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

5663

2009-2010 Regular Sessions

I N A S S E M B L Y

February 17, 2009

Introduced by M. of A. EDDINGTON, HYER-SPENCER -- Multi-Sponsored by -- M. of A. GABRYSZAK, KOON, SWEENEY -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to proceedings conducted by the office of professional medical conduct and to amend chapter 426 of the laws of 1983, amending the public health law relating to professional misconduct proceedings, in relation to the effectiveness of certain provisions thereof

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

Section 1. Paragraphs (a), (f), (g), subparagraph (i) of paragraph (h) and paragraph (m) of subdivision 10 of section 230 of the public health law, paragraphs (a) and (m) as amended by chapter 606 of the laws of 1991, subparagraph (i) of paragraph (a) as amended by chapter 542 of the laws of 2000, subparagraph (ii) of paragraph (a) as amended by chapter 558 of the laws of 1994, subparagraphs (iii), (iv) and (v) of paragraph (a), paragraph (g), subparagraph (i) of paragraph (h) as amended and subparagraph (vii) of paragraph (a) as added by chapter 477 of the laws of 2008, subparagraph (vi) of paragraph (a) as added by chapter 610 of the laws of 1999 and paragraph (f) as amended by chapter 37 of the laws of 1992, are amended to read as follows:

(a) Investigation. (i) The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. The director of the office of professional medical conduct shall cause a preliminary review of every report made to the department pursuant to section twenty-eight hundred three-e OF THIS CHAPTER as added by chapter eight hundred sixty-six of the laws of nineteen hundred eighty, sections twenty-eight hundred five-l and forty-four hundred five-b of this chapter, and section three hundred fifteen of the insurance law, to determine if

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

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such report reasonably appears to reflect physician conduct warranting further investigation pursuant to this subparagraph. THE DIRECTOR SHALL PREPARE A WRITTEN FINDING FOR EVERY COMPLAINT RECEIVED AND SHALL SEND A COPY TO THE LICENSEE AND THE COMPLAINANT.

(ii) If the investigation of cases referred to an investigation committee involves issues of clinical practice, medical experts[,] shall be consulted. Experts may be made available by the state medical society of the state of New York, by county medical societies and specialty societies, and by New York state medical associations dedicated to the advancement of non-conventional medical treatments. [Any information obtained by medical experts in consultations, including the names of licensees or patients, shall be confidential and shall not be disclosed except as otherwise authorized or required by law.]

(iii) In the investigation of cases referred to an investigation committee, the licensee being investigated shall have an opportunity to be interviewed by the office of professional medical conduct in order to provide an explanation of the issues under investigation. Providing an opportunity for such an interview shall be a condition precedent to the convening of an investigation committee on professional misconduct of the board for professional medical conduct.

(A) At least twenty days before the interview, except as otherwise set forth herein, the licensee under investigation shall be given written notice of: (1) a description of the conduct that is the subject of the investigation; (2) the issues relating to the conduct that have been identified at the time of the notice; (3) the time frame of the conduct under investigation; (4) the identity of each patient whose contact with or care by the licensee is believed to be relevant to the investigation; and (5) the fact that the licensee may be represented by counsel and may be accompanied by a stenographer to transcribe the proceeding. All costs of transcription shall be paid by the licensee and a copy shall be provided to the department by the licensee within thirty days of the interview. The notice required by this subparagraph may be given less than twenty days before an interview in any case where the office of professional medical conduct anticipates that the commissioner will take summary action under subdivision twelve of this section, provided that the notice is given within a reasonable amount of time prior to the interview and advises of the possible summary action.

(B) Within thirty days following the interview or, in a case where a stenographer was present at the interview, within fifteen days after the office of professional medical conduct receives the transcript of the interview, whichever is later, the licensee shall be provided with a copy of the report of the interviewer. In addition, the licensee shall promptly be given written notice of issues identified subsequent to the interview. The licensee may submit written comments or expert opinion or medical or scientific literature that is directly relevant to the issues that have been identified by the office of professional medical conduct to the office of professional medical conduct at any time.

(C) If the director determines that the matter shall be submitted to an investigation committee, an investigation committee shall be convened within ninety days of any interview of the licensee. The director shall present the investigation committee with relevant documentation includ-ing, but not limited to: (1) a copy of the original complaint; (2) the report of the interviewer and the stenographic record if one was taken; (3) the report of any medical or scientific expert; (4) copies of reports of any patient record reviews; and (5) the licensee's submissions.

