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

7102--B

2013-2014 Regular Sessions

I N A S S E M B L Y

May 1, 2013

Introduced by M. of A. GOTTFRIED -- (at request of the Department of Health) -- read once and referred to the Committee on Health -- reported and referred to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the public health law and the education law, in relation to enforcing compliance with clinical competency exams, simplifying service of charges, limiting petitions to modify or vacate orders, profiling requirements of self-insured physicians, modifying physician and advertising and testimonial standards; to amend the public health law, in relation to expanding the applicability of penalties for willful violations of the commissioner of health's orders; and to amend chapter 58 of the laws of 2008, amending the elder law and other laws relating to reimbursement to particular provider pharmacies and prescription drug coverage, 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. Subdivision 7 of section 230 of the public health law is amended by adding a new paragraph (d) to read as follows:

(D) (I) A COMMITTEE ON PROFESSIONAL CONDUCT, ON NOTICE TO THE LICENSEE AND AFTER AFFORDING THE LICENSEE AND THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT AN OPPORTUNITY TO BE HEARD, SHALL HAVE THE AUTHORITY TO ORDER THE LICENSEE TO COMPLY WITH RECOMMENDED REMEDIATION ARISING FROM THE EXAMINATIONS IN PARAGRAPH (C) OF THIS SUBDIVISION. (II) IF A COMMITTEE ON PROFESSIONAL CONDUCT WHEN CONSIDERING THE RESULTS OF A CLINICAL COMPETENCY EXAMINATION PURSUANT TO PARAGRAPH (C) OF THIS SUBDIVISION DETERMINES THAT THE LICENSEE IS INCOMPETENT AND THAT THERE IS NO PRACTICAL REMEDIATION FOR SUCH INCOMPETENCE, IT MAY REFER THE CASE TO THE DIRECTOR OF THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT FOR THE DIREC-

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

LBD09282-06-3

TOR'S CONSIDERATION OF WHETHER TO PRESENT TO AN INVESTIGATION COMMITTEE PURSUANT TO SUBPARAGRAPH (IV) OF PARAGRAPH (A) OF SUBDIVISION TEN OF THIS SECTION FOR ITS CONCURRENCE ON CHARGES PURSUANT TO PARAGRAPH (B) OF SUBDIVISION FIVE OF SECTION SIXTY-FIVE HUNDRED THIRTY OF THE EDUCATION LAW.

S 2. Subdivision 5 of section 6530 of the education law, as added by chapter 606 of the laws of 1991, is amended to read as follows:

5. (A) Practicing the profession with incompetence on more than one occasion; OR

(B) BEING FOUND TO BE INCOMPETENT BY AN EXAMINATION WHICH HAS OCCURRED PURSUANT TO PARAGRAPH (C) OF SUBDIVISION SEVEN OF SECTION TWO HUNDRED THIRTY OF THE PUBLIC HEALTH LAW WHEN THE RESULTS OF THE EXAMINATION DEMONSTRATE THAT THERE ARE NO REASONABLE CONDITIONS OR LIMITATIONS THAT COULD BE IMPOSED UPON THE LICENSEE THAT WOULD SUFFICIENTLY MITIGATE SUCH INCOMPETENCE.

S 3. Subdivision 15 of section 6530 of the education law, as added by chapter 606 of the laws of 1991, is amended to read as follows:

15. (A) Failure to comply with an order issued pursuant to subdivision seven, paragraph (a) of subdivision ten, and subdivision seventeen of section two hundred thirty of the public health law; OR

(B) FAILURE TO COMPLY WITH REMEDIATION RECOMMENDATIONS ARISING FROM AN EXAMINATION WHEN AN EXAMINATION HAS OCCURRED PURSUANT TO PARAGRAPH (C) OF SUBDIVISION SEVEN OF SECTION TWO HUNDRED THIRTY OF THE PUBLIC HEALTH LAW, WHEN SUCH COMPLIANCE HAS BEEN ORDERED BY A COMMITTEE ON PROFESSIONAL CONDUCT PURSUANT TO PARAGRAPH (D) OF SUBDIVISION SEVEN OF SECTION TWO HUNDRED THIRTY OF THE PUBLIC HEALTH LAW.

S 4. Subparagraph (i) of paragraph (d) of subdivision 10 of section 230 of the public health law, as amended by chapter 477 of the laws of 2008, is amended to read as follows:

