INFORMATIONAL LETTER

TRANSMITTAL: 94 INF-14

DIVISION: Services and Community Development

TO: Commissioners of Social Services

DATE: March 16, 1994

SUBJECT: Article 81 of the Mental Hygiene Law: Training Approval and Other Implementation Issues

SUGGESTED DISTRIBUTION:
Directors of Services
Adult Services Staff
Agency Attorneys
Staff Development Coordinators

CONTACT PERSON: Your district's Adult Services Representative as follows:

Thomas Burton	(518) 432-2996	or	USERID AX2510
Kathleen Crowe	(518) 432-2985	or	USERID ROF017
Michael Monahan	(518) 432-2667	or	USERID AY3860
Janet Morrissey	(518) 432-2864	or	USERID 0PM100
Irv Abelman	(212) 383-1755	or	USERID 0AM020

ATTACHMENTS: None

FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
93 INF-32 92 INF-40		Part 457	Article 9-B Article 81 Mental Hygiene Law		

The purpose of this release is to inform local social services districts of additional pertinent information regarding the implementation of Article 81 of the Mental Hygiene Law, "Proceedings for Appointment of a Guardian for Personal Needs or Property Management".

I. Guardian and Court Appointed Evaluator Education Requirements

Sections 81.39 and 81.40 of the Mental Hygiene Law (MHL) state that each person appointed by the court to be a guardian or court evaluator must complete a training program approved by the chief administrator of the Office of Court Administration (OCA). This requirement applies to local districts since local social service commissioners are often appointed as guardians for Protective Services for Adults (PSA) clients when no one else is available to serve in this capacity. The OCA has recently approved a request by the Department to consider the completion of the PSA Institute and the updated Legal Aspects of PSA training as meeting the education requirements in 81.39 and 81.40 MHL for guardians and court evaluators. The updated version of the Legal Aspects of PSA includes a revised curriculum covering the legal duties and responsibilities of a guardian, the rights of the incapacitated person, available resources, an overview of terminology related to the diagnosis and assessment of impairments and information on the preparation of annual reports.

For local district staff who previously attended the Legal Aspects of PSA training before it was updated in 1993, attendance at the one day technical assistance session on Article 81 presented by Department staff in March 1993 may be substituted to meet the requirements of 81.39 and 81.40 MHL. Also, we have received approval from OCA that attendance at these training sessions by a Commissioner's designee(s) is deemed sufficient to meet the education requirement for appointment of a guardian. This was allowed in view of the fact that while the Commissioner is officially named as guardian, the actual case management and monitoring functions are usually performed by a PSA worker who is responsible for the case.

Local district staff who want to apply to be court evaluators on a private basis, outside of their official capacity as local district employees, may use the above mentioned training courses as meeting the education requirements for court evaluators stated in 81.40 MHL. Persons who wish to be court evaluators should obtain information on the application process from OCA.

II. Revocation of Existing Power of Attorney

Section 81.22(b) MHL states that a guardian may not revoke any previously given power of attorney (POA). Pursuant to 81.29(d)MHL, a court may revoke a POA only if the court finds that the document was executed while the person was incapacitated and therefore the POA is not valid. As discussed in 93 INF-32, " Article 81 of the Mental Hygiene Law: Responses to Inquiries at Regional Meetings and Notice of Technical

Amendments", if a district has been named guardian for a person and suspects that a person with a power of attorney is exploiting the client, the district should consider, among other options, bringing a civil action under common law grounds alleging breach of fiduciary responsibility. A recent case in which the court revoked an existing POA, relying upon the court's inherent common law authority, has been brought to our attention. Local social services district legal and program staff may wish to review this case to assist them in preparing guardianship petitions in which the revocation of a power of attorney is an issue. Presented below is the specific legal citation and a brief summary of the issues in the case.

In the Matter of the Application of Rochester General Hospital for the Appointment of a Guardian for Albert Levin, An Alleged Incapacitated Person, 601 N.Y.S. 2d 375 (Sup. Ct., Monroe Co. 1993).

SUMMARY: The hospital petitioned the court on behalf of a patient who had been admitted from a nursing home for treatment of medical problems and who had been a patient at the hospital for almost one year. The patient's son, who had previously been granted power of attorney and health care proxy, refused to cooperate in applying for Medicaid reimbursement to cover the hospital expenses. The POA granted to Mr. Levin's son was the statutory short form, as provided for in Article 5 of the General Obligations Law. This document included a statement that "this POA shall not be affected by the subsequent disability or incompetence of the principal".

The court recognized that pursuant to section 81.22(b)(2) MHL, a guardian is expressly prevented from revoking a previously given POA. However, the order states: "Although the guardian would be unable to revoke the previously executed power of attorney, there should be nothing to prevent a court of competent jurisdiction to exercise its inherent powers to set aside such power of attorney under appropriate circumstances." Accordingly, the court revoked the son's power of attorney and granted to the guardian the same powers concerning property management that were contained in the previously executed POA. In addition, addressing the issue of the health care proxy, the court authorized the guardian, pursuant to Article 4 of the Civil Practice Law and Rules, to commence a special proceeding under Public Health Law, Section 2992 to consider the removal of Mr. Levin's son as the agent on the health care proxy.

III. Other Recent Article 81 Decisions

In addition to the above case, we are aware of other recent Article 81 cases which may be of interest to local district staff. These cases are summarized below.

Matter of St.Luke's-Roosevelt Hospital Center (House) (Supreme Court, New York County)

Justice Kristen Booth Glen held that appointment of publicly funded counsel is constitutionally mandated in adult guardianship cases involving the proposed transfer of an allegedly incapacitated person (AIP) to a nursing home or other institution, or granting of power to

make decisions on major medical issues against the AIP's wishes. Article 81 does not address the issue of payment of counsel costs where the petition is not dismissed and the AIP is indigent. Justice Glenn held that New York City should pay for appointed counsel with funds allocated under County Law Article 18-B (which specifically provides for payment of counsel in criminal cases whenever a person faces imprisonment and certain civil proceedings, but not adult guardianship proceedings). The Court cited the constitutional liberty and property interests of the AIP. The Court balanced the private interests, governmental interest and the risk of erroneous determination and found such analysis, as well as prior case law, supported the need for court-appointed counsel. The Court resolved the issue of the lack of payment of court evaluators for indigent AIP's by appointing the Mental Hygiene Legal Service (MHLS).

Matter of White (Sabol) (Supreme Court, Kings County)

The Court granted a petition brought by the Human Resources Administration (HRA) in New York City and awarded counsel fees to HRA. The Court noted that the incapacitated person had "substantial assets" (in excess of $11,000) which must be spent down in order for her to meet Medicaid eligibility requirements.

Matter of G. Heumann (Supreme Court, Kings County)

The Court agreed to come to a nursing home to see and hear for himself the AIP. The Court was persuaded that: appointment of a guardian was unnecessary, in that the AIP's needs were satisfactorily met; there was no evidence that the AIP would be likely to suffer harm; and that the AIP in fact understood the proceedings and adamantly objected, with a valid basis, to the petition. This case highlights how important it is for the Court to see the AIP so that a determination regarding capacity is not based merely on written documentation that may be inaccurate.

Frank Puig
Deputy Commissioner
Services and Community Development