(D) If the director determines to close an investigation following an interview without presentation to an investigation committee, the office of professional medical conduct shall notify the licensee in writing.

(iv) If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of an investigation committee, and after consultation with the executive secretary, determines that a hearing is warranted the director shall, within fifteen days thereafter, direct counsel to prepare the charges. If the investigation committee is unanimous in its concurrence that a hearing is warranted, the charges shall be made public under paragraph (d) of this subdivision. If the investigation committee is not unanimous in its concurrence that a hearing is warranted, the members of such committee shall vote on whether the charges should be made public, and if all of the committee members vote in favor of publication, the charges shall be made public under paragraph (d) of this subdivision. If the director determines after consultation with an investigation committee that: (A) evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing or medical practice, or impairment by drugs, alcohol, physical or mental disability; (B) a recommendation was made by a county medical society or the medical society of the state of New York that warrants further review; or (C) the facts underlying a verdict in a medical malpractice action warrant further review, the director, in addition to the authority set forth in this section, shall be authorized to conduct a comprehensive review of patient records of the licensee and such office records of the licensee as are related to said determination. The licensee shall cooperate with the investigation and willful failure to cooperate in a substantial or material respect may result in an enforcement proceeding pursuant to subparagraph (ii) of paragraph (o) of this subdivision. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

(v) The files of the office of professional medical conduct relating to the investigation of possible instances of professional misconduct shall NOT be confidential and [not] SHALL BE subject to disclosure at the request of any person[, except as provided by law in a pending disciplinary action or proceeding. The provisions of this paragraph shall not prevent the office from sharing information concerning investigations within the department and, pursuant to subpoena, with other duly authorized public agencies responsible for professional regulation or criminal prosecution. Nothing in this subparagraph shall affect the duties of notification set forth in subdivision nine-a of this section or prevent the publication of charges or of the findings, conclusions, determinations, or order of a hearing committee pursuant to paragraphs (d) or (g) of this subdivision. In addition, the commissioner may disclose the information when, in his or her professional judgment, disclosure of such information would avert or minimize a public health threat. Any such disclosure shall not affect the confidentiality of other information in the files of the office of professional medical conduct related to the investigation].

(vi) The office of professional medical conduct, acting under this section, may have access to the criminal history record of any licensee governed by the provisions of this section maintained by the division of criminal justice services pursuant to subdivision six of section eight hundred thirty-seven of the executive law.

(vii) The director of the office of professional medical conduct, in consultation with the patient safety center, shall cause a review on a continuous basis of medical malpractice claim and disposition information reported to the commissioner under section three hundred fifteen of the insurance law, for the purpose of identifying potential misconduct. The office shall commence a misconduct investigation if potential misconduct is identified as a result of such review, which shall be based on criteria such as disposition frequency, disposition type including judgment and settlement, disposition award amount, geographic region, specialty, or other factors as appropriate in identifying potential misconduct.

(f) Conduct of hearing. All hearings must be commenced within sixty days of the service of charges except that an adjournment of the initial hearing date may be granted by the hearing committee upon request by either party upon good cause shown. No adjournment shall exceed thirty days. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing ([subparagraph] PARAGRAPH (c) of this subdivision) and in section four hundred one of the state administrative procedure act. The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairperson of the board. The member shall affirm in writing that he or she has read and considered evidence and transcripts of the prior proceedings. The last hearing day must be held within one hundred twenty days of the first hearing day. Either party, for good cause shown, may request that the committee extend the last hearing day beyond one hundred twenty days PROVIDED, HOWEVER, THAT NO HEARING SHALL BE EXTENDED BEYOND ONE YEAR. An extension requested by the licensee and granted by the committee may not be used as the grounds for a proceeding brought under paragraph (j) of this subdivision.

(g) Results of hearing. The committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, and (3) a determination regarding charges sustained or dismissed, and in the event any of the charges have been sustained, of the penalty to be imposed or appropriate action to be taken and the reasons for the determination. For the committee to make a conclusion sustaining a charge, or determining a penalty or the appropriate action to be taken, two members of the committee must vote for such a conclusion or determination. The committee shall issue an order based on its determination. The committee's findings, conclusions, determinations and order shall become public [upon issuance]. However, if the time to request a review of the committee's determination has not yet expired, or if the review has been requested but no determination as a result of the review has been issued, such publication shall include a statement advising that the licensee or the department may request a review of the committee's determination. No such statement is required if (a) the time to request such review has expired without the filing of such request by either of the parties, or (b) the licensee and the department both affirmatively decline to request review of the committee's determination or fail to perfect such review. In the event any or all such charges are dismissed, such dismissal shall be made public within two business days.

