

**Memorandum of Understanding
Between the
New York State Office for People With Developmental Disabilities
and the
New York State Education Department
Regarding Registered Nursing Supervision
of Unlicensed Direct Care Staff
in Home and Community Settings**

WHEREAS, the Office for People With Developmental Disabilities (OPWDD) is responsible for the delivery of services for individuals with developmental disabilities throughout New York State; and

WHEREAS, the New York State Education Department (SED) is responsible for issuing licenses to registered professional nurses ("RN's") and licensed practical nurses; and

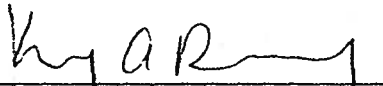
WHEREAS, OPWDD and SED wish to define the appropriate nursing tasks that may be delegated by RN's to unlicensed direct support professionals (DSP's); activities related to the delegation of nursing tasks; the training that must be provided to DSP's; staffing ratios and the level of supervision, that is to be provided by RN's to DSP's who perform nursing tasks pursuant to §6908(1)(a)(v) of the New York State Education Law in the Administrative Memorandum (ADM)- #2015-03, a copy of which is attached hereto as Exhibit "A";

WHEREAS, it is the parties understanding that the Executive, Senate, and Assembly have reached agreement on the enactment of legislation as part of the State Fiscal Year 2015-16 Budget to assist in provision of nursing services in non-certified settings (the "Legislation"), a copy of which is attached hereto as Exhibit "B":

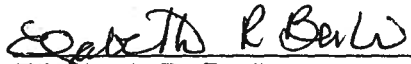
NOW, THEREFORE, OPWDD and SED hereby agree as follows:

1. The home and community settings nursing supervision ADM, defines the appropriate nursing tasks that may be delegated by RN's to DSP's; activities related to the delegation of nursing tasks; the training that must be provided to DSP's; staffing ratios and the level of supervision, that is to be provided by RN's to DSP's who perform nursing tasks pursuant to §6908(1)(a)(v) of the New York State Education Law

2. OPWDD shall comply with the ADM and shall incorporate the ADM within its routine survey of OPWDD certified services and ensure that its providers comply with the attached ADM.
3. The attached ADM may be amended only in writing by mutual agreement of designated representatives of the undersigned parties.
4. This MOU and the ADM are contingent upon the legislation, attached hereto as Exhibit B, being signed into law by the Governor, and the terms of the MOU and the attached ADM shall take effective on the effective date of such law.



Kerry A. Delaney
Acting Commissioner
New York State Office for People with Developmental Disabilities
Dated: March 25, 2015



Elizabeth R. Berlin
Acting Commissioner
New York State Education Department
Dated: March 25, 2015

EXHIBIT A



ADMINISTRATIVE MEMORANDUM (ADM) - #2015-03

To: Directors of Developmental Disabilities State Operations Offices
Directors of Developmental Disabilities Regional Offices
Executive Directors of Agencies Providing Services

From: Helene DeSanto 
Deputy Commissioner
Division of Service Delivery
Office for People With Developmental Disabilities (OPWDD)

Doug Lentivech
Deputy Commissioner
Office of the Professions
New York State Education Department (SED)

Date: April 1, 2015

Subject: Registered Professional Nurse Supervision of Unlicensed Direct Support
Professionals in Programs Approved by the Office for People With Developmental
Disabilities

Suggested Distribution:

Registered Professional Nurses
Licensed Practical Nurses
Quality Compliance Staff
Direct Support Professionals
Administrative Staff
Program Staff
Registered Providers

PURPOSE

This ADM has been developed pursuant to New York State Education Law §6908(1) (a) (v), to:

- (1) identify the programs authorized to utilize direct support professionals to provide certain nursing tasks under the supervision of a registered professional nurse; and

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- (2) define criteria for providing high quality, person centered, nursing services to individuals with intellectual/developmental disabilities, who participate in such programs.

APPLICABILITY

This ADM applies to providers of Home and Community Based Services (HCBS) waiver services approved or certified by OPWDD pursuant to Mental Hygiene Law section 16.03(a)(4). This ADM applies to services provided by registered professional nurses and direct support professionals to individuals with intellectual/developmental disabilities in their private homes and while accompanying the individuals in the community, in settings not certified by OPWDD.

This ADM does not apply to services in facilities licensed by other state agencies to provide personal care and supervision, healthcare, or habilitation services, such as hospitals and adult care facilities, or to OPWDD certified Article 16 clinics. This ADM does not apply to services provided in community residences or in intermediate care facilities certified by OPWDD; these services are covered by Administrative Memorandum 2003-1 and the 2003 Memorandum of Understanding between SED and OPWDD.

DEFINITIONS

Individual

For purposes of this ADM, an individual is a person with an intellectual/developmental disability who lives in a private home that is not certified by OPWDD or another governmental entity and receives habilitation services or respite care services from an approved HCBS provider.

Approved Provider

An approved provider is a not-for-profit corporation certified by OPWDD pursuant to Mental Hygiene Law section 16.03(a)(4) to provide HCBS habilitation services or respite care services to individuals in a private home and in other community settings that are not certified by OPWDD.

Registered Professional Nurse (RN)

An RN is an individual who is licensed to practice registered professional nursing pursuant to Education Law §6902(1).

Licensed Practical Nurse (LPN)

An LPN is an individual who is licensed to practice nursing pursuant to Education Law §6902(2).

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Direct Support Professional (DSP)

Approved providers employ or contract with DSPs to provide habilitation or respite care services to individuals in their homes and while accompanying the individuals in community settings. DSPs provide a wide variety of person-centered supports and services to individuals. For the purposes of this ADM, a DSP is an employee or contractor of an approved provider who provides direct care services, and who, regardless of job title, is responsible for providing the day-to-day hands-on care, training, guidance, direction, assistance, support, etc. to individuals receiving supports and services in a private home or community setting that is not certified by OPWDD (see also, 14 NYCRR 633.99(cm)).

