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

668

2009-2010 Regular Sessions

I N A S S E M B L Y

(PREFILED)

January 7, 2009

Introduced by M. of A. MAGNARELLI, FIELDS, KOON, PEOPLES, GUNTHER, JAFFEE, EDDINGTON, LUPARDO, HOOPER, KAVANAGH, CUSICK, TITONE -- Multi-Sponsored by -- M. of A. BRADLEY, BRODSKY, CLARK, DelMONTE, LANCMAN, V. LOPEZ, MAGEE, McENENY, MILLMAN, PHEFFER, REILICH -- read once and referred to the Committee on Health

AN ACT to amend the social services law and the education law, in relation to the mandatory reporting of abuse in assisted living facilities and adult care facilities

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

Section 1. The social services law is amended by adding a new section 461-n to read as follows:

S 461-N. REPORTING ABUSES OF PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES. 1. UNLESS OTHERWISE INDICATED, WHEN USED IN THIS SECTION, THE TERM "COMMISSIONER" SHALL MEAN THE COMMISSIONER OF HEALTH, AND THE TERM "DEPARTMENT" SHALL MEAN THE DEPARTMENT OF HEALTH.

2. ANY CORONER OR MEDICAL EXAMINER OR ANY ASSISTED LIVING OPERATOR, PHYSICIAN, MEDICAL EXAMINER, CORONER, PHYSICIAN'S ASSOCIATE, SPECIALIST'S ASSISTANT, OSTEOPATH, CHIROPRACTOR, PHYSICAL THERAPIST, OCCUPATIONAL THERAPIST, REGISTERED PROFESSIONAL NURSE, LICENSED PRACTICAL NURSE, DENTIST, PODIATRIST, OPTOMETRIST, PHARMACIST, PSYCHOLOGIST, LICENSED MASTER SOCIAL WORKER, LICENSED CLINICAL SOCIAL WORKER, SPEECH PATHOLOGIST AND AUDIOLOGIST IS REQUIRED TO REPORT IN ACCORDANCE WITH THIS SECTION WHEN: (A) HE OR SHE HAS REASONABLE CAUSE TO BELIEVE THAT A PERSON RECEIVING CARE OR SERVICES IN AN ADULT CARE FACILITY HAS BEEN PHYSICALLY ABUSED, MISTREATED OR NEGLECTED BY ANY OPERATOR OR EMPLOYEE OF SUCH FACILITY; ANY PERSON WHO IS UNDER CONTRACT, OR AN EMPLOYEE OF ANY CORPORATION, PARTNERSHIP, ORGANIZATION OR OTHER ENTITY WHICH, IS UNDER CONTRACT TO PROVIDE PATIENT CARE SERVICES IN SUCH FACILITY; OR (B) AN ALLEGED VICTIM OF PHYSICAL ABUSE, MISTREATMENT OR NEGLECT BY A FAMILY

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

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MEMBER OR PERSON WHO IS NOT REFERRED TO IN PARAGRAPH (A) OF THIS SUBDIVISION, HAS REQUESTED OR CONSENTED THAT IT BE REPORTED.

3. IN ADDITION TO THOSE PERSONS REQUIRED TO REPORT SUSPECTED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES, ANY OTHER PERSON MAY MAKE SUCH A REPORT IF HE OR SHE HAS REASONABLE CAUSE TO BELIEVE THAT A PERSON RECEIVING CARE OR SERVICES HAS BEEN PHYSICALLY ABUSED, MISTREATED OR NEGLECTED IN THE FACILITY.