(i) The findings, conclusions, determination and the reasons for the determination of the committee shall be served upon the licensee, the department, and any hospitals, primary practice settings or health care plans required to be identified in publicly disseminated physician data pursuant to paragraph (j), (n), or (q) of subdivision one of section twenty-nine hundred ninety-five-a of this chapter, within [sixty] TEN days of the last day of hearing. Service shall be either by certified mail upon the licensee at the licensee's last known address and such service shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The licensee shall deliver to the board the license which has been revoked, annulled, suspended or surrendered, together with the registration certificate, within five days after receipt of the order. If the license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, the licensee shall submit an affidavit to that effect and shall deliver such license or certificate to the board when located. The director of the office shall promptly transmit a copy of the order to the division of professional licensing services of the state education department and to each hospital at which the licensee has privileges.

(m) Expedited procedures. (i) Violations. Violations involving professional misconduct of a minor or technical nature may be resolved by expedited procedures as provided in subparagraph (ii) or (iii) of this paragraph. For purposes of this paragraph violations of a minor or technical nature shall include, but shall not be limited to, isolated instances of violations concerning professional advertising or record keeping, and other isolated violations which do not directly affect or impair the public health, welfare or safety.

(ii) Administrative warning and consultation. If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, determines that there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct, the director may issue an administrative warning and/or provide for consultation with a panel of one or more experts, chosen by the director. Panels of one or more experts may include, but shall not be limited to, a peer review committee of a county medical society or a specialty board. Administrative warnings and consultations shall [be confidential and shall] not constitute an adjudication of guilt or be used as evidence that the licensee is guilty of the alleged misconduct. However, in the event of a further allegation of similar misconduct by the same licensee, the matter may be reopened and further proceedings instituted as provided in this section.

(iii) Violation committee proceeding. If the director determines, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, that there is substantial evidence of a violation and that the violation is of a nature justifying a penalty as specified in this subparagraph the department may prepare and serve charges, either by personal service or by certified mail, return receipt requested. A violation committee proceeding shall be commenced within [three years] ONE YEAR of the alleged professional misconduct. Such charges shall include a statement that the matter shall be referred to a committee on professional conduct, which shall act as a violations committee for determination. The violations committee shall be appointed by the chairperson of the

state board. Paragraph (c) of [subdivision ten of this section] THIS SUBDIVISION shall apply to the proceeding. A stenographic record of the hearing shall be made. The evidence in support of the charges shall be presented by an attorney and the licensee shall be afforded an opportunity to be heard and to present evidence in his behalf. Such violations committee may [issue a censure and reprimand, may] require the licensee to perform up to twenty-five hours of public service in a facility licensed pursuant to article twenty-eight of this chapter in a manner and at a time and place directed by the board, and in addition, or in the alternative, may impose a fine not to exceed five [hundred] THOUSAND dollars for each specification of minor or technical misconduct. The violations committee may alternatively dismiss the charges in the interest of justice. The order shall be served either by certified mail to the licensee's last known address and such services shall be effective upon receipt or seven days after mailing by certified mail whichever is earlier or by personal service and such service shall be effective upon receipt. The order may be reviewed by the administrative appeals board for professional medical conduct.

S 2. Subdivisions 17 and 18 of section 230 of the public health law, subdivision 17 as amended by chapter 606 of the laws of 1991, subdivision 18 as amended by chapter 37 of the laws of 1992, paragraphs (a) and (b) of subdivision 18 as amended by chapter 735 of the laws of 1992, are amended and a new subdivision 20 is added to read as follows:

17. Monitoring. (a) A licensee [may] SHALL be ordered to have his or her practice monitored by another appropriate licensee after investigation and review pursuant to paragraph (a) of subdivision ten of this section, if there is reason to believe that the licensee is unable to practice medicine with reasonable skill and safety to patients.

(b) The director of the office of professional medical conduct, after consultation with the executive secretary, shall direct counsel to prepare a notice detailing the reasonable cause and a copy of the notice shall be served on the licensee. The matter shall be presented to a committee on professional conduct by an attorney for the department and the licensee shall have the opportunity to be heard by such committee and may be represented by counsel. A stenographic record of the proceeding shall be made. Service of the notice shall be in accordance with the methods of service authorized by paragraph (d) of subdivision ten of this section.

