

**NEW YORK STATE OFFICE FOR THE AGING**

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<b>TECHNICAL ASSISTANCE MEMORANDUM</b>	<b>Number 17-TAM-01</b>
	<b>Supersedes N/A</b>
	<b>Expiration Date N/A</b>

**DATE:** January 11, 2017

**TO:** Area Agency on Aging Directors, NY Connects Local Administrative Agencies, NY Connects Coordinators, and Regional NY Connects Grantees

**CC:** PeerPlace Champions

**SUBJECT:** Verifying Legal Authority to Provide Consent or Enroll in Services on Another's Behalf

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**PURPOSE:**

The purpose of this Technical Assistance Memorandum (TAM) is to provide basic guidance and to identify areas to be aware of in reviewing Powers of Attorney (POA) and/or guardianship orders to verify their validity and to determine whether the appropriate authority has been granted under these documents.

NYSOFA cannot make a determination of validity or invalidity of any legal documents on behalf of an Area Agency, service provider, or NY Connects Partner. Additionally, as the requirements that apply to Powers of Attorney may vary depending on the date the document was executed, the application of this TAM is limited to Powers of Attorney executed after April 1, 2009 and to those using the Statutory Short Form Power of Attorney provided in Section 5-1513 of New York's General Obligations Law as it reads on the date of this issuance.

Area Agencies and NY Connects Partners should contact their respective county attorney and/or other legal counsel for more detailed instructions regarding when and how to accept or not accept Powers of Attorney or guardianship orders. For purposes of this TAM, the term "NY Connects Partners" shall refer to the Local Administrative Agency and any subcontractors, NY Connects Coordinators, and other NYSOFA NY

Connects grantees and their subcontractors.

## **BACKGROUND:**

For purposes of programs and services provided under the auspices of NYSOFA, there are some circumstances in which an individual other than the recipient of such services may have the legal authority to take certain actions on the recipient's behalf. These actions may involve enrolling in or applying for programs and services, or providing consent on behalf of the other individual to collect or disclose their personal information for these purposes.

New York State recognizes the validity of various legal documents which grant authority to act on behalf of another. The actions that may be authorized will vary depending on the document used. NYSOFA has identified Powers of Attorney and guardianship orders as being documents that are capable under New York State law of granting the authority necessary to enroll in or apply for services provided under the auspices of NYSOFA or to provide informed consent on behalf of another to capture or disclose personal information for purposes related to these programs and services. As such, this Technical Assistance Memorandum addresses only these types of documents. For orders of guardianship, the discussion contained in this Technical Assistance Memorandum is limited to Guardianship under Article 81 of New York's Mental Hygiene Law. For any orders relating to the appointment of a guardian under Articles 17 or 17-a of New York's Surrogate's Court Procedure Act, guidance should be sought from the Area Agency's county attorney or other counsel.

State Law identifies permissible powers which *may* be granted by a Power of Attorney or an order of guardianship. Not every such document will grant all powers that are permissible under law, and will therefore not necessarily include the authority necessary to take the actions described above. Each Power of Attorney or guardianship order must be reviewed carefully to ensure that the necessary authority has been granted to the legal representative named.

Below is guidance identifying specific things that workers of Area Agencies, service providers, or NY Connects Partners should be aware of in determining the validity of both Powers of Attorney and guardianship orders, and in assessing whether a valid document has granted the necessary power.

### **Powers of Attorney**

1. Valid Execution
  - a. The worker should verify that the POA contains the necessary signatures required by law.

- b. The POA must be signed and dated by the principal and the principal's signature acknowledged. The principal is the individual who has executed the POA and granted another the authority to act on his/her behalf.
- c. The POA must be signed and dated by the agent and the agent's signature acknowledged. The agent is a person named in a POA who is granted authority by the principal to act on the principal's behalf.
- d. The POA must contain all necessary language proscribed by New York State law.
- e. The language identified in (d) above and additional requirements for valid execution of a POA can be found in New York State's General Obligations Law § 5-1501B.

## 2. Currentness of Agent's Authority

- a. Has the POA yet taken effect?
  - i. A "springing" Power of Attorney is one that is validly executed, but which provides that the powers granted are not to take effect until a certain contingency has been met.
  - ii. A non-springing Power of Attorney generally becomes effective on the date the agent's signature is acknowledged.
  - iii. The contingency identified in a springing POA is often incapacity of the principal, meaning the agent's authority will not become effective until the principal is deemed incapacitated as described in the POA.
  - iv. POAs should be carefully reviewed to determine whether or not there is a contingency that must be met before the POA is to take effect.
  - v. If the POA is springing, it must be determined whether the contingency identified has been met. If the identified contingency is the principal becoming incapacitated, the POA will identify how this is to be determined.
- b. Is the POA still effective?
  - i. "Durable" Powers of Attorney
    - A. Traditionally, the authority granted under a POA would be terminated if the principal became incapacitated.

