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

11231--A

I N A S S E M B L Y

May 25, 2010

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

AN ACT to amend the social services law, in relation to the licensure of senior living facilities

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

Section 1. Subdivision 9 of section 460-d of the social services law, as added by chapter 704 of the laws of 1981, paragraph (a) as amended by chapter 558 of the laws of 1999, paragraph (b) as added by chapter 848 of the laws of 1992 and subparagraph (i) of paragraph (c) as amended by chapter 515 of the laws of 1988, is amended to read as follows:

9. (a) The department shall have authority to impose a civil penalty not exceeding one thousand dollars per day against, and to issue an order requiring the closing of, after notice and opportunity to be heard, any facility which does not possess a valid operating certificate issued by the department and is an adult care facility subject to the provisions of this article and the regulations of the department. A hearing shall be conducted in accordance with procedures established by department regulations which procedures shall require that notice of the determination that the facility is an adult care facility and the reasons for such determination and notice of the time and place of the hearing be served in person on the operator, owner or prime lessor, if any, or by certified mail, return receipt requested, addressed to such person and received at least twenty days prior to the date of the hearing. If such operator, owner or prime lessor, if any, is not known to the department, then service may be made by posting a copy thereof in a conspicuous place within the facility or by sending a copy thereof by certified mail, return receipt requested, addressed to the facility. A written answer to the notice of violation may be filed with the department not less than five days prior to the date of the hearing. Demonstration by the facility that it possessed an operating certificate issued pursuant to this article, article twenty-eight of the public

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

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health law or article sixteen, [twenty-three,] thirty-one or thirty-two of the mental hygiene law at the time the hearing was commenced shall constitute a complete defense to any charges made pursuant to this subdivision.

(b) The penalty authorized by this section shall begin to run thirty days after the department provides the operator, in writing, with a summary of the inspection of the facility by which the department determined that he or she is operating an uncertified adult care facility. The submission of an application by the operator for an operating certificate for the facility shall not act as a bar to the imposition of a penalty against the operator.

(c) THERE SHALL BE A REBUTTABLE PRESUMPTION THAT ANY FACILITY WHICH ADVERTISES, MARKETS AND PROVIDES HOUSING AND OTHER SERVICES PRIMARILY TO PERSONS OVER THE AGE OF SIXTY-FIVE IS AN ADULT CARE FACILITY UNDER THIS ARTICLE REQUIRING LICENSURE PURSUANT TO THIS ARTICLE IF:

(I) THE FACILITY OR ENTITY PROVIDES OR ARRANGES SERVICES IN A CONGREGATE SETTING TO FIVE OR MORE ADULTS, INCLUDING ANY TWO OF THE FOLLOWING:

(A) TWO OR MORE MEALS PER DAY,

(B) AN ORGANIZED ACTIVITIES SCHEDULE OF AT LEAST TEN HOURS PER WEEK,

(C) CASE MANAGEMENT SERVICES, OR

(D) SUPERVISION (WHICH SHALL INCLUDE BUT NOT BE LIMITED TO MAINTAINING GENERAL KNOWLEDGE OF THE WHEREABOUTS OF EACH RESIDENT, MONITORING RESIDENTS TO IDENTIFY CHANGES IN BEHAVIOR OR APPEARANCE, MONITORING ATTENDANCE AT MEALS AND MAINTENANCE OF APPROPRIATE NUTRITIONAL INTAKE); AND

(II) AT LEAST FIFTY PERCENT OF THE RESIDENTS EMPLOY OR ENGAGE HOME CARE AIDES OR PRIVATE DUTY AIDES.

