capacity to give informed consent regarding the proposed plan, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, or a determination of insufficient capacity has been made pursuant to paragraph (7) of this subdivision, informed consent shall be obtained from one of the surrogates listed, in the order stated:

- **Existing subparagraph 633.16(g)(7)(i) is amended to read as follows:**

(i) In the first instance, it shall be the program planning team's responsibility to determine the person's capacity to give informed consent for each proposed restrictive/intrusive intervention. The team's determination and documentation shall be included and available in the person's record. If the person has an informal supported decision-making agreement or otherwise makes use of supported decision-making, the team must take into consideration the supports and accommodations available under such supported decision-making agreement or other use of supported decision-making, and must include discussion of such consideration in documentation of its determination.

- **Existing clause 633.16(g)(7)(iii)(d) is amended to read as follows:**

(d) ensure that the opinions of the program planning team, the licensed psychologist or physician, and the decision of the agency's chief executive officer or designee, are documented in the person's record and communicated to that person and to [his or her]their correspondent, advocate, actively involved adult family member or the Consumer Advisory Board, as appropriate, unless the person is a[n]capable adult [who has been determined to have the capacity to give informed consent] and objects to such notice being made. If the person has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the person, that supporter must also be provided a copy of any notice specified in this subdivision, unless the person or the supporter specifies that they do not wish for the supporter to receive such notice.

- **New paragraph 633.16(g)(9) is added as follows**

(9) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634

Note: New material is underlined and deleted material is in [brackets].

of this Title, and such supported decision-making agreement includes provisions related to behavioral health, consenting to plans of service generally, restrictive/intrusive interventions or rights limitations/modifications, or that could otherwise reasonably be construed to include provisions encompassing a decision to consent to a behavior support plan that includes a restrictive/intrusive intervention or rights limitation/modification, then informed consent for a proposed behavior support plan shall only be obtained from the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(i) the person has a guardian of the person under article 17-A of the Surrogate's Court Procedure Act, or a guardian empowered to make behavioral decisions for the person under article 81 of the Mental Hygiene Law;

(ii) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(iii) a court of competent jurisdiction overrides the authority of the person to provide informed consent for themselves, provided that upon application to a court notice is made to the Mental Hygiene Legal Service.

- **Existing subparagraph 633.16(j)(1)(ix) is amended to read as follows:**

(ix) Whenever any intermediate or restrictive physical intervention technique has been used in an emergency, the person's guardian, parent, actively involved family member, representative of the Consumer Advisory Board (for Willowbrook class members it fully represents), correspondent, or advocate must be notified within two business days after the intervention has been used, unless the person is a capable adult who objects to such notification. If the person has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the person, that supporter must also be provided a copy of any notice specified in this subparagraph, unless the person or the supporter specifies that they do not wish the supporter to receive such notice.

- **Existing subdivision 633.99(p) is amended to read as follows:**

(p) Capacity.

The ability, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, to adequately understand and appreciate the nature and consequences of professional medical treatment (see glossary), behavior support plans, pursuant to section 633.16 of this Part and DNR orders (see glossary), including the benefits and significant risks and alternatives to such treatment/plans so as to be capable of making a decision thereto in a knowing and voluntary manner. A person's decision relative to the proposed professional medical treatment, proposed plan or proposed DNR order shall not, in and of itself, be the exclusive basis for the determination of capacity.

- **Existing subdivision 633.99(x) is amended to read as follows:**

(x) Consent, a person's capacity to.

Note: New material is underlined and deleted material is in [brackets].

For the purposes of section 633.13 of this Part only, a person's ability, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, to understand the purpose, nature, risks, benefits and, where appropriate, alternatives of the research, to make a decision about participation, and to understand that the decision about participation in the research will involve no penalty or loss of rights to which the person is otherwise entitled.

- **Existing paragraph 633.99(y)(1) is amended to read as follows:**

(1) For the purposes of this Part, informed consent shall mean the effective knowing consent by a person (or [his/her]their legally empowered surrogate[, parent or adult child]) with sufficient capacity to consent, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, and so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion. Such consent shall be in writing, except in the case of:

(i) consent for research involving no more than minimal risk where there is a waiver of consent; [or]

(ii) a waiver of the need for written consent as allowed in 45 CFR 46.117(c) to ensure confidentiality; [or]

(iii) the use of short-term medication pursuant to section 633.16(j)(5)(v) of this Part (with limitations); [or]

(iv) the use of restrictive/intrusive interventions or rights limitations pursuant to section 633.16(g)(1) of this Part (with limitations).

- **Existing paragraph 633.99(y)(5) is deleted and a new paragraph 633.9(y)(5) is added as follows:**

(5) If a person has a supported decision-making agreement, whether formal or informal, and requests the participation of a supporter or supporters in gathering, interpreting, or understanding information, or weighing options and alternatives to a decision to grant consent, or considering the consequences of making a decision to grant consent, then such supporter or supporters shall be granted access to the information presented in paragraph (4) of this subdivision, and in a manner permitting a knowledgeable evaluation and decision to be made, as described in that paragraph.