- B. In contrast, a “durable” Power of Attorney is one under which the authority granted to an agent is not affected by the incapacity of the principal.
  - C. Today, a POA in New York State is to be considered durable unless it expressly provides that that it is terminated by the incapacity of the principal.
  - D. POAs should be carefully reviewed for language indicating that one is not durable. If a POA is not durable, and if the principal has become incapacitated, the agent will no longer have authority under the POA to act on the principal’s behalf.
- ii. Other issues affecting current effectiveness of authority
    - A. POAs may be drafted to terminate upon a specified date, or upon the occurrence of a specified event.
    - B. Additional circumstances which may cause the termination of a POA or of an agent’s authority are identified in New York State’s General Obligations Law § 5-1511.

### 3. Necessary Powers

- a. NYSOFA has identified two powers permissible under a POA that, if included in the POA, would provide the necessary authority for the purposes described in this Technical Assistance Memorandum.
  - i. “Benefits from Government Programs or Civil or Military Service.”
    - A. Identified in New York State’s General Obligations Law § 5-1502J.
    - B. This phrase is construed under law to include the authority of an agent to “enroll in, apply for, select, reject, change, amend, or discontinue a benefit or program on the principal’s behalf.”
    - C. If a POA grants the authority, without limitation, to take actions with respect to “benefits from government programs,” or to “enroll in, apply for, select, reject, change, amend, or discontinue a benefit or program on the principal’s behalf,” the POA likely provides the authority necessary for the purposes described in this TAM.
    - D. This authority may also be granted by a principal through use of a

Statutory Short Form Power of Attorney by initialing Line (J) under “GRANT OF AUTHORITY,” or by initialing Line (P) and identifying the power by listing the letter “J.”

- ii. “All Other Matters”
  - A. Identified in New York State’s General Obligations Law § 5-1502N.
  - B. This phrase is construed under law to include broad authority of an agent to act as the “alter ego” of the principal.
  - C. If a POA grants the authority, without limitation, to take actions with respect to “all other matters,” the POA likely provides the authority necessary for the purposes described in this TAM.
  - D. This authority may also be granted by a principal through use of a Statutory Short Form Power of Attorney by initialing Line (N) under “GRANT OF AUTHORITY,” or by initialing Line (P) and identifying the power by listing the letter “N.”
- b. Even where either or both of the above powers have been granted, the POA should be reviewed to identify any potential limitations on the grant of authority.

### **Guardianship Orders under Article 81 of New York’s Mental Hygiene Law**

- 1. Validity of the Order
  - a. When presented with a guardianship order, workers should verify that the order has been signed by a judge.
  - b. The worker should verify that the person has been named as a guardian.
  - c. The worker should identify any limitations on the duration of the guardian’s authority to act.
- 2. Necessary Powers
  - a. NYSOFA has identified two powers permissible under an order of guardianship that, if included in the order, would provide the necessary authority for the purposes described in this Technical Assistance Memorandum.
    - i. Authority to “apply for government and private benefits.”

- A. This authority is identified New York’s Mental Hygiene Law § 81.21(a)(12), which relates to powers of a guardian of the property, and § 81.22(a)(7), which relates to a guardian of the person.
  - B. This may be included in a guardianship order by explicit reference.
  - C. This may be included by granting “all powers able to be granted to a guardian of the property,” “all powers enumerated in Section 81.21 of the Mental Hygiene Law,” or other similar phrasing.
  - D. This may be included by granting “all powers able to be granted to a guardian of the person,” “all powers enumerated in Section 81.22 of the Mental Hygiene Law,” or other similar phrasing.
- ii. Authority to “authorize access to or release of confidential records.”
- A. This authority is identified New York’s Mental Hygiene Law § 81.21(a)(11), which relates to powers of a guardian of the property, and § 81.22(a)(5), which relates to a guardian of the person.
  - B. This may be included in a guardianship order by explicit reference.
  - C. This may be included by granting “all powers able to be granted to a guardian of the property,” “all powers enumerated in Section 81.21 of the Mental Hygiene Law,” or other similar phrasing.
  - D. This may be included by granting “all powers able to be granted to a guardian of the person,” “all powers enumerated in Section 81.22 of the Mental Hygiene Law,” or other similar phrasing.

**PROGRAMS AFFECTED:**

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| <input checked="" type="checkbox"/> Title III-D                                   | <input checked="" type="checkbox"/> Title III-E | <input checked="" type="checkbox"/> CSE     | <input checked="" type="checkbox"/> SNAP   | <input checked="" type="checkbox"/> Energy |
| <input checked="" type="checkbox"/> EISEP   | <input checked="" type="checkbox"/> NSIP        | <input checked="" type="checkbox"/> Title V | <input checked="" type="checkbox"/> HIICAP | <input type="checkbox"/> LTCOP             |
| <input checked="" type="checkbox"/> NY Connects:<br>Choices for Long<br>Term Care | <input checked="" type="checkbox"/> Other       |   |  |  |

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