4. REPORTS OF SUSPECTED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT MADE PURSUANT TO THIS SECTION SHALL BE MADE TO THE DEPARTMENT IMMEDIATELY BY TELEPHONE AND IN WRITING WITHIN FORTY-EIGHT HOURS FOLLOWING ANY ALLEGED INCIDENT OF ABUSE, MISTREATMENT OR NEGLECT. WRITTEN REPORTS SHALL BE MADE ON FORMS SUPPLIED BY THE COMMISSIONER, AND SHALL INCLUDE THE FOLLOWING INFORMATION: THE IDENTITY OF THE PERSON MAKING THE REPORT AND WHERE HE OR SHE CAN BE FOUND; THE NAME AND ADDRESS OF THE ADULT CARE FACILITY; THE NAMES OF THE OPERATOR AND ADMINISTRATOR OF THE FACILITY, IF KNOWN; THE NAME OF THE SUBJECT OF THE ALLEGED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT, IF KNOWN; THE NATURE AND EXTENT OF THE PHYSICAL ABUSE, MISTREATMENT OR NEGLECT; THE DATE, TIME AND SPECIFIC LOCATION OF THE OCCURRENCE; THE NAMES OF NEXT OF KIN OR SPONSORS OF THE SUBJECT OF THE ALLEGED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT, IF KNOWN; AND ANY OTHER INFORMATION WHICH THE PERSON MAKING THE REPORT BELIEVES WOULD BE HELPFUL TO FURTHER THE PURPOSES OF THIS SECTION. SUCH WRITTEN REPORTS SHALL BE ADMISSIBLE IN EVIDENCE, CONSISTENT WITH THE PROVISIONS OF PARAGRAPH (F) OF SUBDIVISION SEVEN OF THIS SECTION, IN ANY ACTIONS OR PROCEEDINGS RELATING TO PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES. WRITTEN REPORTS MADE OTHER THAN ON FORMS SUPPLIED BY THE COMMISSIONER WHICH CONTAIN THE INFORMATION REQUIRED HEREIN SHALL BE TREATED AS IF MADE ON SUCH FORMS.

5. ANY PERSON WHO REASONABLY AND IN GOOD FAITH MAKES A REPORT PURSUANT TO THIS SECTION SHALL HAVE IMMUNITY FROM ANY LIABILITY, CIVIL OR CRIMINAL, FOR HAVING MADE SUCH A REPORT. FOR THE PURPOSE OF ANY PROCEEDING, CIVIL OR CRIMINAL, THE GOOD FAITH OF ANY PERSON REQUIRED TO REPORT INSTANCES OF PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES SHALL BE PRESUMED.

6. NOTWITHSTANDING THE PROVISIONS OF SECTION TWO HUNDRED THIRTY OF THE PUBLIC HEALTH LAW, ANY LICENSED PERSON WHO COMMITS AN ACT OF PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF A PERSON RECEIVING CARE OR SERVICES IN AN ADULT CARE FACILITY AND ANY LICENSED PERSON REQUIRED BY THIS SECTION TO REPORT AN INSTANCE OF SUSPECTED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF A PERSON RECEIVING CARE OR SERVICES IN AN ADULT CARE FACILITY WHO FAILS TO DO SO SHALL BE GUILTY OF UNPROFESSIONAL CONDUCT IN THE PRACTICE OF HIS OR HER PROFESSION.

7. (A) UPON RECEIPT OF A REPORT MADE PURSUANT TO THIS SECTION, THE COMMISSIONER SHALL CAUSE AN INVESTIGATION TO BE MADE OF THE ALLEGATIONS CONTAINED IN THE REPORT. NOTIFICATION OF THE RECEIPT OF A REPORT SHALL BE MADE IMMEDIATELY BY THE DEPARTMENT TO THE APPROPRIATE DISTRICT ATTORNEY IF A PRIOR REQUEST IN WRITING HAS BEEN MADE TO THE DEPARTMENT BY THE DISTRICT ATTORNEY. PRIOR TO THE COMPLETION OF THE INVESTIGATION BY THE DEPARTMENT, EVERY REASONABLE EFFORT SHALL BE MADE TO NOTIFY, PERSONALLY OR BY CERTIFIED MAIL, ANY PERSON UNDER INVESTIGATION FOR HAVING COMMITTED AN ACT OF PHYSICAL ABUSE, MISTREATMENT OR NEGLECT. THE COMMISSIONER SHALL MAKE A WRITTEN DETERMINATION, BASED ON THE FINDINGS OF THE INVESTIGATION, OF WHETHER OR NOT SUFFICIENT CREDIBLE EVIDENCE EXISTS TO SUSTAIN THE ALLEGATIONS CONTAINED IN THE REPORT OR WOULD SUPPORT A