Habilitation and Respite Care Services

For the purposes of this ADM, habilitation and respite care services are person-centered supports and services provided by the approved provider pursuant to the OPWDD HCBS waiver program that help individuals with intellectual/developmental disabilities to live at home and participate fully in community life. Habilitation and respite care services may include nursing services provided by RNs, LPNs, and, pursuant to this ADM, DSPs.

Nursing Tasks

For the purposes of this ADM, nursing tasks are tasks that may be delegated in writing by an RN to a DSP, and may include the following:

- bladder catheterization care (except for the insertion or removal of indwelling catheters or procedures requiring sterile technique);
- non-sterile dressing changes;
- glucose monitoring tests using medical devices approved by the FDA for over-the-counter use, if used for a single individual;
- respiratory care tasks, such as basic spirometry, oxygen administration, and nebulizer treatments;
- permanent gastrostomy or jejunostomy tube feedings;
- colostomy care that does not require sterile technique;
- basic medication administration tasks (e.g., topical, eye/ear/nose drops, enemas, suppositories, and some routinely administered oral medications); and
- subcutaneous injections of diabetes-related medications and emergency injections (including, but not limited to, epinephrine, narcan, glucagon);

For the purpose of this ADM, the following activities and services shall not be delegated to a DSP and shall not be performed by a DSP:

- any activity that is outside the scope of practice of a licensed practical nurse;
- the administration of medications or fluids parenterally (except for subcutaneous injections of diabetes-related medications or emergency injections [including but not limited to epinephrine, narcan, glucagon, as described above]);

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- any services that are inconsistent with care ordered or prescribed by a physician, physician assistant, nurse practitioner, dentist, or podiatrist;
- the administration of controlled substances, except for federal Schedule IV and Schedule V controlled substances prescribed to treat seizure disorders or another developmental disability;
- the insertion or removal of indwelling catheters;
- any services requiring sterile technique; and,
- any nursing care that requires professional nursing judgment, including the assessment of the medication needs of an individual served by OPWDD.

DELEGATION OF NURSING TASKS

Initial Assessment

With respect to each new individual served by an approved provider, the approved provider, in collaboration with an RN employed by or under contract with the approved provider, shall review the individual's nursing needs, if any. If the RN determines that the individual requires nursing services, the RN shall complete a comprehensive assessment of the individual to determine whether nursing tasks, in whole or in part, can be delegated to DSPs with adequate training and nursing supervision.

The comprehensive nursing assessment must include the following information:

- (1) the individual's current health status and a review of the individual's psychosocial, functional, behavioral, and cognitive status as they relate to the provision of nursing services to the individual at home or in community settings;
- (2) the individual's strengths, goals, and care preferences;
- (3) current medical or nursing treatments ordered or prescribed by the individual's physician, nurse practitioner, or other qualified health professional; and
- (4) a review of all medications that the individual is currently taking to identify any potential issues (e.g., significant adverse effects, duplicate drug therapy, ineffective drug therapy, significant drug interactions, or non-compliance with drug therapy).

An RN shall update the comprehensive nursing assessment as frequently as the individual's condition warrants.

Delegation Decisions

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It shall be the responsibility of the RN to determine, using professional nursing judgment, whether any and which nursing tasks can be delegated to DSPs and which DSPs will be authorized and trained to perform the delegated tasks. The RN shall exercise professional judgment as to when delegation is unsafe and/or not in the individual's best interest.

When making a decision regarding the delegation of a nursing task, the RN shall consider the following:

- complexity of the task;
- condition/stability of the individual;
- training and abilities of the DSP involved, including relevant factors related to the DSP's ability to safely provide nursing services; and
- input from the individual or the individual's representative, if any.

The RN shall not delegate any nursing tasks to a DSP unless the RN determines that:

- (1) adequate equipment, supplies, and medications are available in the individual's home or in the community setting, if applicable, to perform the delegated nursing tasks appropriately;
- (2) the DSP has demonstrated to the RN that the DSP can perform the delegated nursing tasks safely and competently in the individual's home or in the community setting, if applicable;
- (3) the individual's medical condition is stable and predictable; and
- (4) the individual or the individual's representative (if any) agrees to have nursing tasks provided by DSPs.

Documenting Delegation Decisions

The RN shall develop an individualized plan of nursing services based on the comprehensive nursing assessment of the individual, which identifies the nursing services to be provided to the individual, including delegated nursing tasks. An RN who delegates the performance of nursing tasks shall note in the individualized plan of nursing services a description of the nursing task, the name of the DSP(s) to whom the task is delegated, the date of delegation, the RN who will initially be assigned to supervise the DSP(s), and the RN's signature. The RN may include specific recommendations relating to the RN supervision of the delegated tasks. The RN shall promptly document in the individualized plan of nursing services any changes or termination of a delegation along with the RN's signature.

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A delegating RN shall provide written individual-specific instructions for performing each delegated nursing task and criteria for identifying, reporting, or responding to problems or complications to the qualified DSPs to whom the nursing task is delegated.

An RN shall document in the plan of nursing services the delegation of nursing tasks to qualified DSPs as well as any changes in or termination of nursing tasks. The RN shall provide the DSP with written individual-specific instructions for performing each delegated nursing task and criteria for identifying, reporting, or responding to problems or complications.

In cases of staffing shortages where a qualified DSP is not available, an approved provider may assign an LPN or RN to perform the nursing tasks.

RN Supervision of DSPs

An RN shall be responsible for the supervision of DSPs in the performance of nursing tasks and activities. The approved provider shall ensure that each RN who supervises the performance of nursing tasks shall be: (1) thoroughly familiar with each individual's health status and nursing care plan and care needs; (2) informed of the approved provider's policy and procedures relating to the delegation of and supervision of nursing tasks performed by DSPs; (3) in receipt of required training relating to the supervision of nursing tasks provided by the DSPs; (4) authorized to oversee and direct care rendered by DSPs; and (5) capable of personally visiting the individual whenever necessary to protect the health and safety of the individual and prevent unnecessary emergency room visits.