- **The following subdivisions of section 633.99 are added, amended, and renumbered as follows:**

(ah) Decision, capacity to make health care.

In relation to section 633.20 of this Part, the ability, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of, and alternatives to, any proposed health care, and to reach an informed decision.

Note: New material is underlined and deleted material is in [brackets].

(ai) Decision-maker.

An adult 18 years of age or older who uses, or is seeking to use, supported decision-making to make decisions about their own life, through the use of a supported decision-making agreement, whether formal or informal.

(a[i]j) Disability, developmental.

(a[j]k) Discharge.

(a[k]l) Entity(ies).

(a[l]m) Facility.

(an) Facilitation.

As used in reference to supported decision-making agreements throughout this Chapter, a process in which an authorized facilitator works with a person who uses or is seeking to use supported decision-making (known as a decision-maker). The facilitator seeks to help the decision-maker understand how decisions are made, educate them about the steps that go into making a considered decision, and together with the decision-maker's chosen supporter or supporters guide the decision-maker through the steps necessary to create a formal supported decision-making agreement, including identifying in which areas the decision-maker feels they need support, what kinds of support they desire, and from whom they wish to receive that support. The facilitator's role is to educate and stimulate reflection and discussion between the decision-maker and their supporter or supporters to empower the decision-maker to design and implement a decision-making process in specific areas of their life that reflects the decision-maker's wishes and needs for assistance in those areas.

(a[m]o) Friend, close

(a[n]p) Futile, medically.

(a[o]q) Governing body.

(a[p]r) Hospital.

(a[q]s) Illness, HIV-related.

(a[r]t) Illness, mental.

(a[s]u) Indicated.

(a[t]v) Individual/Individuals.

(a[u]w) Infection, HIV.

(a[v]x) Information, HIV-related.

(a[w]y) Interest, best.

(a[x]z) Involved, actively.

([ay]ba) IRB.

Note: New material is underlined and deleted material is in [brackets].

([az]bb) Justice Center for the Protection of People with Special Needs (Justice Center).

(b[a]c) List, surrogate.

The prioritized lists [set forth] appearing in various sections of [section 633.18(a)(8)(iv)] this Part setting forth parties who may act as authorized surrogate under the terms of the respective section.

(b[b]d) Medication.

(b[c]e) Medication, over-the-counter.

(b[d]f) Medication, prescribed.

(b[e]g) Medication, self-administration of.

(b[f]h) Member, family.

(b[g]i) Mental Hygiene Legal Service (MHLS).

(b[h]j) Minor.

(b[i]k) Officer, chief executive.

(b[j]l) OPWDD.

(b[k]m) Order, do not resuscitate (DNR).

(b[l]n) Order, nonhospital DNR.

(b[m]o) Parent.

(b[n]p) Participant(s).

(b[o]q) Party, qualified.

(b[p]r) Person, capable adult.

For the purposes of this Part, a person 18 years of age or older who is able, including with the assistance of supports and accommodations available under a supported decision-making agreement, to understand the nature and implication of various issues such as program planning, treatment or movement. The assessment of capability in relation to each issue as it arises will be made by the person's program planning team. If the [individual]person resides in a developmental center or is on conditional release, this shall be done with notice to the Mental Hygiene Legal Service. Capability as stipulated by this definition does not mean legal competency; or does it necessarily relate to a person's capability to independently handle his or her own financial affairs; nor does it relate to the person's capacity to understand appropriate disclosures regarding proposed professional medical treatment, which must be evaluated independently. Thus, a[n individual]person may be capable of participation in planning for his or her services and programs but still requires assistance in the management of financial matters. Whenever there is doubt on the part of other party interested in the welfare of the [individual]person as to that person's ability to make decisions, as ascertained by the program planning team, a determination of capability is to be made

Note: New material is underlined and deleted material is in [brackets].

by an external Capability Review Board, designated by the commissioner. A capable adult person[s] cannot override the authority of a guardian appointed in accordance with the Surrogate Court Procedure Act or Mental Hygiene Law, or of a conservator, or of a committee.

(b[q]s) Person/persons.

(b[r]t) Physician, attending.

(b[s]u) Placement.

(b[t]v) Plan, individualized service (ISP).

(b[u]w) Policies/procedures or policy/procedure.

(b[v]x) Practitioner.

(b[w]y) Principal.

(b[x]z) Principles of compliance.

([by]ca) Professional.

([bz]cb) Professional, health care.

(c[a]c) Provider, health care.

(c[b]d) Proxy, health care.

(c[c]e) Punishment, corporal.

(c[d]f) Research.

(c[e]g) Resuscitate, order not to (DNR orders).

(c[f]h) Resuscitation, cardiopulmonary (CPR).

(c[g]i) Risk, minimal.

(c[h]j) Risk, significant.

(c[i]k) Risk, undue.