CONCLUSION THAT A PERSON NOT NAMED IN SUCH REPORT HAS COMMITTED AN ACT OF PHYSICAL ABUSE, NEGLECT OR MISTREATMENT. A COPY OF SUCH WRITTEN DETERMINATION, TOGETHER WITH A NOTICE OF THE RIGHT TO A HEARING AS PROVIDED IN THIS SUBDIVISION, SHALL BE SENT BY REGISTERED OR CERTIFIED MAIL TO EACH PERSON WHO THE COMMISSIONER HAS DETERMINED HAS COMMITTED AN ACT OF PHYSICAL ABUSE, NEGLECT OR MISTREATMENT. A LETTER SHALL BE SENT TO ANY OTHER PERSON ALLEGED IN SUCH REPORT TO HAVE COMMITTED SUCH AN ACT STATING THAT A DETERMINATION HAS BEEN MADE THAT THERE IS NOT SUFFICIENT EVIDENCE TO SUSTAIN THE ALLEGATIONS RELATING TO SUCH PERSON. A COPY OF EACH SUCH DETERMINATION AND LETTER SHALL BE SENT TO THE FACILITY IN WHICH THE ALLEGED INCIDENT OCCURRED.

(B) THE COMMISSIONER MAY MAKE A WRITTEN DETERMINATION, BASED ON THE FINDINGS OF THE INVESTIGATION, THAT SUFFICIENT CREDIBLE EVIDENCE EXISTS TO SUPPORT A CONCLUSION THAT A PERSON REQUIRED BY THIS SECTION TO REPORT SUSPECTED PHYSICAL ABUSE, MISTREATMENT OR NEGLECT HAD REASONABLE CAUSE TO BELIEVE THAT SUCH INCIDENT OCCURRED AND FAILED TO REPORT SUCH INCIDENT. A COPY OF SUCH WRITTEN DETERMINATION, TOGETHER WITH A NOTICE OF THE RIGHT TO A HEARING AS PROVIDED IN THIS SUBDIVISION, SHALL BE SENT BY REGISTERED OR CERTIFIED MAIL TO EACH PERSON WHO THE COMMISSIONER HAS DETERMINED HAS FAILED TO REPORT AS REQUIRED BY THIS SECTION.

(C) ALL INFORMATION RELATING TO ANY ALLEGATION WHICH THE COMMISSIONER HAS DETERMINED WOULD NOT BE SUSTAINED SHALL BE EXPUNGED ONE HUNDRED TWENTY DAYS FOLLOWING NOTIFICATION OF SUCH DETERMINATION TO THE PERSON WHO MADE THE REPORT PURSUANT TO THIS SECTION, UNLESS A PROCEEDING PERTAINING TO SUCH ALLEGATION IS PENDING PURSUANT TO ARTICLE SEVENTY-EIGHT OF THE CIVIL PRACTICE LAW AND RULES. WHENEVER INFORMATION IS EXPUNGED, THE COMMISSIONER SHALL NOTIFY ANY OFFICIAL NOTIFIED PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION THAT THE INFORMATION HAS BEEN EXPUNGED.

(D) AT ANY TIME WITHIN THIRTY DAYS OF THE RECEIPT OF A COPY OF A DETERMINATION MADE PURSUANT TO THIS SECTION, A PERSON NAMED IN SUCH DETERMINATION AS HAVING COMMITTED AN ACT OF PHYSICAL ABUSE, NEGLECT OR MISTREATMENT, OR AS HAVING FAILED TO REPORT SUCH AN INCIDENT, MAY REQUEST IN WRITING THAT THE COMMISSIONER AMEND OR EXPUNGE THE RECORD OF SUCH REPORT, TO THE EXTENT SUCH REPORT APPLIES TO SUCH PERSON, OR SUCH WRITTEN DETERMINATION. IF THE COMMISSIONER DOES NOT COMPLY WITH SUCH REQUEST WITHIN THIRTY DAYS, SUCH PERSON SHALL HAVE THE RIGHT TO A FAIR HEARING TO DETERMINE WHETHER THE RECORD OF THE REPORT OR THE WRITTEN DETERMINATION SHOULD BE AMENDED OR EXPUNGED ON THE GROUNDS THAT THE RECORD IS INACCURATE OR THE DETERMINATION IS NOT SUPPORTED BY THE EVIDENCE. THE BURDEN OF PROOF IN SUCH HEARING SHALL BE ON THE DEPARTMENT. WHENEVER INFORMATION IS EXPUNGED, THE COMMISSIONER SHALL NOTIFY ANY OFFICIAL NOTIFIED PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION THAT THE INFORMATION HAS BEEN EXPUNGED.