(D) IF A FACILITY MEETS THE REBUTTABLE PRESUMPTION CRITERIA PRESCRIBED IN PARAGRAPH (C) OF THIS SUBDIVISION, IT SHALL PRESENT TO THE DEPARTMENT EITHER:

(I) A COMPLETE APPLICATION TO THE DEPARTMENT FOR A LICENSE TO OPERATE AN ADULT CARE FACILITY; OR

(II) PROVIDE THE DEPARTMENT WITH DOCUMENTARY EVIDENCE, SUBMITTED UNDER PENALTY OF PERJURY, TO REBUT THE PRESUMPTION AND DEMONSTRATE THAT THE FACILITY DOES NOT REQUIRE AN ADULT CARE FACILITY LICENSE. SUCH DOCUMENTARY EVIDENCE MUST INCLUDE, BUT NEED NOT BE LIMITED TO, THE FOLLOWING:

(A) AFFIDAVIT BY THE OPERATOR, OWNER OR PRIME LESSOR THAT THE FACILITY DOES NOT PROVIDE, ARRANGE FOR OR COORDINATE PERSONAL CARE OR SUPERVISION FOR ITS RESIDENTS, TOGETHER WITH A COPY OF THE FACILITY'S STANDARD LEASE OR RESIDENCY AGREEMENT AND ANY OTHER DOCUMENTS OR MATERIALS GIVEN TO PROSPECTIVE RESIDENTS OR RESIDENTS DESCRIBING THE SERVICES OFFERED BY THE FACILITY;

(B) AFFIDAVIT BY THE OPERATOR, OWNER OR PRIME LESSOR THAT THE FACILITY DOES NOT ADVERTISE OR MARKET TO THE PUBLIC AS ASSISTED LIVING, ASSISTIVE LIVING OR ANY SIMILAR TERM, TOGETHER WITH A COPY OF ALL FACILITY MARKETING MATERIALS AND ADVERTISEMENTS;

(C) AFFIDAVIT BY THE OPERATOR, OWNER OR PRIME LESSOR THAT THE FACILITY AND THE HOME CARE AGENCIES PROVIDING SERVICES TO RESIDENTS ARE NOT COMMONLY OWNED OR OTHERWISE SUBJECT TO THE CONTROL OF ONE OR MORE ENTITIES OR PRINCIPALS AND/OR DO NOT WORK TOGETHER TO PROVIDE, ARRANGE OR COORDINATE SUCH SERVICES TO RESIDENTS;

(D) AFFIDAVIT BY THE OPERATOR, OWNER OR PRIME LESSOR PROVIDING DETAILED NON-PERSONALLY IDENTIFIABLE INFORMATION IN THE POSSESSION OF THE FACILITY FOR EACH INDIVIDUAL RESIDENT RECEIVING SERVICES FROM A HOME CARE AGENCY OR PRIVATE DUTY AIDE. SUCH INFORMATION SHALL BE UPDATED MONTHLY UNTIL A FINAL DETERMINATION IS MADE BY THE DEPARTMENT AND SHALL INCLUDE:

(1) A DETAILED DESCRIPTION OF THE SPECIFIC SERVICES PROVIDED TO THE INDIVIDUAL RESIDENT BY THE HOME CARE AGENCY OR PRIVATE DUTY AIDE TO THE EXTENT THE FACILITY IS IN POSSESSION OF SUCH INFORMATION; PROVIDED NOTHING HEREIN SHALL REQUIRE THE RESIDENT, HOME CARE AGENCY OR PRIVATE DUTY AIDE TO DISCLOSE INFORMATION TO THE FACILITY NOT OTHERWISE IN ITS POSSESSION;

(2) A DETAILED DESCRIPTION OF THE SPECIFIC SERVICES, MONITORING AND SUPERVISION PROVIDED TO THE INDIVIDUAL RESIDENT BY THE FACILITY;

(3) A DESCRIPTION OF ANY AND ALL INTERACTION OR COORDINATION BETWEEN THE FACILITY STAFF AND THE HOME CARE AGENCY STAFF OR PRIVATE DUTY AIDE;

(E) A STAFFING SCHEDULE FOR THE FACILITY, INCLUDING TITLES AND JOB DESCRIPTIONS FOR EACH STAFFER; AND

(F) SUCH OTHER INFORMATION AS MAY BE RELEVANT TO WHETHER THE FACILITY REQUIRES A LICENSE AS AN ADULT CARE FACILITY.