For the purposes of this ADM, adequate nursing supervision of the performance of nursing tasks by a DSP involves:

- initial individual-specific training regarding the nursing task to be delegated to a DSP and verification that the DSP can competently perform the delegated nursing task(s) in the individual's home;
- monitoring and periodic inspection of the DSP's performance of the delegated nursing tasks;
- providing guidance, direction, and other assistance to a DSP by phone or in person, relating to delegated nursing tasks;
- soliciting feedback from the individual or the individual's representative, regarding services rendered by the DSP; and
- responding to the individual's nursing care needs by phone or in person, as needed, to ensure that the individual is safe and receiving good quality nursing care.

The amount and type of nursing supervision required will be determined by the RN responsible for supervising the task or activity, and will depend upon:

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- the complexity of the task;
- the skill, experience and training of the DSP; and
- the health conditions and health status of the individual being served.

Training

The approved provider shall ensure that all RNs who do not have previous experience in the field of nursing for individuals with intellectual/developmental disabilities complete an orientation for registered nurses in developmental disabilities nursing within three months of being hired. The approved provider shall ensure that the new RN completes such orientation before being assigned to supervise or delegate the performance of nursing tasks to DSPs without clinical oversight by a qualified RN with experience in provision of nursing services to individuals with intellectual/developmental disabilities.

The approved provider shall ensure that all DSPs complete all OPWDD required training relating to nursing tasks. It is the responsibility of the delegating and supervising RN to provide initial and on-going individual-specific training to DSPs for all nursing tasks that DSPs will perform. The supervising RN must periodically review the performance of DSPs to verify that the DSP's care is consistent with written individual-specific instructions for performing each delegated nursing task and for responding to problems or complications.

The approved provider shall ensure that medication administration, tube feeding and diabetic care is taught utilizing a standard curriculum approved by OPWDD.

The approved provider shall ensure that diabetic care is taught by either:

- A Certified Diabetic Educator (CDE). In those instances where the CDE is not a RN, the administration of insulin or glucagon shall be taught by an RN;

OR

- An RN who has successfully completed an OPWDD approved train-the-trainer course to teach diabetes care to unlicensed Direct Support Professionals. Approval to teach diabetic care to unlicensed Direct Support Professionals shall be for a period of one year. Continued approval will be dependent upon completion of annual knowledge/skill maintenance training.

The approved provider shall ensure that DSPs are separately certified for medication administration, tube feeding, and insulin administration by the RN employed by or under contract with the approved provider, and shall be recertified on an annual basis.

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Availability of RNs to DSPs

The approved provider shall ensure that one or more qualified RNs are available to provide adequate supervision of DSPs in the provision of nursing tasks when DSPs are performing such tasks on behalf of the individual, 24 hours a day, 7 days a week. The RN must be either on site or immediately available by telephone when necessary to ensure that the individual is safe and to prevent unnecessary emergency room visits. The approved provider shall ensure that all supervising RNs (including supervising RNs working during off-hours or on-call), will be immediately notified of changes in medical orders for an individual and/or of changes in an individual's health status. This notification may be provided by the DSP or by other staff working with the individual at the time a change occurs (e.g., by the DSP who accompanied an individual to a medical appointment that resulted in a new medical order; an individual becomes ill or injured while under the care of the assigned DSP or other staff member, etc.)

Frequency of Visits by RNs

The frequency of visits to sites where DSPs provide nursing tasks shall be at the discretion of the RN responsible for supervision but in no case shall visits occur less frequently than once during the month in which such nursing tasks are delivered.

Plan of Nursing Services

The RN is responsible for developing an individualized Plan of Nursing Services (PONS) for any individual who requires nursing care, including those who require medication administration for diagnosed medical conditions. Such plans will be updated at least annually or whenever there is a significant change in the individual's condition. The PONS shall identify the RN(s) who delegated each nursing task and the nursing tasks that were delegated. The approved provider and the delegating RN must assure and document that the DSPs to whom the nursing tasks have been delegated have received and maintained all required training.

The RN shall document that the DSPs have been educated about the chronic conditions and related health care needs of each individual in their care.

The RN shall ensure that there is an individual specific medication sheet for each medication that is administered. This sheet shall include all of the information required by 14 NYCRR §633.17(a)(17)(iii).

Clinical Performance Evaluations

The RN shall conduct annual clinical performance evaluations for unlicensed DSPs for procedures that include, but are not limited to, medication administration, insulin administration, and tube feeding. This evaluation shall become part of the employee's annual performance evaluation.

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Staffing Ratios

The approved provider is responsible for ensuring that adequate, qualified staffing is available at all times to meet the specific nursing care needs of individuals. The approved provider shall consider the following when establishing an RN/individual ratio for RNs assigned to provide nursing services in programs subject to this ADM:

- the health status/stability of the individuals;
- the type of facility or program;
- the actual number of DSPs, both full and part time, who are to be trained and supervised;
- the number of LPNs to be supervised;
- the number of locations, ease of access involved, their geographic location and proximity to each other, and proximity to health care providers; and
- the degree of additional nursing services provided by external nursing agencies.

Based on the evaluation of these factors, the approved provider shall establish a registered nurse/individual ratio that ensures consistently adequate nursing supervision. In no instance shall this ratio exceed one full time equivalent of an RN to 35 individuals (1:35). RN supervisors, in conjunction with the RNs, shall routinely and/or as necessary evaluate the ratio of RNs to individuals. Some ratios will need to be significantly less than this based upon the evaluation of the above factors.

RN/individual ratios shall be re-evaluated within one week if there are any significant changes in any of the factors listed above and RN assignments adjusted accordingly.

If an RN is acting as the supervising nurse for the approved provider and also has responsibility for one or more locations, only that portion of her/his time that is devoted to the locations may be used in calculating the ratio.

CONTACT INFORMATION

For additional information, contact OPWDD Director of Nursing and Health Services, (518) 474-3558.