(c[j]l) Service, Mental Hygiene Legal (MHLS).

(c[k]m) Services, home and community-based (HCBS) waiver.

(c[l]n) Services, plan of.

(c[m]o) Services, staff providing direct care.

(c[n]p) Sibling.

(c[o]q) Staff.

(c[p]r) Standards of certification.

Note: New material is underlined and deleted material is in [brackets].

(c[q]s) Status, involuntary admission.

(c[r]t) Sterilization.

(c[s]u) Subjects, assurance of compliance with regulations for the protection of human.

(c[t]v) Substances, significant risk of bodily fluids.

(cw) Supported decision-making.

A way by which a person (known as a decision-maker) utilizes support from trusted persons in their life in order to make their own decisions about their life, including, but not limited to, decisions related to where and with whom the decision-maker wants to live; decisions about finances; the services, supports, and health care the decision-maker wants to receive; decisions about work; and decisions to consent or object to any plan of service.

(cx) Supported decision-making agreement, formal.

A written agreement governed by article 82 of the Mental Hygiene Law entered into by a person (known as a decision-maker) and one or more of their designated supporters that describes how the decision-maker uses supported decision-making to make their own decisions. Formal supported decision-making agreements must be in a form that complies with section 82.10 of the Mental Hygiene Law; be the product of a facilitation process, as provided by Part 634 of this Title; and be signed by a facilitator. Formal supported decision-making agreements meet the requirements of section 82.09 of the Mental Hygiene Law and are entitled to full legal effect pursuant to sections 82.11 and 82.12(b) through (d) of the Mental Hygiene Law, and section 634.9 of this Title. A decision or request made or communicated by a decision-maker with a formal supported decision-making agreement with the assistance of a supporter in accordance with the provisions of the agreement, must be recognized as the decision or request of the decision-maker themselves, and must be honored by any party, entity, or agency that receives the agreement, unless the party, entity, or agency, has substantial cause to believe the agreement has been revoked, or that the decision-maker is being abused, coerced, unduly influenced or financially exploited by the supporter, or that the decision will cause the decision-maker substantial and imminent physical or financial harm. (See sections 634.6 and 634.9 of this Title)

(cy) Supported decision-making agreement, informal.

An agreement, either written or unwritten, governed by article 82 of the Mental Hygiene Law, between a person (known as a decision-maker) and one or more of their designated supporters that provides the decision-maker a means by which to use supported decision-making to make their own decisions. Informal supported decision-making agreements are not required to be written, however a written agreement that complies with section 82.10 of the Mental Hygiene Law may allow the decision-maker to define clearer limits regarding the scope of supporters' respective roles, and may allow supporters more opportunity to provide the decision-maker assistance in the communication and implementation of their decisions.

Note: New material is underlined and deleted material is in [brackets].

(cz) Supporter.

An adult 18 years of age or older who has voluntarily entered into a supported decision-making agreement, either formal or informal, by agreeing to assist the person with the supported decision-making agreement (known as the decision-maker) in making their own decisions as prescribed by the supported decision-making agreement, and who is not ineligible to be a supporter under section 82.08 of the Mental Hygiene Law or section 634.6 of this Title.

([cu]da) Surrogate.

([cv]db) System, dispute, mediation,

([cw]dc) Team, program planning.

([cx]dd) Test, HIV-related.

([cy]de) Training.

([cz]df) Treatment, capacity to understand appropriate disclosures regarding proposed professional medical.

(d[a]g) Treatment, professional medical.

(d[b]h) Verify.

(d[c]i) Volunteer.

- **New paragraphs 635-11.1(b)(9)-(12) are added as follows:**

(9) Supported decision-making.

A way by which a person (known as a decision-maker) utilizes support from trusted persons in their life in order to make their own decisions about their life, including, but not limited to, decisions related to where and with whom the decision-maker wants to live; decisions about finances; the services, supports, and health care the decision-maker wants to receive; decisions about work; and decisions to consent or object to any plan of service.

(10) Supported decision-making agreement, formal.

A written agreement governed by article 82 of the Mental Hygiene Law entered into by a person (known as a decision-maker) and one or more of their designated supporters that describes how the decision-maker uses supported decision-making to make their own decisions. Formal supported decision-making agreements must be in a form that complies with section 82.10 of the Mental Hygiene Law; be the product of a facilitation process, as provided by Part 634 of this Title; and be signed by a facilitator. Formal supported decision-making agreements meet the requirements of section 82.09 of the Mental Hygiene Law and are entitled to full legal effect pursuant to sections 82.11 and 82.12(b) through (d) of the Mental Hygiene Law, and section 634.9 of this Title. A decision or request made or communicated by a decision-maker with a formal supported decision-making agreement with the assistance of a supporter in accordance

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with the provisions of the agreement, must be recognized as the decision or request of the decision-maker themselves, and must be honored by any party, entity, or agency that receives the agreement, unless the party, entity, or agency, has substantial cause to believe the agreement has been revoked, or that the decision-maker is being abused, coerced, unduly influenced or financially exploited by the supporter, or that the decision will cause the decision-maker substantial and imminent physical or financial harm. (See sections 634.6 and 634.9 of this Title)

(11) Supported decision-making agreement, informal.