(E) EXCEPT AS HEREINAFTER PROVIDED, ANY REPORT, RECORD OF THE INVESTIGATION OF SUCH REPORT AND ALL OTHER INFORMATION RELATED TO SUCH REPORT SHALL BE CONFIDENTIAL AND SHALL BE EXEMPT FROM DISCLOSURE UNDER ARTICLE SIX OF THE PUBLIC OFFICERS LAW.

(F) INFORMATION RELATING TO A REPORT MADE PURSUANT TO THIS SECTION SHALL BE DISCLOSED UNDER ANY OF THE FOLLOWING CONDITIONS:

(I) PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW AFTER EXPUNGEMENT OR AMENDMENT, IF ANY, IS MADE IN ACCORDANCE WITH A HEARING CONDUCTED PURSUANT TO THIS SECTION, OR AT LEAST FORTY-FIVE DAYS AFTER A WRITTEN DETERMINATION IS MADE BY THE COMMISSIONER CONCERNING SUCH REPORT, WHICHEVER IS LATER; PROVIDED, HOWEVER, THAT THE IDENTITY OF THE PERSON WHO MADE THE REPORT, THE VICTIM, OR ANY OTHER PERSON NAMED,

EXCEPT A PERSON WHO THE COMMISSIONER HAS DETERMINED COMMITTED AN ACT OF PHYSICAL ABUSE, NEGLECT OR MISTREATMENT, SHALL NOT BE DISCLOSED UNLESS SUCH PERSON AUTHORIZES SUCH DISCLOSURE;

(II) AS MAY BE REQUIRED BY THE PENAL LAW OR ANY LAWFUL ORDER OR WARRANT ISSUED PURSUANT TO THE CRIMINAL PROCEDURE LAW; OR

(III) TO A PERSON WHO HAS REQUESTED A HEARING PURSUANT TO THIS SECTION, INFORMATION RELATING TO THE DETERMINATION UPON WHICH THE HEARING IS TO BE CONDUCTED; PROVIDED, HOWEVER, THAT THE IDENTITY OF THE PERSON WHO MADE THE REPORT OR ANY OTHER PERSON WHO PROVIDED INFORMATION IN AN INVESTIGATION OF THE REPORT SHALL NOT BE DISCLOSED UNLESS SUCH PERSON AUTHORIZES SUCH DISCLOSURE.

(G) WHERE APPROPRIATE, THE COMMISSIONER SHALL REPORT INSTANCES OF PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OR THE FAILURE TO REPORT AS REQUIRED BY THIS SECTION, TO THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT OR THE DEPARTMENT OF EDUCATION'S OFFICE OF PROFESSIONAL DISCIPLINE WHEN (I) A DETERMINATION HAS BEEN MADE AFTER THE COMMISSIONER HAS PROVIDED AN OPPORTUNITY TO BE HEARD IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION, OR (II) THE COMMISSIONER BELIEVES THAT A PROFESSIONAL LICENSEE IS CAUSING, ENGAGING IN OR MAINTAINING A CONDITION OR ACTIVITY WHICH IN THE COMMISSIONER'S OPINION CONSTITUTES AN IMMINENT DANGER TO THE PUBLIC HEALTH, AND THAT IT THEREFORE APPEARS TO BE PREJUDICIAL TO THE INTERESTS OF THE PUBLIC TO DELAY ACTION AGAINST SUCH PROFESSIONAL'S LICENSE UNTIL AN OPPORTUNITY FOR A HEARING CAN BE PROVIDED IN ACCORDANCE WITH PROVISIONS OF THIS SECTION.

8. IN ADDITION TO ANY OTHER PENALTIES PRESCRIBED BY LAW, ANY PERSON WHO COMMITS AN ACT OF PHYSICAL ABUSE, NEGLECT OR MISTREATMENT, OR WHO FAILS TO REPORT SUCH AN ACT AS PROVIDED IN THIS SECTION, SHALL BE DEEMED TO HAVE VIOLATED THIS SECTION AND SHALL BE LIABLE FOR A PENALTY PURSUANT TO SECTION TWELVE OF THE PUBLIC HEALTH LAW AFTER AN OPPORTUNITY TO BE HEARD PURSUANT TO THIS SECTION.