EXHIBIT B

DRAFT LBDC

AN ACT to amend the social services law, the executive law and the mental hygiene law, in relation to providing professional services to individuals with developmental disabilities in non-certified settings; in relation to the exemption of the nurse practice act for direct care staff in non-certified settings funded, authorized or approved by the office for people with developmental disabilities; in relation to services and needs assessments; and to repeal certain provisions of the mental hygiene law relating thereto (Part S);

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

1

PART S

2 Section 1. Section 366 of the social services law is amended by adding
3 a new subdivision 7-a to read as follows:

4 7-a. a. The commissioner of health in consultation with the commis-
5 sioner of developmental disabilities shall apply for a home and communi-
6 ty-based waiver, pursuant to subdivision (c) of section nineteen hundred
7 fifteen of the federal social security act, in order to provide home and
8 community-based services for a population of persons with developmental
9 disabilities, as such term is defined in section 1.03 of the mental
10 hygiene law.

11 b. Persons eligible for participation in the waiver program shall:

12 (i) have a developmental disability as such term is defined in subdi-
13 vision twenty-two of section 1.03 of the mental hygiene law;

14 (ii) meet the level of care criteria provided by an intermediate care
15 facility for the developmentally disabled;

16 (iii) be eligible for Medicaid;

1 (iv) live at home or in an individualized residential alternative,
2 community residence or family care home, operated or licensed by the
3 office for people with developmental disabilities;

4 (v) be capable of being cared for in the community if provided with
5 such services as respite, home adaptation, or other home and community-
6 based services, other than room and board, as may be approved by the
7 secretary of the federal department of health and human services, in
8 addition to other services provided under this title, as determined by
9 the assessment required by paragraph c of this subdivision;

10 (vi) have a demonstrated need for home and community based waiver
11 services; and

12 (vii) meet such other criteria as may be established by the commis-
13 sioner of health and the commissioner of developmental disabilities, as
14 may be necessary to administer the provisions of this subdivision.

15 c. The commissioner of developmental disabilities shall assess the
16 eligibility of persons enrolled, or seeking to enroll, in the waiver
17 program. The assessment shall include, but need not be limited to, an
18 evaluation of the health, psycho-social, developmental, habilitation and
19 environmental needs of the person and shall serve as the basis for the
20 development and provision of an appropriate person centered plan of care
21 for such person.

22 d. The office for people with developmental disabilities shall under-
23 take or arrange for the development of a written person centered plan of
24 care for each person enrolled in the waiver. Such person centered plan
25 of care shall describe the provision of home and community based waiver
26 services consistent with the assessment for each person.

27 e. The office for people with developmental disabilities shall review
28 the person centered plan of care and authorize those home and community

1 based services to be included in the person centered plan of care,
2 taking into account the person's assessed needs, valued outcomes and
3 available resources.

4 f. The commissioners of developmental disabilities and health shall
5 determine quality standards for organizations providing services under
6 such waiver and shall authorize organizations that meet such standards
7 to provide such services.

8 g. The commissioner of developmental disabilities or health may
9 promulgate rules and regulations as necessary to effectuate the
10 provisions of this section.

11 h. This subdivision shall be effective only if, and as long as, feder-
12 al financial participation is available for expenditures incurred under
13 this subdivision.

14 § 2. Paragraph (a) of subdivision 4 of section 488 of the social
15 services law, as added by section 1 of part B of chapter 501 of the laws
16 of 2012, is amended to read as follows:

17 (a) a facility or program in which services are provided and which is
18 operated, licensed or certified by the office of mental health, the
19 office for people with developmental disabilities or the office of alco-
20 holism and substance abuse services, including but not limited to
21 psychiatric centers, inpatient psychiatric units of a general hospital,
22 developmental centers, intermediate care facilities, community resi-
23 dences, group homes and family care homes, provided, however, that such
24 term shall not include a secure treatment facility as defined in section
25 10.03 of the mental hygiene law, services defined in subparagraph four
26 of subdivision (a) of section 16.03 of the mental hygiene law, or
27 services provided in programs or facilities that are operated by the
28 office of mental health and located in state correctional facilities

1 under the jurisdiction of the department of corrections and community
2 supervision;

3 § 3. Subdivision 2 of section 550 of the executive law, as added by
4 section 3 of part A of chapter 501 of the laws of 2012, is amended to
5 read as follows:

6 2. "Mental hygiene facility" shall mean a facility as defined in
7 subdivision six of section 1.03 of the mental hygiene law and facilities
8 for the operation of which an operating certificate is required pursuant
9 to article sixteen or thirty-one of the mental hygiene law and including
10 family care homes. "Mental hygiene facility" also means a secure treat-
11 ment facility as defined by article ten of the mental hygiene law. This
12 term shall not include services defined in subparagraph four of subdivi-
13 sion (a) of section 16.03 of the mental hygiene law.

14 § 4. Subdivisions 3, 4, 5 and 22 of section 1.03 of the mental hygiene
15 law, subdivision 3 as amended by chapter 223 of the laws of 1992, subdivi-
16 sion 4 as added by chapter 978 of the laws of 1977, subdivision 5 as
17 amended by chapter 75 of the laws of 2006, and subdivision 22 as amended
18 by chapter 255 of the laws of 2002, are amended to read as follows:

19 3. "Mental disability" means mental illness, [mental retardation]
20 intellectual disability, developmental disability, alcoholism, substance
21 dependence, or chemical dependence. [A mentally disabled person is one
22 who has a mental disability.]

23 4. "Services for [the mentally disabled] persons with a mental disa-
24 bility" means examination, diagnosis, care, treatment, rehabilitation,
25 supports, habilitation or training of the mentally disabled.

26 5. "Provider of services" means an individual, association, corpo-
27 ration, partnership, limited liability company, or public or private
28 agency, other than an agency or department of the state, which provides

1 services for [the mentally disabled] persons with a mental disability.
2 It shall not include any part of a hospital as defined in article twen-
3 ty-eight of the public health law which is not being operated for the
4 purpose of providing services for the mentally disabled. No provider of
5 services shall be subject to the regulation or control of the department
6 or one of its offices except as such regulation or control is provided
7 for by other provisions of this chapter.