An agreement, either written or unwritten, governed by article 82 of the Mental Hygiene Law, between a person (known as a decision-maker) and one or more of their designated supporters that provides the decision-maker a means by which to use supported decision-making to make their own decisions. Informal supported decision-making agreements are not required to be written, however a written agreement that complies with section 82.10 of the Mental Hygiene Law may allow the decision-maker to define clearer limits regarding the scope of supporters' respective roles, and may allow supporters more opportunity to provide the decision-maker assistance in the communication and implementation of their decisions.

(12) Supporter.

An adult 18 years of age or older who has voluntarily entered into a supported decision-making agreement, either formal or informal, by agreeing to assist the person with the supported decision-making agreement (known as the decision-maker) in making their own decisions as prescribed by the supported decision-making agreement, and who is not ineligible to be a supporter under section 82.08 of the Mental Hygiene Law or section 634.6 of this Title.

- **Existing subdivision 635-11.2(a) is amended to read as follows:**

(a) If a person has the ability to choose a PDP[,] on their own or with the assistance of supported decision-making, the person may enroll [himself or herself]themselves in a PDP or appoint another party to enroll [him or her]them. If a person has the ability to act in the Part D review process[,] on their own or with the assistance of supported decision-making, the person may act in the Part D review process for [himself or herself]themselves or appoint another party to act in the Part D review process for [him or her]them.

- **New subdivision 635-11.2(d) is added and existing subdivision 635-11.2(d) is renumbered 635-11.2(e) and amended to read as follows:**

(d) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, choice of insurance, or the choice of prescription drug plan, then the choice to enroll in a PDP or act in the Part D

Note: New material is underlined and deleted material is in [brackets].

review process may only be made by the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to plans of service;

(2) a court of competent jurisdiction specifically provides consent for enrollment in a PDP or otherwise acts in the Part D review process under the provisions of this section and notice is given to the Mental Hygiene Legal Service;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) the person appoints another party to enroll the person in a PDP and/or act in the Part D review process.

([d]e) In all other situations, the chief executive officer (CEO) (see section 635-99.1 of this Title) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may enroll the person or act in the Part D review process. The CEO or designee may also enroll the person or act in the Part D review process when any party specified in subdivisions (a)-(c) of this section who would otherwise enroll or act in the Part D review process is unwilling or unavailable. For the purposes of this [subsection]section only, if the person's residential facility is operated by OPWDD, the CEO of the agency is the director of the DDSOO that operates the residential facility.

(1) If a CEO or designee enrolls a person, [he or she]the CEO or designee shall give written notice of such enrollment to the person's correspondent or advocate, the person's supporter(s) under an applicable supported decision-making agreement, and the person's Medicaid service coordinator, or other person identified as that person's care coordinator.

(2) Process to request a different PDP.

(i) A correspondent, [or] advocate, or supporter under an applicable supported decision-making agreement, may request that the person be enrolled in a different PDP. Such request must be in writing.

(ii) The agency or sponsoring agency shall consider the request, verify the person's agreement or inability to participate in the decision to request a different PDP, and, if it agrees with the request, the CEO or designee shall enroll the person in the PDP requested and notify the advocate, supporter, or correspondent of the enrollment. Such notification must also be made to the person.

(iii) If the agency or sponsoring agency does not agree with the request, the agency or sponsoring agency shall notify the correspondent, supporter, or advocate in writing of the disagreement. The notice shall also inform the advocate, supporter, or correspondent that [he or she]they

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may appeal in writing to the DDRO director for the region within which the person's residential facility is located if the residential facility is not operated by OPWDD. If the person's residential facility is operated by OPWDD, then the notice shall inform the advocate, supporter, or correspondent that [he or she]they may appeal in writing to the to the director of the DDSOO that operates that residential facility.

(iv) If the advocate, supporter, or correspondent appeals in writing to the DDRO director or DDSOO director, the director shall review the request and relevant information and shall decide whether to enroll the person in a different PDP. Such decision shall be in writing and shall be sent to the correspondent, supporter, or advocate and agency or sponsoring agency. Such decision must also be sent to the person.

(v) While a request is being considered, the person shall remain enrolled in the PDP selected by the CEO or designee, or in a PDP in which the person is subsequently enrolled by the CEO or designee.

(3) Notwithstanding any other provision of this Title, if the person enrolls in a PDP (or a parent, guardian or appointee enrolls [him or her]them) and the CEO or designee notifies the person, guardian, parent or appointee of the agency or sponsoring agency of the objection to the selection of the PDP, the agency or sponsoring agency is not fiscally responsible for any excess costs that may be incurred, as a result of the selection of the PDP, compared to the costs of the PDP that would have been selected by the CEO or designee. The agency or sponsoring agency's written notification of the objection must inform the person, guardian, parent or appointee that the excess costs are not the responsibility of the agency or sponsoring agency and that the person, guardian, parent or appointee (whoever completed the enrollment) is responsible for the additional costs. Receipt of the written notification must be documented.