(E) IF, AFTER RECEIPT OF THE INFORMATION PROVIDED BY SUBPARAGRAPH (II) OF PARAGRAPH (D) OF THIS SUBDIVISION, THE DEPARTMENT DETERMINES THAT A FACILITY IS PROVIDING SERVICES REQUIRING LICENSURE PURSUANT TO THIS ARTICLE, THE FACILITY SHALL, WITHIN SIXTY DAYS OF SUCH FINDING, SUBMIT AN APPLICATION FOR LICENSURE PURSUANT TO THIS ARTICLE.

(F) AFTER NOTICE BY THE DEPARTMENT THAT THE DEPARTMENT HAS REASON TO PRESUME A FACILITY IS AN ADULT CARE FACILITY UNDER THIS ARTICLE, IF THE OPERATOR, OWNER OR PRIME LESSOR FAILS TO SUBMIT THE DOCUMENTARY EVIDENCE PURSUANT TO PARAGRAPH (D) OF THIS SUBDIVISION, OR FAILS TO SUBMIT AN APPLICATION FOR LICENSURE PURSUANT TO PARAGRAPH (E) OF THIS SUBDIVISION, THEN THE DEPARTMENT MAY, IN ADDITION TO ASSESSING CIVIL PENALTIES AND EXERCISING INJUNCTIVE RELIEF PURSUANT TO SECTION TWELVE OF THE PUBLIC HEALTH LAW, IMMEDIATELY ISSUE AN ORDER OR NOTICE TO CEASE AND DESIST ADVERTISEMENT, MARKETING, AND ADMISSION OF NEW RESIDENTS AGED SIXTY-FIVE AND OVER, UNTIL IT IS DETERMINED BY THE DEPARTMENT WHETHER THE FACILITY IS OR IS NOT AN ADULT CARE FACILITY UNDER THIS ARTICLE; PROVIDED, HOWEVER, THAT THE OPERATOR, OWNER OR PRIME LESSOR SHALL BE AFFORDED AN OPPORTUNITY TO BE HEARD AT AN EXPEDITED HEARING TO BE HELD WITHIN THIRTY DAYS OF THE ISSUANCE OF THE ORDER OR NOTICE.

(G) (i) For the purposes of assessing the applicability of this article and the regulations of the department, the department shall be authorized to inspect any facility which reasonably appears to the department to be subject to the provisions of this article and to assess the needs of the residents of such facility pursuant to the provisions of section four hundred sixty-c of this title.

(ii) At the time that a representative of the department appears at the facility for purposes of conducting such inspection, the representative shall inform the operator, administrator or other person in charge that the inspection will be conducted unless such person objects to the inspection and that if such person does object the department, pursuant to the provisions of subparagraph (iii) of this paragraph, shall be authorized to request the attorney general to apply to the court for an order granting the department access to the facility.

(iii) If the department is not permitted access to such facility by the operator, administrator or other person in charge thereof, the attorney general, upon the request of the department, shall be authorized to apply, without notice to the operator, administrator or chairman of the board of directors of a not-for-profit facility, to the supreme court in the county in which the facility is located for an order granting the department access to such facility. The court may grant such an order if it determines, based on evidence presented by the attorney general, that there is reasonable cause to believe that such facility is

an adult care facility which does not possess a valid operating certificate issued by the department.

[(d)] (H) Upon the request of the department, the attorney general may commence an action in any court of competent jurisdiction against any facility subject to the provisions of this subdivision, and against any person or corporation operating such facility, for the recovery of any penalty assessed by the department in accordance with the provisions of this subdivision.

[(e)] (I) Any penalty assessed by the department pursuant to this subdivision may be released or compromised by the department before the matter has been referred to the attorney general and where such matter has been referred to the attorney general, any such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the attorney general with the consent of the department.

S 2. This act shall take effect on the ninetieth day after it shall have become a law.