8 22. "Developmental disability" means a disability of a person which:

9 (a) (1) is attributable to [mental retardation] intellectual disabili-
10 ty, cerebral palsy, epilepsy, neurological impairment, familial dysauto-
11 nomia or autism;

12 (2) is attributable to any other condition of a person found to be
13 closely related to [mental retardation] intellectual disability because
14 such condition results in similar impairment of general intellectual
15 functioning or adaptive behavior to that of [mentally retarded] intel-
16 lectually disabled persons or requires treatment and services similar to
17 those required for such person; or

18 (3) is attributable to dyslexia resulting from a disability described
19 in subparagraph [(1)] one or [(2)] two of this paragraph;

20 (b) originates before such person attains age twenty-two;

21 (c) has continued or can be expected to continue indefinitely; and

22 (d) constitutes a substantial handicap to such person's ability to
23 function normally in society.

24 § 5. Intentionally omitted.

25 § 6. Subdivision (a) of section 16.03 of the mental hygiene law is
26 amended by adding a new paragraph 4 to read as follows:

27 (4) The provision of home and community based services approved under
28 a waiver program authorized pursuant to subdivision (c) of section nine-

1 teen hundred fifteen of the federal social security act and subdivisions
2 seven and seven-a of section three hundred sixty-six of the social
3 services law, provided that an operating certificate issued pursuant to
4 this paragraph shall only authorize services in a home or community
5 setting.

6 § 7. Section 16.03 of the mental hygiene law is amended by adding a
7 new subdivision (f) to read as follows:

8 (f) Any provider of services that holds an operating certificate
9 pursuant to paragraph four of subdivision (a) of this section, shall be
10 authorized to employ or contract with persons licensed to practice nurs-
11 ing pursuant to article one hundred thirty-nine of the education law;
12 employ or contract with exempt individuals authorized to perform tasks
13 pursuant to subparagraph (v) of paragraph a of subdivision one of
14 section sixty-nine hundred eight of the education law; or contract with
15 entities legally authorized to employ persons licensed to practice nurs-
16 ing pursuant to article one hundred thirty-nine of the education law or
17 exempt individuals authorized to perform tasks pursuant to subparagraph
18 (v) of paragraph a of subdivision one of section sixty-nine hundred
19 eight of the education law; provided that such exempt individuals shall
20 only be authorized to provide those tasks delegated pursuant to subpara-
21 graph (v) of paragraph a of subdivision one of section sixty-nine
22 hundred eight of the education law.

23 § 8. Subdivision (a), paragraphs 2, 3, and 6 of subdivision (c), para-
24 graphs 1 and 4 of subdivision (d), subdivision (e), and subdivision (i)
25 of section 16.05 of the mental hygiene law, subdivision (a), paragraphs
26 2, 3, and 6 of subdivision (c), paragraphs 1 and 4 of subdivision (d)
27 and subdivision (e) as added by chapter 786 of the laws of 1983, para-
28 graph 6 of subdivision (c) and paragraph 4 of subdivision (d) as renun-

bered by chapter 618 of the laws of 1990, and subdivision (i) as amended by chapter 37 of the laws of 2011, are amended to read as follows:

(a)(1) Application for an operating certificate shall be made upon forms prescribed by the commissioner.

(2) Application shall be made by the person or entity responsible for operation of the facility or provider of services as described in subdivision four of section 16.03 of this article. Applications shall be in writing, shall be verified and shall contain such information as required by the commissioner.

(2) The character, competence and standing in the community of the person or entity responsible for operating the facility or providing services;

(3) The financial resources of the proposed facility or provider of services and its sources of future revenues;

(6) In the case of residential facilities, that arrangements have been made with other providers of services for the provision of health, habilitation, day treatment, education, sheltered workshop, transportation or other services as may be necessary to meet the needs of [clients] individuals who will reside in the facility; and

(1) the financial resources of the proposed facility or provider of services and its sources of future revenues;

(4) in the case of residential facilities, that arrangements have been made with other providers of services for the provision of health, habilitation, day treatment, education, sheltered workshop, transportation or other services as may be necessary to meet the needs of [clients] individuals who will reside in the facility; and

(e) The commissioner may disapprove an application for an operating certificate, may authorize fewer services than applied for, and may

1 place limitations or conditions on the operating certificate including,
2 but not limited to compliance with a time limited plan of correction of
3 any deficiency which does not threaten the health or well-being of any
4 [client] individuals. In such cases the applicant shall be given an
5 opportunity to be heard, at a public hearing if requested by the appli-
6 cant.

7 (i) In the event that the holder of an operating certificate for a
8 residential facility issued by the commissioner pursuant to this article
9 wishes to cease the operation or conduct of any of the activities, as
10 defined in paragraph one or four of subdivision (a) of section 16.03 of
11 this article, for which such certificate has been issued or to cease
12 operation of any one or more of facilities for which such certificate
13 has been issued; wishes to transfer ownership, possession or operation
14 of the premises and facilities upon which such activities are being
15 conducted or to transfer ownership, possession or operation of any one
16 or more of the premises or facilities for which such certificate has
17 been issued; or elects not to apply to the commissioner for re-certifi-
18 cation upon the expiration of any current period of certification, it
19 shall be the duty of such certificate holder to give to the commissioner
20 written notice of such intention not less than sixty days prior to the
21 intended effective date of such transaction. Such notice shall set forth
22 a detailed plan which makes provision for the safe and orderly transfer
23 of each person with a developmental disability served by such certifi-
24 cate holder pursuant to such certificate into a program of services
25 appropriate to such person's on-going needs and/or for the continuous
26 provision of a lawfully operated program of such activities and services
27 at the premises and facilities to be conveyed by the certificate holder.
28 Such certificate holder shall not cease to provide any such services to

1 any such person with a developmental disability under any of the circum-
2 stances described in this section until the notice and plan required
3 hereby are received, reviewed and approved by the commissioner. For the
4 purposes of this paragraph, the requirement of prior notice and contin-
5 uous provision of programs and services by the certificate holder shall
6 not apply to those situations and changes in circumstances directly
7 affecting the certificate holder that are not reasonably foreseeable at
8 the time of occurrence, including, but not limited to, death or other
9 sudden incapacitating disability or infirmity. Written notice shall be
10 given to the commissioner as soon as reasonably possible thereafter in
11 the manner set forth within this subdivision.