(i) A copy of the charges and the notice of the hearing shall be served BY THE BOARD on the licensee EITHER (A) personally [by the board] at least thirty days before the hearing[. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served]; OR (B) by registered or certified mail to the licensee's [last known] CURRENT RESIDENTIAL OR PRACTICE address [by the board]; MAILED at least [fifteen] THIRTY days before the hearing; OR (C) BY REGISTERED OR CERTIFIED MAIL TO THE LICENSEE'S CURRENT REGISTRATION ADDRESS PURSUANT TO SECTION SIXTY-FIVE HUNDRED TWO OF THE EDUCATION LAW OR THE LICENSEE'S MOST RECENT MAILING ADDRESS ON FILE WITH THE NEW YORK STATE EDUCATION DEPARTMENT PURSUANT TO THE NOTIFICATION REQUIREMENT SET FORTH IN SUBDIVISION FIVE OF SUCH SECTION, MAILED AT LEAST FORTY-FIVE DAYS BEFORE THE HEARING; OR (D) BY FIRST CLASS MAIL TO AN ATTORNEY, LICENSED TO PRACTICE IN THE STATE OF NEW YORK, WHO HAS APPEARED ON BEHALF OF THE LICENSEE IN THE MATTER BEFORE THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT MAILED AT LEAST THIRTY DAYS BEFORE THE HEARING. IN THE EVENT A COPY OF THE CHARGES ARE SERVED THROUGH EITHER CLAUSES (A), (B), OR (C) OF THIS SUBPARAGRAPH, THEN THE BOARD SHALL ALSO SERVE THE ATTORNEY, LICENSED TO PRACTICE IN THE STATE OF NEW YORK, WHO HAS REQUESTED IN WRITING SERVICE ON BEHALF OF THE LICENSEE IN THE MATTER BEFORE THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT AT LEAST THIRTY DAYS BEFORE THE HEARING.

S 5. Paragraph (q) of subdivision 10 of section 230 of the public health law, as added by chapter 477 of the laws of 2008, is amended to read as follows:

(q) [At any time subsequent] SUBSEQUENT to the final conclusion of a professional misconduct proceeding against a licensee, whether upon the

determination and order of a hearing committee issued pursuant to paragraph (h) of this subdivision or upon the determination and order of the administrative review board issued pursuant to paragraph (d) of subdivision four of section two hundred thirty-c of this title, the licensee may file a petition with the director, requesting vacatur or modification of the determination and order. IF THE DETERMINATION AND ORDER DID NOT INCLUDE THE PENALTY OF LICENSE REVOCATION, THE PETITION MAY BE FILED AT ANY TIME. IF THE DETERMINATION AND ORDER INCLUDED A SANCTION OF LICENSE REVOCATION, THE PETITION MAY BE FILED AT ANY TIME PRIOR TO SUCH TIME AS THE LICENSEE IS AUTHORIZED, PURSUANT TO SECTION SIXTY-FIVE HUNDRED ELEVEN OF THE EDUCATION LAW, THE RULES OF THE BOARD OF REGENTS AND THE REGULATIONS OF THE COMMISSIONER OF EDUCATION TO SEEK BOARD OF REGENTS RESTORATION OF THE REVOKED LICENSE. The director shall, after reviewing the matter and after consulting with department counsel, determine in the reasonable exercise of his or her discretion whether there is new and material evidence that was not previously available which, had it been available, would likely have led to a different result, or whether circumstances have occurred subsequent to the original determination that warrant a reconsideration of the measure of discipline. Upon determining that such evidence or circumstances exist, the director shall have the authority to join the licensee in an application to the chairperson of the state board for professional medical conduct to vacate or modify the determination and order, as the director may deem appropriate. Upon the joint application of the licensee and the director, the chairperson shall have the authority to grant or deny such application.

S 6. Section 6511 of the education law, as amended by chapter 542 of the laws of 2000, is amended to read as follows:

S 6511. Penalties for professional misconduct. The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine and sixty-five hundred ten of this [article] SUBPART) are: (1) censure and reprimand, (2) suspension of license, (a) wholly, for a fixed period of time; (b) partially, until the licensee successfully completes a course of retraining in the area to which the suspension applies; (c) wholly, until the licensee successfully completes a course of therapy or treatment prescribed by the regents; (3) revocation of license, (4) annulment of license or registration, (5) limitation on registration or issuance of any further license, (6) a fine not to exceed ten thousand dollars, upon each specification of charges of which the respondent is determined to be guilty, (7) a requirement that a licensee pursue a course of education or training, and (8) a requirement that a licensee perform up to one hundred hours of public service, in a manner and at a time and place as directed by the board. The board of regents may stay such penalties in whole or in part, may place the licensee on probation and may restore a license which has been revoked, provided, in the case of licensees subject to section two hundred thirty of the public health law, notice that the board is considering such restoration is given to the office of professional medical conduct at least thirty days before the date on which such restoration shall be considered. Upon the recommendation of the office of professional medical conduct, the board of regents may deny such restoration. IN THE EVENT THAT THE BOARD, WHEN CONSIDERING SUCH RESTORATION, ELECTS TO ACT IN A MANNER INCONSISTENT WITH ANY RECOMMENDATION OF THE OFFICE OF PROFESSIONAL MEDICAL CONDUCT, THE BOARD SHALL INCLUDE AN EXPLICIT JUSTIFICATION FOR DEPARTING FROM

SUCH RECOMMENDATION IN ITS WRITTEN DETERMINATION. Any fine imposed pursuant to this section or pursuant to subdivision two of section sixty-five hundred ten of this [article] SUBPART may be sued for and recovered in the name of the people of the state of New York in an action brought by the attorney general. In such action the findings and determination of the board of regents or of the violations committee shall be admissible evidence and shall be conclusive proof of the violation and the penalty assessed.