9. NO ADULT CARE FACILITY, OR OFFICER OR EMPLOYEE THEREOF SHALL DISCHARGE OR IN ANY MANNER DISCRIMINATE OR RETALIATE AGAINST ANY PERSON IN ANY ADULT CARE FACILITY, OR ANY RELATIVE, OR SPONSOR THEREOF, OR AGAINST ANY EMPLOYEE OF THE FACILITY, OR AGAINST ANY OTHER PERSON BECAUSE SUCH PERSON, RELATIVE, LEGAL REPRESENTATIVE, SPONSOR OR EMPLOYEE HAS MADE, OR IS ABOUT TO MAKE, A REPORT PURSUANT TO THIS SECTION, OR HAS TESTIFIED, OR IS ABOUT TO TESTIFY, IN ANY PROCEEDING RELATING TO PHYSICAL ABUSE, MISTREATMENT OR NEGLECT OF A PERSON RECEIVING CARE OR SERVICES IN AN ADULT CARE FACILITY. THE SUPREME COURT MAY GRANT INJUNCTIVE RELIEF TO ANY PERSON SUBJECT TO SUCH RETALIATION OR DISCRIMINATION. ANY VIOLATION OF THIS SUBDIVISION SHALL BE PUNISHABLE PURSUANT TO SECTION TWELVE OF THE PUBLIC HEALTH LAW.

10. NO LATER THAN MARCH FIFTEENTH OF EVERY YEAR THE COMMISSIONER SHALL PREPARE AND TRANSMIT TO THE GOVERNOR AND THE LEGISLATURE A REPORT ON THE INCIDENTS OF PHYSICAL ABUSE, MISTREATMENT AND NEGLECT OF PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES. NO INFORMATION CONCERNING ANY INDIVIDUAL OR FACILITY SHALL BE DISCLOSED IN A REPORT MADE PURSUANT TO THIS SUBDIVISION, OR IN ANY OTHER REPORT, EXCEPT INFORMATION WHICH WOULD BE AVAILABLE PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW AS PROVIDED IN THIS SECTION. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO PROHIBIT THE MAINTENANCE OR DISCLOSURE OF, OR REQUIRE THE EXPUNGEMENT OF, STATISTICAL DATA WHICH WOULD NOT REVEAL THE IDENTITY OF ANY PERSON OR FACILITY.

11. AN INVESTIGATION SHALL BE MADE OF EACH INCIDENT REPORTED PURSUANT TO THIS SECTION, BUT ONLY THE PROVISIONS OF PARAGRAPHS (E) AND (F) OF SUBDIVISION SEVEN, AND SUBDIVISIONS THREE, FIVE, NINE AND TEN OF THIS

SECTION SHALL APPLY TO PHYSICAL ABUSE BY PERSONS RECEIVING CARE OR SERVICES IN ADULT CARE FACILITIES.

12. THE COMMISSIONER SHALL ADOPT RULES AND REGULATIONS NECESSARY TO IMPLEMENT THIS SECTION.

S 2. The commissioner of health, in consultation with the executive director of the office for the prevention of domestic violence and the commissioner of the office for children and family services, shall develop model policies and protocols for recognizing possible abuse, maltreatment, or neglect, and determining the duty to report and submit such model policies and protocols to the legislature no later than one year after the effective date of this act.

S 3. Subdivision 10 of section 6509 of the education law, as amended by chapter 294 of the laws of 1985 and as renumbered by chapter 606 of the laws of 1991, is amended to read as follows:

(10) A violation of section twenty-eight hundred three-d or twenty-eight hundred five-k of the public health law, OR SECTION FOUR HUNDRED SIXTY-ONE-N OF THE SOCIAL SERVICES LAW.

S 4. Section 6530 of the education law is amended by adding a new subdivision 50 to read as follows:

50. A VIOLATION OF SECTION TWENTY-EIGHT HUNDRED THREE-D OR TWENTY-EIGHT HUNDRED FIVE-K OF THE PUBLIC HEALTH LAW, OR SECTION FOUR HUNDRED SIXTY-ONE-N OF THE SOCIAL SERVICES LAW.

S 5. This act shall take effect on the one hundred eightieth day after it shall have become a law provided, however, that effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized and directed to be made and completed on or before such effective date.