12 § 8-a. Subdivision (c) of section 16.05 of the mental hygiene law is
13 amended by adding a new paragraph 6-a to read as follows:

14 (6-a) In the case of a provider of services seeking to provide nurs-
15 ing tasks by non-licensed persons authorized to provide such tasks
16 pursuant to subparagraph (v) of paragraph a of subdivision one of
17 section sixty-nine hundred eight of the education law, that such provid-
18 er will provide services and perform tasks in a safe and competent
19 manner and will fully comply with the requirements of such subparagraph
20 and any memorandum of understanding between the office and the state
21 education department pursuant to such subparagraph. Any operating
22 certificate subject to this paragraph shall specify that the provider of
23 services is authorized to provide these nursing services.

24 § 9. Paragraph 1 of subdivision (a) of section 16.09 of the mental
25 hygiene law, as added by chapter 786 of the laws of 1983, is amended to
26 read as follows:

27 (1) "Facility" is limited to a facility in which services are offered
28 for which an operating certificate is required by this article. For the

1 purposes of this section facility shall include family care homes but
2 shall not include the provision of services, as defined in paragraph
3 four of subdivision (a) of section 16.03 of this article, outside of a
4 facility.

5 § 10. The section heading and subdivision (a) of section 16.11 of the
6 mental hygiene law are REPEALED and a new section heading and subdivi-
7 sion (a) are added to read as follows:

8 Oversight of facilities and services. (a) The commissioner shall
9 provide for the oversight of facilities and providers of services hold-
10 ing operating certificates pursuant to section 16.03 of this article and
11 shall provide for the annual review of such facilities and providers in
12 implementing the requirements of the office and in providing quality
13 care and person centered and community based services.

14 (1) The review of facilities issued an operating certificate pursuant
15 to this article shall include periodic visitation and review of each
16 facility. Reviews shall be made as frequently as the commissioner may
17 deem necessary but in any event such inspections shall be made on at
18 least two occasions during each calendar year which shall be without
19 prior notice, provided, however, that where, in the discretion of the
20 commissioner, an operating certificate has been issued to a program with
21 a history of compliance and a record of providing a high quality of
22 care, the periodic inspection and visitation required by this subdivi-
23 sion shall be made at least once during each calendar year provided such
24 visit shall be without prior notice. Areas of review shall include, but
25 not be limited to, a review of a facility's: physical plant, fire safety
26 procedures, health care, protective oversight, abuse and neglect
27 prevention, and reporting procedures.

1 (2) The review of providers of services, as defined in paragraph four
2 of subdivision (a) of section 16.03 of this article, shall ensure that
3 the provider of services complies with all the requirements of the
4 applicable federal home and community based services waiver program and
5 applicable federal regulation, subdivisions seven and seven-a of section
6 three hundred sixty-six of the social services law and rules and regu-
7 lations adopted by the commissioner.

8 § 11. Subdivisions (b), (c), (d), and (e) of section 16.11 of the
9 mental hygiene law, subdivision (b) as amended by chapter 37 of the laws
10 of 2011, and subdivisions (c), (d) and (e) as added by chapter 786 of
11 the laws of 1983, are amended to read as follows:

12 (b) The commissioner shall have the power to conduct investigations
13 into the operations of any provider of service, person or entity which
14 holds an operating certificate issued by the office, into the operation
15 of any facility, service or program issued an operating certificate by
16 the office and into the operations, related to the provision of services
17 regulated by this chapter, of any person or entity providing a residence
18 for one or more unrelated persons with developmental disabilities.

19 (c) In conducting [an inspection] a review or investigation, the
20 commissioner or his or her authorized representative shall have the
21 power to inspect facilities, conduct interviews of clients, interview
22 personnel, examine and copy all records, including financial and medical
23 records of the facility or provider of services, and obtain such other
24 information as may be required in order to carry out his or her respon-
25 sibilities under this chapter.

26 (d) In conducting any [inspection] review or investigation under this
27 chapter, the commissioner or his or her authorized representative is
28 empowered to subpoena witnesses, compel their attendance, administer

1 oaths to witnesses, examine witnesses under oath, and require the
2 production of any books or papers deemed relevant to the investigation,
3 inspection, or hearing. A subpoena issued under this section shall be
4 regulated by the civil practice law and rules.

5 (e) The supreme court may enjoin persons or entities subject to
6 [inspection] review or investigation pursuant to this article to cooper-
7 ate with the commissioner and to allow the commissioner access to
8 providers of services, facilities, records, clients and personnel as
9 necessary to enable the commissioner to conduct the [inspection] review
10 or investigation.

11 § 12. Section 16.17 of the mental hygiene law, as added by chapter 786
12 of the laws of 1983, subdivision (a) and paragraph 2 and subparagraph b
13 of paragraph 1 of subdivision (b) as amended and subparagraph d of para-
14 graph 1 of subdivision (b) as relettered by chapter 169 of the laws of
15 1992, subdivision (b) as amended by chapter 856 of the laws of 1985, the
16 opening paragraph and subparagraph c of paragraph 1 of subdivision (b)
17 as amended by chapter 37 of the laws of 2011, subparagraph d of para-
18 graph 1 of subdivision (b) as added by chapter 618 of the laws of 1990,
19 paragraph 4 of subdivision (b) as amended by chapter 168 of the laws of
20 2010, paragraph 1 of subdivision (f) as amended by chapter 601 of the
21 laws of 2007, subdivision (g) as amended by chapter 24 of the laws of
22 2007, and subdivision (h) as amended by chapter 306 of the laws of 1995,
23 is amended to read as follows:

24 § 16.17 Suspension, revocation, or limitation of an operating certifi-
25 cate.