- **Existing subdivision 635-11.3(a) is amended to read as follows:**

(a) If a person has the ability to choose a PDP[,] on their own or with the assistance of supported decision-making, the person may enroll [himself or herself]themselves in a PDP or appoint another party to enroll [him or her]them. If a person has the ability to act in the Part D review process[,] on their own or with the assistance of supported decision-making, the person may act in the Part D review process for [himself or herself]themselves or appoint another party to act in the Part D review process for [him or her]them.

- **New subdivision 635-11.3(d) is added and existing subdivision 635-11.3(d) is renumbered 635-11.3(e) and amended to read as follows:**

(d) Notwithstanding any other provisions of this section, if an a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, choice

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of insurance, or the choice of prescription drug plan, then the choice to enroll in a PDP or act in the Part D review process may only be made by the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to plans of service or make decisions related to benefits or insurance;

(2) a court of competent jurisdiction specifically provides consent for enrollment in a PDP or otherwise acts in the Part D review process under the provisions of this section and notice is given to the Mental Hygiene Legal Service;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) the person appoints another party to enroll the person in a PDP and/or act in the Part D review process.

([d]e) In all other situations, or if any party specified in subdivisions (a) through[-(c)](d) of this section who would otherwise enroll the person or act in the Part D review process is unwilling or unavailable, any of the following parties may enroll the person, act in the Part D review process or appoint another party to act in the Part D review process:

(1) an actively involved: spouse, parent, adult child, adult sibling, adult family member or friend, an advocate or correspondent; or

(2) if none of the above are willing and available, the CEO (or designee) of the agency providing service coordination for the person.

- **Existing subdivision 635-11.4(a) is amended to read as follows:**

(a) If a person has the ability to choose a FIDA-IDD plan[,] on their own or with the assistance of supported decision-making, the person may enroll [himself or herself]themselves in a FIDA-IDD plan or appoint another party to enroll [him or her]them. If a person has the ability to act in the FIDA-IDD review process[,] on their own or with the assistance of supported decision-making, the person may act in the FIDA-IDD review process for [himself or herself]themselves or appoint another party to act in the FIDA-IDD review process for [him or her]them.

- **New subdivision 635-11.4(c) is added and existing subdivision 635-11.4(c) is renumbered and amended to read as follows:**

(c) Notwithstanding any other provisions of this section, if a person is 21 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, choice of insurance, or Medicaid or Medicare benefits, then the choice to enroll in a FIDA-IDD or act in the FIDA-IDD review process may only be made by the person themselves with the

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assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to plans of service or make decisions related to benefits or insurance;

(2) a court of competent jurisdiction specifically provides consent to enroll in a FIDA-IDD plan under the provisions of this section and notice is given to the Mental Hygiene Legal Service;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) the person appoints another party to enroll the person in a FIDA-IDD and/or act in the FIDA-IDD review process.

([c]d) If a party specified in subdivisions (a) [or]through ([b]c) of this section who would otherwise enroll the person or act in the FIDA-IDD review process is unwilling or unavailable, then any of the following parties, in the order stated, may enroll the person, act in the FIDA-IDD review process or appoint another party to act in the FIDA-IDD review process:

(1) an actively involved spouse;

(2) an actively involved parent;

(3) an actively involved adult child;

(4) an actively involved adult sibling;

(5) an actively involved adult family member;

(6) the Consumer Advisory Board for the Willowbrook Class (only for class members it fully represents).

• **Existing subdivisions 635-11.4(d) – (g) are renumbered and amended as follows:**

([d]e) In all other situations, the chief executive officer (CEO) (see section 635-99.1 of this Part) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may enroll the person or act in the FIDA-IDD review process. The CEO or designee may also enroll the person or act in the FIDA-IDD review process when any party specified in subdivisions (a)[-]through ([c]d) of this section who would otherwise enroll or act in the FIDA-IDD review process is unwilling or unavailable. For the purposes of this [subsection]section only, if the person's residential facility is operated by OPWDD, the CEO of the agency is the director of the DDSOO that operates the residential facility.

([e]f) If a party specified in subdivisions (a) through ([d]e) of this section, in the order so specified, makes a decision to enroll in a FIDA-IDD plan; not to enroll in a FIDA-IDD plan; or to disenroll from a FIDA-IDD plan; that decision shall be considered the final

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decision of the affected [individual]person and any party in a subordinate position, as specified in subdivisions (a) through ([d]e) of this section, may not change that enrollment decision. The party that enrolls the [individual]person shall also be the party authorized to act in the FIDA-IDD review process unless the person themselves becomes able to act in the FIDA-IDD review process, including with the assistance of supported decision-making, in which case the person shall be the party authorized to act in the FIDA-IDD review process or appoint another party to act in the FIDA-IDD process in their stead.