(c) If the committee determines that reasonable cause exists as specified in paragraph (a) of this subdivision and that there is insufficient evidence for the matter to constitute misconduct as defined in sections sixty-five hundred thirty and section sixty-five hundred thirty-one of the education law, the committee [may] SHALL issue an order directing that the licensee's practice of medicine be monitored for a period specified in the order, which shall in no event exceed one year, by a licensee approved by the director, which may include members of county medical societies or district osteopathic societies designated by the commissioner. The licensee responsible for monitoring the licensee shall submit regular reports to the director. If the licensee refuses to cooperate with the licensee responsible for monitoring or if the monitoring licensee submits a report that the licensee is not practicing medicine with reasonable skill and safety to his or her patients, the committee [may] SHALL refer the matter to the director for further proceedings pursuant to subdivision ten of this section. [An order pursuant to this paragraph shall be kept confidential and shall not be subject to discovery or subpoena, unless the licensee refuses to comply with the order.]

(d) A licensee may not seek the appointment of a monitor pursuant to this subdivision in lieu of an order issued pursuant to subdivision seven of this section or a disciplinary proceeding pursuant to subdivision ten or twelve of this section.

(E) A LICENSEE WHO IS SUBJECT TO MONITORING PURSUANT TO THIS SECTION SHALL BE REQUIRED TO NOTIFY ALL PATIENTS IN WRITING, OF THIS CONDITION, INCLUDING ANY FINDINGS OF MISCONDUCT AND ANY OTHER PENALTIES IMPOSED.

18. (a) The director shall [have the authority to] monitor physicians, physician's assistants and specialist's assistants who have been placed on probation pursuant to a determination of professional misconduct by the board. During such period of probation, the director, or his or her designee, as provided in the order of the board, and after consultation with the executive secretary, (i) [may] SHALL review the professional performance of the licensee by randomly selecting office records, patient records and hospital charts, (ii) [may] SHALL require periodic visits by the licensee to a member of the state board for professional medical conduct or an employee of the office of professional medical conduct, (iii) [may] SHALL require the licensee to obtain an appropriate monitor, approved by the director, to monitor the licensee's practice, (iv) [may] SHALL require an audit of the licensee's billings for services rendered during probation, (v) [may] SHALL require the licensee to submit on a random basis to tests for the presence of alcohol or drugs, (vi) [may] SHALL require the licensee to obtain additional training prior to completion of the probation, (vii) [may] SHALL require the licensee to work in a supervised setting, (viii) [may] SHALL require, as a condition of the licensee's continued practice, that the licensee undergo therapy and/or treatment approved and monitored by the director, (ix) [may] SHALL require that the licensee comply with the requirements of the penalty imposed, and (x) [may] SHALL impose upon the licensee such additional requirements as reasonably relate to the misconduct found or are necessary to protect the health of the people pursuant to regulation. The director is authorized to delegate some or all of the foregoing responsibilities to designated county medical societies and district osteopathic societies.

(b) Any health care provider licensed pursuant to this chapter or the education law, hospital licensed pursuant to article twenty-eight of this chapter or medical school that participates in a monitoring or remediation program pursuant to this subdivision and subdivision seventeen of this section shall not be liable for the negligence of the monitored licensee in providing medical care pursuant to a monitoring program. However, this paragraph does not diminish the participating provider's, hospital's or school's liability for failure to exercise reasonable care in properly carrying out its responsibilities under the program. The monitored licensee shall be required to maintain medical malpractice insurance coverage with limits no less than two million dollars per occurrence and six million dollars per policy year.

20. THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT SHALL MAINTAIN AN OFFICIAL WEBSITE WHICH SHALL PROVIDE CLEAR AND UP TO DATE INFORMATION REGARDING ANY CASES WHERE A COMPLAINT AGAINST A LICENSEE WHERE THE DIRECTOR OF SUCH OFFICE HAS DETERMINED THAT AN INVESTIGATION IS WARRANTED. SUCH WEBSITE SHALL ALSO PROVIDE EASILY ACCESSIBLE INFORMATION REGARDING THE DISPOSITION OF ANY CASE WHICH IS INVESTIGATED, ANY PENALTY OR CONDITION IMPOSED, INCLUDING ANY CENSURE OR WARNING ISSUED.

S 3. Section 5 of chapter 426 of the laws of 1983, amending the public health law relating to professional misconduct proceedings, as amended by chapter 36 of the laws of 2008, is amended to read as follows:

S 5. This act shall take effect June 1, 1983 [and]; PROVIDED THAT SECTIONS TWO, THREE AND FOUR OF THIS ACT shall remain in full force and effect until March 31, [2013] 2014.

S 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.