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

8862

I N A S S E M B L Y

(PREFILED)

January 4, 2012

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:

Section 1. Subdivision 7 and paragraphs (a) and (b) of subdivision 9 of section 460-d of the social services law, subdivision 7 as added by chapter 669 of the laws of 1977, paragraph (a) of subdivision 7 as amended by chapter 719 of the laws of 1989, paragraph (b) of subdivision 7 as amended by chapter 524 of the laws of 1984, subparagraph 2 of paragraph (b) of subdivision 7 as amended by chapter 733 of the laws of 1994, paragraph (a) of subdivision 9 as amended by chapter 558 of the laws of 1999 and paragraph (b) of subdivision 9 as added by chapter 848 of the laws of 1992, are amended to read as follows:

7. (a) The department shall adopt regulations establishing civil penalties of up to [one] FIVE thousand dollars PER VIOLATION per day to be assessed against all adult care facilities except facilities operated by a social services district for violations of (i) regulations of the department pertaining to the care of residents in such facilities, (ii) paragraph (a) of subdivision three of section four hundred sixty-one-a of this [chapter] ARTICLE, or (iii) an order issued pursuant to subdivision eight of this section. The regulations shall specify the violations subject to penalty and the amount of the penalty to be assessed in connection with each such violation and shall specify that only civil penalties of up to [one] FIVE thousand dollars PER VIOLATION per day [per violation] shall be assessed pursuant to this paragraph against an adult care facility found responsible for an act of retaliation or reprisal against any resident, employee, or other person for having filed a complaint with or having provided information to any long term care [patient] ombudsman functioning in accordance with section [five hundred forty-four or five hundred forty-five] TWO HUNDRED EIGHTEEN of the [executive] ELDER law.

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

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

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

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

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

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

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

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

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

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

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

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

complaint concerning the operation of an adult care facility, participates in the investigation of a complaint or is the subject of an action identified in a complaint.

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

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

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

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

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

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

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

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

[(c)] (D) 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 section, 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.

[(d)] (E) Any such penalty assessed by the department 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.

(a) The department shall have authority to impose a civil penalty not exceeding [one] FIVE thousand dollars PER VIOLATION 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 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 OF AN UNLICENSED ADULT CARE FACILITY.

S 2. This act shall take effect on the ninetieth day after it shall have become a law; provided that any rules and regulations, and any other actions necessary to implement the provisions of this act on its effective date are authorized and directed to be completed on or before such date.