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I N   A S S E M B L Y

(PREFILED)

January 4, 2012

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Introduced by M. of A. GOTTFRIED -- read once and referred to the  
Committee on Health

AN ACT to amend the social services law, in relation to penalties for  
violations relating to residential care programs for adults

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

1     Section 1. Subdivision 7 and paragraphs (a) and (b) of subdivision 9  
2     of section 460-d of the social services law, subdivision 7 as added by  
3     chapter 669 of the laws of 1977, paragraph (a) of subdivision 7 as  
4     amended by chapter 719 of the laws of 1989, paragraph (b) of subdivision  
5     7 as amended by chapter 524 of the laws of 1984, subparagraph 2 of para-  
6     graph (b) of subdivision 7 as amended by chapter 733 of the laws of  
7     1994, paragraph (a) of subdivision 9 as amended by chapter 558 of the  
8     laws of 1999 and paragraph (b) of subdivision 9 as added by chapter 848  
9     of the laws of 1992, are amended to read as follows:  
10    7. (a) The department shall adopt regulations establishing civil  
11    penalties of up to [one] FIVE thousand dollars PER VIOLATION per day to  
12    be assessed against all adult care facilities except facilities operated  
13    by a social services district for violations of (i) regulations of the  
14    department pertaining to the care of residents in such facilities, (ii)  
15    paragraph (a) of subdivision three of section four hundred sixty-one-a  
16    of this [chapter] ARTICLE, or (iii) an order issued pursuant to subdivi-  
17    sion eight of this section. The regulations shall specify the violations  
18    subject to penalty and the amount of the penalty to be assessed in  
19    connection with each such violation and shall specify that only civil  
20    penalties of up to [one] FIVE thousand dollars PER VIOLATION per day  
21    [per violation] shall be assessed pursuant to this paragraph against an  
22    adult care facility found responsible for an act of retaliation or  
23    reprisal against any resident, employee, or other person for having  
24    filed a complaint with or having provided information to any long term  
25    care [patient] ombudsman functioning in accordance with section [five  
26    hundred forty-four or five hundred forty-five] TWO HUNDRED EIGHTEEN of  
27    the [executive] ELDER law.

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

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1 (b) [(1)] In addition to any other civil or criminal penalty provided  
2 by law, the department shall have the power to assess civil penalties in  
3 accordance with its regulations adopted pursuant to paragraph (a) of  
4 this subdivision, after a hearing conducted in accordance with the  
5 procedures established by regulations of the department. Such procedures  
6 shall require that notice of the time and place of the hearing, together  
7 with a statement of charges of violations, shall be served in person or  
8 by certified mail addressed to the facility at least thirty days prior  
9 to the date of the hearing. The statement of charges of violations shall  
10 set forth the existence of the violations, the amount of penalty for  
11 which it may become liable and the steps which must be taken to rectify  
12 the violation and, where applicable, a statement that the department  
13 contends that a penalty may be imposed under this paragraph regardless  
14 of rectification. An answer to the charges of violations, in writing,  
15 shall be filed with the department, not less than ten days prior to the  
16 date of hearing. The answer shall notify the department of the facility's  
17 position with respect to each of the charges and shall include all  
18 matters which if not disclosed in the answer would be likely to take the  
19 department by surprise. The commissioner, or a member of his staff who  
20 is designated and authorized by him to hold such hearing, may in his  
21 discretion allow the facility to prove any matter not included in the  
22 answer.

23 (C) Where the facility satisfactorily demonstrates that it either had  
24 rectified the violations within thirty days of receiving CERTIFIED written  
25 notification of the results of the inspection pursuant to section  
26 four hundred sixty-one-a of this [chapter] ARTICLE, or had submitted  
27 within thirty days an acceptable plan for rectification and was rectifying  
28 the violations in accordance with the steps and within the additional  
29 periods of time as accepted by the department in such plan, [no]  
30 THE DEPARTMENT MAY DETERMINE THAT THE penalty UNDER THIS SECTION shall  
31 be REDUCED FROM WHAT OTHERWISE WOULD BE imposed[, except as provided in  
32 subparagraph two of this paragraph.

33 (2) Rectification shall not preclude the assessment of a penalty if  
34 the department establishes at a hearing that] OR WAIVED. IN MAKING A  
35 DETERMINATION UNDER THIS PARAGRAPH, THE DEPARTMENT SHALL CONSIDER:

36 (I) WHETHER a particular violation[, although corrected,] endangered  
37 or resulted in harm to any resident [as the result of:

38 (i)], IN WHICH CASE THE PENALTY SHALL NOT BE REDUCED OR WAIVED. ENDANGERMENT IS DEFINED AS:

40 (A) the total or substantial failure of the facility's fire detection  
41 or prevention systems, or emergency evacuation procedures prescribed by  
42 department safety standard regulations;

