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I N   S E N A T E

May 17, 2010

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Introduced by Sen. KRUGER -- read twice and ordered printed, and when printed to be committed to the Committee on Aging

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:

1     Section 1. Subdivision 9 of section 460-d of the social services law,  
2     as added by chapter 704 of the laws of 1981, paragraph (a) as amended by  
3     chapter 558 of the laws of 1999, paragraph (b) as added by chapter 848  
4     of the laws of 1992 and subparagraph (i) of paragraph (c) as amended by  
5     chapter 515 of the laws of 1988, is amended to read as follows:  
6     9. (a) The department shall have authority to impose a civil penalty  
7     not exceeding one thousand dollars per day against, and to issue an  
8     order requiring the closing of, after notice and opportunity to be  
9     heard, any facility which does not possess a valid operating certificate  
10    issued by the department and is an adult care facility subject to the  
11    provisions of this article and the regulations of the department. A  
12    hearing shall be conducted in accordance with procedures established by  
13    department regulations which procedures shall require that notice of the  
14    determination that the facility is an adult care facility and the  
15    reasons for such determination and notice of the time and place of the  
16    hearing be served in person on the operator, owner or prime lessor, if  
17    any, or by certified mail, return receipt requested, addressed to such  
18    person and received at least twenty days prior to the date of the hear-  
19    ing. If such operator, owner or prime lessor, if any, is not known to  
20    the department, then service may be made by posting a copy thereof in a  
21    conspicuous place within the facility or by sending a copy thereof by  
22    certified mail, return receipt requested, addressed to the facility. A  
23    written answer to the notice of violation may be filed with the depart-  
24    ment not less than five days prior to the date of the hearing. Demon-  
25    stration by the facility that it possessed an operating certificate  
26    issued pursuant to this article, article twenty-eight of the public  
27    health law or article sixteen, [twenty-three,] thirty-one or thirty-two  
28    of the mental hygiene law at the time the hearing was commenced shall

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

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1 constitute a complete defense to any charges made pursuant to this  
2 subdivision.

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

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

14 (I) THE FACILITY OR ENTITY PROVIDES OR ARRANGES SERVICES IN A CONGRE-  
15 GATE SETTING TO FIVE OR MORE ADULTS, INCLUDING ANY TWO OF THE FOLLOWING:  
16 (1) TWO OR MORE MEALS PER DAY; (2) CONGREGATE SOCIAL FUNCTIONS; (3) CASE  
17 MANAGEMENT SERVICES; OR (4) SUPERVISION, WHICH SHALL INCLUDE, BUT NOT BE  
18 LIMITED TO, MAINTAINING GENERAL KNOWLEDGE OF THE WHEREABOUTS OF EACH  
19 RESIDENT, MONITORING RESIDENTS TO IDENTIFY CHANGES IN BEHAVIOR OR  
20 APPEARANCE, MONITORING ATTENDANCE AT MEALS AND MAINTENANCE OF APPROPRI-  
21 ATE NUTRITIONAL INTAKE; AND

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

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

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

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

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

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

43 (3) AFFIDAVIT BY THE OPERATOR, OWNER OR PRIME LESSOR THAT THE FACILITY  
44 AND THE HOME CARE AGENCIES PROVIDING SERVICES TO RESIDENTS ARE NOT  
45 COMMONLY OWNED OR OTHERWISE SUBJECT TO THE CONTROL OF ONE OR MORE ENTI-  
46 TIES OR PRINCIPALS AND/OR DO NOT WORK TOGETHER TO PROVIDE, ARRANGE OR  
47 COORDINATE SUCH SERVICES TO RESIDENTS;

48 (4) DETAILED NON-PERSONALLY IDENTIFIABLE INFORMATION FOR EACH INDIVID-  
49 UAL RESIDENT RECEIVING SERVICES FROM A HOME CARE AGENCY, PRIVATE DUTY  
50 AIDE OR COMPANION. SUCH INFORMATION SHALL BE UPDATED MONTHLY UNTIL A  
51 FINAL DETERMINATION IS MADE BY THE DEPARTMENT AND SHALL INCLUDE:

52 (A) A DETAILED DESCRIPTION OF THE SPECIFIC SERVICES PROVIDED TO THE  
53 INDIVIDUAL RESIDENT BY THE HOME CARE AGENCY, PRIVATE DUTY AIDE OR  
54 COMPANION, WHICH THE OPERATOR, OWNER OR PRIME LESSOR SHALL REQUEST FROM  
55 THE AGENCY, AIDE OR COMPANION IF NECESSARY; PROVIDED, HOWEVER, THAT THE

1 AGENCY, AIDE OR COMPANION MAY ELECT TO PROVIDE SUCH INFORMATION DIRECTLY  
2 TO THE DEPARTMENT;

3 (B) A DETAILED DESCRIPTION OF THE SPECIFIC SERVICES PROVIDED TO THE  
4 INDIVIDUAL RESIDENT BY THE FACILITY;

5 (C) A DESCRIPTION OF ANY AND ALL INTERACTION OR COORDINATION BETWEEN  
6 THE FACILITY STAFF AND THE HOME CARE AGENCY STAFF, PRIVATE DUTY AID OR  
7 COMPANION;

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

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

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

17 (F) AFTER NOTICE BY THE DEPARTMENT THAT THE DEPARTMENT HAS REASON TO  
18 PRESUME A FACILITY IS AN ADULT CARE FACILITY UNDER THIS ARTICLE, IF THE  
19 OPERATOR, OWNER OR PRIME LESSOR FAILS TO SUBMIT THE DOCUMENTARY EVIDENCE  
20 PURSUANT TO PARAGRAPH (D) OF THIS SUBDIVISION, OR FAILS TO SUBMIT AN  
21 APPLICATION FOR LICENSURE PURSUANT TO PARAGRAPH (E) OF THIS SUBDIVISION,  
22 THEN THE DEPARTMENT MAY, IN ADDITION TO ASSESSING CIVIL PENALTIES AND  
23 EXERCISING INJUNCTIVE RELIEF PURSUANT TO SECTION TWELVE OF THE PUBLIC  
24 HEALTH LAW, IMMEDIATELY ISSUE AN ORDER OR NOTICE TO CEASE AND DESIST  
25 ADVERTISEMENT, MARKETING, AND ADMISSION OF NEW RESIDENTS AGED SIXTY-FIVE  
26 AND OVER, UNTIL IT IS DETERMINED BY THE DEPARTMENT THAT THE FACILITY IS  
27 OR IS NOT AN ADULT CARE FACILITY UNDER THIS ARTICLE; PROVIDED, HOWEVER,  
28 THAT THE OPERATOR, OWNER OR PRIME LESSOR SHALL BE AFFORDED AN OPPORTU-  
29 NITY TO BE HEARD AT AN EXPEDITED HEARING TO BE HELD WITHIN THIRTY (30)  
30 DAYS OF THE ISSUANCE OF THE ORDER OR NOTICE.

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

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

45 (iii) If the department is not permitted access to such facility by  
46 the operator, administrator or other person in charge thereof, the  
47 attorney general, upon the request of the department, shall be author-  
48 ized to apply, without notice to the operator, administrator or chairman  
49 of the board of directors of a not-for-profit facility, to the supreme  
50 court in the county in which the facility is located for an order grant-  
51 ing the department access to such facility. The court may grant such an  
52 order if it determines, based on evidence presented by the attorney  
53 general, that there is reasonable cause to believe that such facility is  
54 an adult care facility which does not possess a valid operating certifi-  
55 cate issued by the department.

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

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

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