26 (a) The commissioner may revoke, suspend, or limit an operating
27 certificate or impose the penalties described in subparagraph a, b, c or
28 d of paragraph one of subdivision (b) or in subdivision (g) of this

1 section upon a determination that the holder of the certificate has
2 failed to comply with the terms of its operating certificate or with the
3 provisions of any applicable statute, rule or regulation. The holder of
4 the certificate shall be given notice and an opportunity to be heard
5 prior to any such determination except that no such notice and opportu-
6 nity to be heard shall be necessary prior to an emergency suspension or
7 limitation of the facility's or provider of services' operating certifi-
8 cate imposed pursuant to paragraph one of subdivision (b) of this
9 section, nor shall such notice and opportunity to be heard be necessary
10 should the commissioner, in his or her discretion, decide to issue sepa-
11 rate operating certificates to each facility or provider of services
12 formerly included under the services authorized by one operating certifi-
13 cate to the provider of services.

14 (b) (1) An operating certificate may be temporarily suspended or
15 limited without a prior hearing for a period not in excess of sixty days
16 upon written notice to the facility or provider of services following a
17 finding by the office for people with developmental disabilities that a
18 [client's] individual's health or safety is in imminent danger. Upon
19 such finding and notice, the power of the commissioner temporarily to
20 suspend or limit an operating certificate shall include, but shall not
21 be limited to, the power to:

22 a. Prohibit or limit the placement of new [clients] individuals in the
23 facility or services;

24 b. Remove or cause to be removed some or all of the [clients] individ-
25 uals in the facility or services;

26 c. Suspend or limit or cause to be suspended or limited the payment of
27 any governmental funds to the facility or provider of services provided
28 that such action shall not in any way jeopardize the health, safety and

1 welfare of any person with a developmental disability in such program or
2 facility or services;

3 d. Prohibit or limit the placement of new [clients] individuals,
4 remove or cause to be removed some or all [clients] individuals, or
5 suspend or limit or cause to be suspended or limited the payment of any
6 governmental funds, in or to any one or more of the facilities or
7 provider of services authorized pursuant to an operating certificate
8 [issued to a provider of services].

9 (2) At any time subsequent to the suspension or limitation of any
10 operating certificate pursuant to paragraph one of this subdivision
11 where said suspension or limitation is the result of correctable phys-
12 ical plant, staffing or program deficiencies, the facility or provider
13 of services may request the office to [reinspect] review the facility or
14 provider of services to redetermine whether a physical plant, staffing
15 or program deficiency continues to exist. After the receipt of such a
16 request, the office shall [reinspect] review the facility or provider of
17 services within ten days and in the event that the previously found
18 physical plant, staffing or program deficiency has been corrected, the
19 suspension or limitation shall be withdrawn. If the physical plant,
20 staffing or program deficiency has not been corrected, the commissioner
21 shall not thereafter be required to [reinspect] review the facility or
22 provider of services during the emergency period of suspension or limi-
23 tation.

24 (3) During the sixty day suspension or limitation period provided for
25 in paragraph one of this subdivision the commissioner shall determine
26 whether to reinstate or remove the limitations on the facility's or
27 provider of services' operating certificate or to revoke, suspend or
28 limit the operating certificate pursuant to subdivision (a) of this

1 section. Should the commissioner choose to revoke, suspend or limit the
2 operating certificate, then the emergency suspension or limitation
3 provided for in this subdivision shall remain in effect pending the
4 outcome of an administrative hearing on the revocation, suspension or
5 limitation.

6 (4) The facility operator or provider of services, within ten days of
7 the date when the emergency suspension or limitation pursuant to para-
8 graph one of this subdivision is first imposed, may request an evidenti-
9 ary hearing to contest the validity of the emergency suspension or limi-
10 tation. Such an evidentiary hearing shall commence within ten days of
11 the facility operator's or provider's request and no request for an
12 adjournment shall be granted without the concurrence of the facility
13 operator or provider of service, office for people with developmental
14 disabilities, and the hearing officer. The evidentiary hearing shall be
15 limited to those violations of federal and state law and regulations
16 that existed at the time of the emergency suspension or limitation and
17 which gave rise to the emergency suspension or limitation. The emergency
18 suspension or limitation shall be upheld upon a determination that the
19 office for people with developmental disabilities had reasonable cause
20 to believe that a [client's] individual's health or safety was in immi-
21 nent danger. A record of such hearing shall be made available to the
22 facility operator or provider of service upon request. Should the
23 commissioner determine to revoke, suspend or limit [the facility's] an
24 operating certificate pursuant to subdivision (a) of this section, no
25 administrative hearing on that action shall commence prior to the
26 conclusion of the evidentiary hearing. The commissioner shall issue a
27 ruling within ten days after the receipt of the hearing officer's
28 report.

1 (c) When the holder of an operating certificate shall request an
2 opportunity to be heard, the commissioner shall fix a time and place for
3 the hearing. A copy of the charges, together with the notice of the time
4 and place of the hearing, shall be served in person or mailed by regis-
5 tered or certified mail to the facility or provider of services at least
6 ten days before the date fixed for the hearing. The facility or provider
7 of services shall file with the office, not less than three days prior
8 to the hearing, a written answer to the charges.

9 (d) (1) When a hearing must be afforded pursuant to this section or
10 other provisions of this article, the commissioner, acting as hearing
11 officer, or any person designated by him or her as hearing officer,
12 shall have power to:

13 a. administer oaths and affirmations;

14 b. issue subpoenas, which shall be regulated by the civil practice law
15 and rules;

16 c. take testimony; or

17 d. control the conduct of the hearing.

18 (2) The rules of evidence observed by courts need not be observed
19 except that the rules of privilege recognized by law shall be respected.
20 Irrelevant or unduly repetitious evidence may be excluded.

21 (3) All parties shall have the right of counsel and be afforded an
22 opportunity to present evidence and cross-examine witnesses.

23 (4) If evidence at the hearing relates to the identity, condition, or
24 clinical record of [a client] an individual, the hearing officer may
25 exclude all persons from the room except parties to the proceeding,
26 their counsel and the witness. The record of such proceeding shall not
27 be available to anyone outside the office, other than a party to the
28 proceeding or his counsel, except by order of a court of record.