43 [(ii)] (B) the retention of any resident who has been evaluated by the  
44 resident's physician as being medically or mentally unsuited for care in  
45 the facility or as requiring placement in a hospital or residential  
46 health care facility and for whom the operator is not making persistent  
47 efforts to secure appropriate placement;

48 [(iii)] (C) the failure in systemic practices and procedures;

49 [(iv)] (D) the failure of the operator to take actions as required by  
50 department regulations in the event of a resident's illness or accident;

51 [(v)] (E) the failure of the operator to provide at all times supervision  
52 of residents by numbers of staff at least equivalent to the night  
53 staffing requirement set forth in department regulations; or

54 [(vi)] (F) unreasonable threats of retaliation or taking reprisals,  
55 including but not limited to unreasonable threats of eviction or hospitalization  
56 against any resident, employee or other person who makes a

1 complaint concerning the operation of an adult care facility, partic-  
2 ipates in the investigation of a complaint or is the subject of an  
3 action identified in a complaint.

4 The department shall specify in its regulations those [regulations]  
5 VIOLATIONS to which this [subparagraph two] PARAGRAPH shall apply[.

6 (3) In assessing penalties pursuant to this paragraph, the department  
7 shall consider promptness];

8 (II) WHETHER A PARTICULAR VIOLATION IS ONE OF THE FOLLOWING:

9 (A) A VIOLATION WHEREIN HARM, SHORT OF ENDANGERMENT AS DEFINED IN  
10 SUBPARAGRAPH (I) OF THIS PARAGRAPH, WAS ACTUALLY COMMITTED;

11 (B) A VIOLATION WHEREIN A RESIDENT OR RESIDENTS WERE PUT AT RISK OF  
12 HARM; OR

13 (C) A VIOLATION WHEREIN A RESIDENT WAS NEITHER HARMED NOR PUT AT RISK  
14 OF HARM;

15 (III) THE FACILITY'S HISTORY OF PROVIDING QUALITY CARE, VIOLATIONS;  
16 AND

17 (IV) PROMPTNESS of rectification, delay occasioned by the department,  
18 and the specific circumstances of the violations as mitigating factors.

19 [(c)] (D) Upon the request of the department, the attorney general may  
20 commence an action in any court of competent jurisdiction against any  
21 facility subject to the provisions of this section, and against any  
22 person or corporation operating such facility, for the recovery of any  
23 penalty assessed by the department in accordance with the provisions of  
24 this subdivision.

25 [(d)] (E) Any such penalty assessed by the department may be released  
26 or compromised by the department before the matter has been referred to  
27 the attorney general, and where such matter has been referred to the  
28 attorney general, any such penalty may be released or compromised and  
29 any action commenced to recover the same may be settled and discontinued  
30 by the attorney general with the consent of the department.

31 (a) The department shall have authority to impose a civil penalty not  
32 exceeding [one] FIVE thousand dollars PER VIOLATION per day against, and  
33 to issue an order requiring the closing of, after notice and opportunity  
34 to be heard, any facility which does not possess a valid operating  
35 certificate issued by the department and is an adult care facility  
36 subject to the provisions of this article and the regulations of the  
37 department. A hearing shall be conducted in accordance with procedures  
38 established by department regulations which procedures shall require  
39 that notice of the determination that the facility is an adult care  
40 facility and the reasons for such determination and notice of the time  
41 and place of the hearing be served in person on the operator, owner or  
42 prime lessor, if any, or by certified mail, return receipt requested,  
43 addressed to such person and received at least twenty days prior to the  
44 date of the hearing. If such operator, owner or prime lessor, if any, is  
45 not known to the department, then service may be made by posting a copy  
46 thereof in a conspicuous place within the facility or by sending a copy  
47 thereof by certified mail, return receipt requested, addressed to the  
48 facility. A written answer to the notice of violation may be filed with  
49 the department not less than five days prior to the date of the hearing.  
50 Demonstration by the facility that it possessed an operating certificate  
51 issued pursuant to this article, article twenty-eight of the public  
52 health law or article sixteen, [twenty-three,] thirty-one or thirty-two  
53 of the mental hygiene law at the time the hearing was commenced shall  
54 constitute a complete defense to any charges made pursuant to this  
55 subdivision.

1 (b) [The penalty authorized by this section shall begin to run thirty  
2 days after the department provides the operator, in writing, with a  
3 summary of the inspection of the facility by which the department deter-  
4 mined that he or she is operating an uncertified adult care facility.]  
5 The submission of an application by the operator for an operating  
6 certificate for the facility shall not act as a bar to the imposition of  
7 a penalty against the operator OF AN UNLICENSED ADULT CARE FACILITY.  
8 S 2. This act shall take effect on the ninetieth day after it shall  
9 have become a law; provided that any rules and regulations, and any  
10 other actions necessary to implement the provisions of this act on its  
11 effective date are authorized and directed to be completed on or before  
12 such date.