S 7. Subdivision 3 of section 2995-a of the public health law, as added by chapter 542 of the laws of 2000, is amended to read as follows:

3. Each physician who is self-insured for professional medical malpractice shall periodically report to the department on forms and in the time and manner required by the commissioner the information specified in paragraph [(f)] (E) of subdivision one of this section, except that the physician shall report the dollar amount (to the extent of the physician's information and belief) for each judgment, award and settlement and not a level of significance or context.

S 8. Subdivision 27 of section 6530 of the education law, as added by chapter 606 of the laws of 1991, is amended to read as follows:

27. Advertising or soliciting for patronage that is not in the public interest. (a) Advertising or soliciting not in the public interest shall include, but not be limited to, advertising or soliciting that: (i) is false, fraudulent, deceptive, OR misleading[, sensational, or flamboyant];

(ii) represents intimidation or undue pressure;

(iii) [uses testimonials;

(iv)] guarantees any service;

[(v)] (IV) makes any claim relating to professional services or products or the costs or price therefor which cannot be substantiated by the licensee, who shall have the burden of proof;

[(vi)] (V) makes claims of professional superiority which cannot be substantiated by the licensee, who shall have the burden of proof; or

[(vii)] (VI) offers bonuses or inducements in any form other than a discount or reduction in an established fee or price for a professional service or product.

(b) The following shall be deemed appropriate means of informing the public of the availability of professional services: (i) informational advertising not contrary to the foregoing prohibitions; and

(ii) the advertising in a newspaper, periodical or professional directory or on radio [or], television, OR THE INTERNET of fixed prices, or a stated range of prices, for specified routine professional services, provided that if there is an additional charge for related services which are an integral part of the overall service being provided by the licensee, the advertisement shall so state, and provided further that the advertisement indicates the period of time for which the advertised prices shall be in effect.

(c)(i) All licensees placing advertisements shall maintain, or cause to be maintained, an exact copy of each advertisement, transcript, tape or video tape thereof as appropriate for the medium used, for a period of one year after its last appearance. This copy shall be made available for inspection upon demand of the department of health;

(ii) A licensee shall not compensate or give anything of value to representatives of the press, radio, television or other communications media in anticipation of or in return for professional publicity in a news item[;].

(d) [No demonstrations, dramatizations or other portrayals of professional practice shall be permitted in advertising on radio or television;] TESTIMONIALS, DEMONSTRATIONS, DRAMATIZATIONS, OR OTHER PORTRAYALS OF PROFESSIONAL PRACTICE ARE PERMITTED PROVIDED THAT THEY OTHERWISE COMPLY WITH THE LAWS OF PROFESSIONAL MEDICAL CONDUCT AND FURTHER PROVIDED THAT THE FOLLOWING CONDITIONS ARE SATISFIED:

(I) THE PATIENT EXPRESSLY AUTHORIZES THE PORTRAYAL IN WRITING;

(II) THE APPROPRIATE DISCLOSURE IS INCLUDED TO PREVENT ANY MISLEADING INFORMATION OR IMAGERY AS TO THE IDENTITY OF THE PATIENT;

(III) REASONABLE DISCLAIMERS ARE INCLUDED AS TO ANY STATEMENTS MADE OR RESULTS ACHIEVED IN A PARTICULAR MATTER;

(IV) THE USE OF FICTIONAL SITUATIONS OR CHARACTERS MAY BE USED IF NO TESTIMONIALS ARE INCLUDED; AND

(V) FICTIONAL PATIENT TESTIMONIALS ARE NOT PERMITTED.

S 9. Section 32 of part A of chapter 58 of the laws of 2008, amending the elder law and other laws relating to reimbursement to particular provider pharmacies and prescription drug coverage, as amended by section 26 of part A of chapter 59 of the laws of 2011, is amended to read as follows:

S 32. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after April 1, 2008; provided however, that sections one, six-a, nineteen, twenty, twenty-four, and twenty-five of this act shall take effect July 1, 2008; provided however that sections sixteen[, seventeen] and eighteen of this act shall expire April 1, 2014; provided, however, that the amendments made by section twenty-eight of this act shall take effect on the same date as section 1 of chapter 281 of the laws of 2007 takes effect; provided further, that sections twenty-nine, thirty, and thirty-one of this act shall take effect October 1, 2008; provided further, that section twenty-seven of this act shall take effect January 1, 2009; and provided further, that section twenty-seven of this act shall expire and be deemed repealed March 31, 2014; and provided, further, however, that the amendments to subdivision 1 of section 241 of the education law made by section twenty-nine of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith and provided that the amendments to section 272 of the public health law made by section thirty of this act shall not affect the repeal of such section and shall be deemed repealed therewith.

S 10. This act shall take effect immediately; provided that sections one, two, three, four, five, six and eight of this act shall take effect on the sixtieth day after this act shall have become a law.