1 (5) The commissioner may establish regulations to govern the hearing
2 procedure and the process of determination of the proceeding.

3 (6) The commissioner shall issue a ruling within ten days after the
4 termination of the hearing or, if a hearing officer has been designated,
5 within ten days from the hearing officer's report.

6 (e) All orders or determinations hereunder shall be subject to review
7 as provided in article seventy-eight of the civil practice law and
8 rules.

9 (f) (1) Except as provided in paragraph two of this subdivision,
10 anything contained in this section to the contrary notwithstanding, an
11 operating certificate of a facility or provider of service shall be
12 revoked upon a finding by the office that any individual, member of a
13 partnership or shareholder of a corporation to whom or to which an oper-
14 ating certificate has been issued, has been convicted of a class A, B or
15 C felony or a felony related in any way to any activity or program
16 subject to the regulations, supervision, or administration of the office
17 or of the office of temporary and disability assistance, the department
18 of health, or another office of the department of mental hygiene, or in
19 violation of the public officers law in a court of competent jurisdic-
20 tion of the state, or in a court in another jurisdiction for an act
21 which would have been a class A, B or C felony in this state or a felony
22 in any way related to any activity or program which would be subject to
23 the regulations, supervision, or administration of the office or of the
24 office of temporary and disability assistance, the department of health,
25 or another office of the department of mental hygiene, or for an act
26 which would be in violation of the public officers law. The commissioner
27 shall not revoke or limit the operating certificate of any facility or
28 provider of service, solely because of the conviction, whether in the

1 courts of this state or in the courts of another jurisdiction, more than
2 ten years prior to the effective date of such revocation or limitation,
3 of any person of a felony, or what would amount to a felony if committed
4 within the state, unless the commissioner makes a determination that
5 such conviction was related to an activity or program subject to the
6 regulations, supervision, and administration of the office or of the
7 office of temporary and disability assistance, the department of health,
8 or another office of the department of mental hygiene, or in violation
9 of the public officers law.

10 (2) In the event one or more members of a partnership or shareholders
11 of a corporation shall have been convicted of a felony as described in
12 paragraph one of this subdivision, the commissioner shall, in addition
13 to his or her other powers, limit the existing operating certificate of
14 such partnership or corporation so that it shall apply only to the
15 remaining partner or shareholders, as the case may be, provided that
16 every such convicted person immediately and completely ceases and with-
17 draws from participation in the management and operation of the facility
18 or provider of services and further provided that a change of ownership
19 or transfer of stock is completed without delay, and provided that such
20 partnership or corporation shall immediately reapply for a certificate
21 of operation pursuant to subdivision (a) of section 16.05 of this arti-
22 cle.

23 (g) The commissioner may impose a fine upon a finding that the holder
24 of the certificate has failed to comply with the terms of the operating
25 certificate or with the provisions of any applicable statute, rule or
26 regulation. The maximum amount of such fine shall be one thousand
27 dollars per day or fifteen thousand dollars per violation.

1 Such penalty may be recovered by an action brought by the commissioner
2 in any court of competent jurisdiction.

3 Such penalty may be released or compromised by the commissioner before
4 the matter has been referred to the attorney general. Any such penalty
5 may be released or compromised and any action commenced to recover the
6 same may be settled or discontinued by the attorney general with the
7 consent of the commissioner.

8 (h) Where a proceeding has been brought pursuant to section 16.27 of
9 this article, and a receiver appointed pursuant thereto, the commission-
10 er may assume operation of the facility subject to such receivership,
11 upon termination of such receivership, and upon showing to the court
12 having jurisdiction over such receivership that no voluntary associ-
13 ation, not-for-profit corporation or other appropriate provider is will-
14 ing to assume operation of the facility subject to receivership and is
15 capable of meeting the requirements of this article; provided that the
16 commissioner notifies the chairman of the assembly ways and means
17 committee, the chairman of the senate finance committee and the director
18 of the budget of his intention to assume operation of such facility upon
19 service of the order to show cause upon the owner or operator of the
20 facility, pursuant to subdivision (b) of section 16.27 of this article.

21 § 13. Paragraph 5 of subdivision (a) of section 16.29 of the mental
22 hygiene law, as amended by section 9 of part C of chapter 501 of the
23 laws of 2012, is amended to read as follows:

24 (5) removing a service recipient when it is determined that there is a
25 risk to such person if he or she continues to remain in a facility or
26 service program; and

1 § 14. Paragraph (ii) of subdivision (c) of section 16.29 of the mental
2 hygiene law, as amended by section 9 of part C of chapter 501 of the
3 laws of 2012, is amended to read as follows:

4 (ii) development and implementation of a plan of prevention and reme-
5 diation, in the event an investigation of a report of an alleged report-
6 able incident exists and such reportable incident may be attributed in
7 whole or in part to noncompliance by the facility or provider of
8 services with the provisions of this chapter or regulations of the
9 office applicable to the operation of such facility or provider of
10 services. Any plan of prevention and remediation required to be devel-
11 oped pursuant to this subdivision by a facility supervised by the office
12 shall be submitted to and approved by such office in accordance with
13 time limits established by regulations of such office. Implementation of
14 the plan shall be monitored by such office. In reviewing the continued
15 qualifications of a residential facility or provider of services or
16 program for an operating certificate, the office shall evaluate such
17 facility's or provider of service's compliance with plans of prevention
18 and remediation developed and implemented pursuant to this subdivision.

19 § 14-a. Section 366 of the social services law is amended by adding a
20 new subdivision 7-b to read as follows:

21 7-b. Services and needs assessment. The assessment completed pursuant
22 to subdivision seven-a of this section shall be based upon a valid and
23 reliable assessment tool. The assessment shall also include an evalu-
24 ation of the individual's home environment, including but not limited
25 to, the ability of family and/or caregivers to provide supports outside
26 of those within the waiver, including but not limited to, activities of
27 daily living.

28 § 15. This act shall take effect immediately.