([f]g) If the CEO enrolls the person in the FIDA-IDD plan or acts in the FIDA-IDD review process, [he or she]the CEO shall give written notice of such enrollment and/or action to:

(1) the person;

([1]2) the person's correspondent or advocate, if one is available;

([2]3) the person's Medicaid service coordinator, or other person identified as that person's care coordinator;

([3]4) the DDRO director for the region encompassing the person's residence;

(5) the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

- **Existing subdivision 635-11.5(a) is amended to read as follows:**

(a) If a person has the ability to choose a FIDA-IDD plan[,] on their own or with the assistance of supported decision-making, the person may enroll [himself or herself]themselves in a FIDA-IDD plan or appoint another party to enroll [him or her]them. If a person has the ability to act in the FIDA-IDD review process[,] on their own or with the assistance of supported decision-making, the person may act in the FIDA-IDD review process for [himself or herself]themselves or appoint another party to act in the FIDA-IDD review process for [him or her]them.

- **New subdivision 635-11.5(c) is added and the following subdivisions are renumbered and amended to read as follows:**

(c) Notwithstanding any other provisions of this section, if a person is 21 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, choice of insurance, or Medicaid or Medicare benefits, then the choice to enroll in a FIDA-IDD or act in the FIDA-IDD review process may only be made by the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally

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empowered to give consent to plans of service or make decisions related to benefits or insurance;

(2) a court of competent jurisdiction specifically provides consent to enroll in a FIDA-IDD plan or act in the FIDA-IDD review process under the provisions of this section and notice is given to the Mental Hygiene Legal Service;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) the person appoints another party to enroll the person in a FIDA-IDD plan and/or act in the FIDA-IDD review process.

([c]d) In all other situations, or if any party specified in subdivisions (a)[-] through ([c]d) of this section who would otherwise enroll the person or act in the FIDA-IDD review process is unwilling or unavailable, any of the following parties, in the order stated, may enroll the person, act in the FIDA-IDD review process or appoint another party to act in the FIDA-IDD review process:

(1) an actively involved spouse;

(2) an actively involved parent;

(3) an actively involved adult child;

(4) an actively involved adult sibling;

(5) an actively involved adult family member;

(6) the Consumer Advisory Board for the Willowbrook Class (only for class members it fully represents).

([d]e) In all other situations, the person may be enrolled by the CEO (or designee) of the agency providing service coordination for the person. The CEO or designee may also enroll the person or act in the FIDA-IDD review process when any party specified in subdivisions (a)[-] through ([c]d) of this section who would otherwise enroll or act in the FIDA-IDD review process is unwilling or unavailable. If that CEO enrolls the person in the FIDA-IDD plan or acts in the FIDA-IDD review process, [he or she]they shall give written notice of such enrollment and/or action to:

(1) the person;

([1]2) the person's correspondent or advocate, if one is available; [and]

([2]3) the DDRO director for the region encompassing the person's residence[.];
and

(4) the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

([e]f) If a party specified in subdivisions (a) through ([d]e) of this section, in the order so specified, makes a decision to enroll in a FIDA-IDD plan; not to enroll in a FIDA-IDD

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plan; or to disenroll from a FIDA-IDD plan; that decision shall be considered the final decision of the affected [individual]person and any party in a subordinate position, as specified in subdivisions (a) through ([d]) of this section, may not change that enrollment decision. The party that enrolls the [individual]person shall also be the party authorized to act in the FIDA-IDD review process.

- **New subdivision 635-11.8(c) is added as follows and existing 635-11.8(c) and remaining subdivisions are renumbered and amended as follows:**

(c) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, or choice of care coordination or care coordinator, then only the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, may choose a CCO, or take any of the actions enumerated in subdivision (a) of this section, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to plans of service, or make decisions related to plans of service or care coordination generally;

(2) a court of competent jurisdiction specifically provides consent to enroll in a CCO under the provisions of this section or take any of the actions enumerated in subdivision (a) of this section, and notice is given to the Mental Hygiene Legal Service;

(4) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(3) the person appoints another party to enroll the person in a CCO and/or take any of the actions enumerated in subdivision (a) of this section.

([c]d) If a person lacks the ability to choose a CCO and does not have a guardian lawfully empowered to enroll [him or her]them in a CCO, then any of the following parties, in the order stated, may take any of the actions enumerated in subdivision (a) of this section:

([d]e) If the first surrogate on the list in subdivision (c[d]) of this section is not reasonably available and willing to make enrollment decisions and enroll the [individual]person in a CCO or act in the CCO review process, and is not expected to become reasonably available and willing to make an enrollment decision and enroll the [individual]person in a CCO or act in the CCO review process, the surrogate who has the highest priority on the list and who is willing and available shall have the authority to make enrollment decisions and enroll the [individual]person in a CCO or act in the CCO review process.

([e]f) If more than one party exists within a category in subdivision ([c]d) of this section utilizing the standard of active involvement, consent shall be sought first from the party

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with a higher level of involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.

([f]g) If a person lacks the ability to choose a CCO, does not have a guardian lawfully empowered to enroll him or her in a CCO, and there are no parties identified in subdivision ([c]d) of this section, then the chief executive officer (CEO) (see section 635 99.1 of this Part) of the agency operating the person's residential facility or sponsoring the family care home, or a designee of the CEO, may take any of the actions enumerated in subdivision (a) of this section. For the purposes of this [sub]section only, director of the DDSOO that operates the residential facility.

([g]h) If a party specified in subdivisions (a) through ([e]f) of this section, in the order so specified, makes a decision to enroll in a CCO; not to enroll in a CCO; or to disenroll from a CCO; that decision shall be considered the final decision of the affected [individual]person and any party in a subordinate position, as specified in subdivisions (a) through ([e]f) of this section, may not change that enrollment decision. The party that enrolls the [individual]person shall also be the party authorized to act in the CCO review process.

([h]i) If the CEO enrolls the person in the CCO or acts in the CCO review process, [he or she]they shall give written notice of such enrollment and/or action to:

(1) the person;

([1]2) the person's correspondent or advocate, if one is available;

([2]3) the person's Medicaid service coordinator, or other person identified as that person's care coordinator;

([3]4) the DDRO director for the region encompassing the person's residence[.];
and

(5) the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

([i]j) For each [individual]person eligible to enroll in a CCO, the [individual's]person's care management provider for OPWDD-certified services shall identify a decision-maker who has the authority to make enrollment decisions for the [individual]person pursuant to this section. If there is no care management provider assigned to the [individual]person at the time of the eligibility, the DDRO director for the region encompassing the person's current residence, or his or her designee, shall identify a decision-maker pursuant to this section.

([j]k) The care management provider or DDRO director shall notify the following parties of the decision-maker identified to make enrollment decisions:

(1) the person;

Note: New material is underlined and deleted material is in [brackets].

([1]2) the identified decision-maker;[and]

([2]3) OPWDD, if necessary[.];

(4) the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

([k]!) The care management provider or DDRO director shall maintain documentation of the current decision-maker identified pursuant to this section, including documentation of attempts to reach unavailable [individuals]persons, and shall confirm the identification of the current decision maker as necessary, but at least annually.

- **New subdivision 635-11.9(c) is added as follows and existing subdivision 635-11.9(c) and remaining subdivisions are renumbered and amended as follows:**

(c) Notwithstanding any other provisions of this section, if a person is 18 years of age or older, and has executed a formal supported decision-making agreement under section 82.06 of the Mental Hygiene Law that has been facilitated under the terms of Part 634 of this Title, and such supported decision-making agreement includes provisions related to consenting to plans of services, plans of service generally, or choice of care coordination or care coordinator, then only the person themselves with the assistance of a supporter or supporters under the supported decision-making agreement, may choose a CCO, or take any of the actions enumerated in subdivision (a) of this section, unless:

(1) the person has a guardian under article 17-A of the Surrogate's Court Procedure Act or article 81 of the Mental Hygiene Law who is specifically legally empowered to give consent to plans of service, or make decisions related to plans of service or care coordination generally;

(2) a court of competent jurisdiction specifically provides consent to enroll in a CCO under the provisions of this section, or take any of the actions enumerated in subdivision (a) of this section, and notice is given to the Mental Hygiene Legal Service;

(3) refusing to honor a decision made in accordance with the supported decision-making agreement is otherwise permitted under Part 634 of this Title; or

(4) the person appoints another party to enroll the person in a CCO and/or take any of the actions enumerated in subdivision (a) of this section.

([c]d) If a person lacks the ability to choose a CCO and does not have a guardian lawfully empowered to enroll him or her in a CCO, then any of the following parties, in the order stated, may take any of the actions enumerated in subdivision (a) of this section:

([d]e) If the first surrogate on the list in subdivision ([c]d) of this section is not reasonably available and willing to make enrollment decisions and enroll the [individual]person in a CCO or act in the CCO review process, and is not expected to become reasonably available and willing to make an enrollment decision and enroll the [individual]person in

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a CCO or act in the CCO review process, the surrogate who has the highest priority on the list and who is willing and available shall have the authority to make enrollment decisions and enroll the [individual]person in a CCO or act in the CCO review process.

([e]f) If more than one party exists within a category in subdivision ([c]d) of this section utilizing the standard of active involvement, consent shall be sought first from the party with a higher level of active involvement or, when the parties within a category are equally actively involved, consent shall be sought from any of such parties.

([f]g) If a person lacks the ability to choose a CCO: does not have a guardian lawfully empowered to enroll him or her in a CCO; and there are no parties identified in subdivision ([c]d) of this section, the DDRO director for the region encompassing the person's residence, or his or her designee may take any of the actions enumerated in subdivision (a) of this section. If the DDRO director or designee enrolls the person in the CCO, acts in the CCO review process, or disenrolls the [individual]person from a CCO, he or she shall give written notice of such enrollment, disenrollment and/or action to the person's correspondent or advocate, if one is available.

([g]h) If the DDRO director or designee enrolls the person in the CCO, acts in the CCO review process, or disenrolls the [individual]person from a CCO, [he or she]the DDRO director or designee shall give written notice of such enrollment, disenrollment and/or action to the person, the person's correspondent or advocate, if one is available, and the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

([h]i) If a party specified in subdivisions (a) through ([e]f) of this section, in the order so specified, makes a decision to enroll in a CCO; not to enroll in a CCO; or to disenroll from a CCO; that decision shall be considered the final decision of the affected [individual]person and any party in a subordinate position, as specified in subdivisions (a) through ([e]f) of this section, may not change that enrollment decision. The party that enrolls the [individual]person shall also be the party authorized to act in the CCO review process.

([i]j) For each [individual]person eligible to enroll in a CCO, the [individual's]person's care management provider for OPWDD-certified services shall identify a decision-maker who has the authority to make enrollment decisions for the [individual]person pursuant to this section. If there is no care management provider assigned to the [individual]person at the time of the eligibility, the DDRO director for the region encompassing the person's current residence, or his or her designee, shall identify a decision-maker pursuant to this section.

([j]k) The care management provider or DDRO director shall notify the following parties of the decision-maker identified to make enrollment decisions:

(1) the person;

([1]2) the identified decision-maker;[and]

Note: New material is underlined and deleted material is in [brackets].

([2]3) OPWDD, if necessary[.];

(4) the person's supporter(s) under a supported decision-making agreement, if the supported decision-making agreement provides that such supporter(s) are entitled to receive a copy of such notice made to the person.

([k]) The care management provider or DDRO director shall maintain documentation of the current decision-maker identified pursuant to this [subsection]section, including documentation of attempts to reach unavailable [individuals]persons, and shall confirm the identification of the current decision maker as necessary, but at least annually.

- **Existing subdivision 635-12.3(c) is amended to read as follows:**

(c) Notice and schedule of fees.

Prior to the receipt of services, the provider shall give the individual and any known other liable parties copies of the fee schedule for those services, together with a notice including a description of the obligations of the provider, the individual and liable parties under the law and this regulation in the form and format specified by the commissioner. If the individual has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the individual, that supporter must also be provided a copy of any information and notice made to the individual under this section, unless the individual or the supporter specifies verbally or in writing that they do not wish the supporter to receive such information or notice.

- **Existing subdivision 635-12.4(c) is amended to read as follows:**

(c) Notice and schedule of fees.

On or before the notice date, the provider shall give all individuals receiving preexisting services and any known other liable parties copies of the fee schedule for preexisting services which the individual is receiving, together with a notice including a description of the obligations of the provider, the individual and liable parties under the law and this regulation in the form and format specified by the commissioner. If the individual has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the individual, that supporter must also be provided a copy of any information and notice made to the individual under this section, unless the individual or the supporter specifies verbally or in writing that they do not wish the supporter to receive such information or notice.

- **New paragraph 635-12.12(b)(3) is added as follows:**

(3) If an individual receiving notice under this section has a supported decision-making agreement that provides that a supporter is entitled to receive a copy of notice made to the individual, that supporter must also be provided any notification made to the person under this section, unless the person or the supporter specifies verbally or in writing that they do not wish the supporter to receive such notice.

- **Existing subdivision 636-1.5(a) is amended to read as follows:**

Note: New material is underlined and deleted material is in [brackets].

(a) The care manager must give notice of the individual's right to a person-centered planning process in accordance with section 636-1.2 of this Subpart and to a person-centered plan in accordance with section 636-1.3 of this Subpart, and of the right to object to services pursuant to section 633.12 of this Title, to the individual and the person upon whom decision-making authority is conferred by State law (see section 636-1.2[a][1] of this Subpart), if any, prior to the initiation of the person-centered planning process and development of the plan. If the individual has a supported decision-making agreement (see Part 634 of this Title) that provides that a supporter is entitled to receive a copy of notice made to the individual, that supporter must also be provided a copy of any notice specified in this section, unless the individual or the supporter specifies verbally or in writing that they do not wish for the supporter to receive such notice.

- **Existing paragraph 679.4(k)(2) is amended to read as follows:**

(2) at least semi-annually by the treating practitioner or treatment coordinator in consultation with the person receiving the service and/or [his/her]their collaterals (unless the person is an adult, has the capacity to object, including with due consideration paid to the supports and accommodations available under an informal supported decision-making agreement, and does so object to the provision of such services), for all other ongoing rehabilitation/habilitation services (see section 679.3(j)(2) of this Part) or health care services (see section 679.3(j)(4) of this Part) of six months or longer duration.

- **Repeal and reserve section 681.13.**

Note: New material is underlined and deleted material is in [brackets].