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

5820--A

2015-2016 Regular Sessions

I N A S S E M B L Y

March 5, 2015

Introduced by M. of A. GOTTFRIED, JAFFEE, BRONSON, STECK, GALEF, ROSENTHAL, ABINANTI, MOSLEY, BENEDETTO, DINOWITZ, ROBINSON, BLAKE, LINARES -- Multi-Sponsored by -- M. of A. ARROYO, BRENNAN, COOK, SIMON, THIELE -- read once and referred to the Committee on Health -- recommitted to the Committee on Health in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the social services law and the mental hygiene law, in relation to violations of safety conditions in adult care facilities

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

Section 1. Paragraph (b) of subdivision 4 of section 460-d of the social services law, as amended by chapter 733 of the laws of 1994, is amended to read as follows:

(b) No operating certificate shall be revoked, suspended or limited without a hearing held in accordance with procedures established by department regulations, which procedures shall require that notice of the time and place of the hearing, and notice of the charges, shall be served in person or by certified mail addressed to the facility at least thirty days prior to the date of the hearing. A written answer to the charges may be filed with the department not less than ten business days prior to the date of the hearing. An operating certificate may, nevertheless, be suspended or limited without a hearing for a period not in excess of sixty days, upon written notice to the facility following a finding by the department that the public health, or an individual's health, safety or welfare, are in imminent danger; PROVIDED, HOWEVER, THAT IF THE DEPARTMENT MAKES REASONABLE EFFORTS TO COMMENCE A HEARING WITHIN SUCH SIXTY DAY PERIOD AND TO COMPLETE SUCH HEARING WITHIN A REASONABLE PERIOD OF TIME, THE HEARING OFFICER MAY AUTHORIZE THE DEPARTMENT TO EXTEND THE PERIOD OF SUSPENSION OR LIMITATION FOR AN APPROPRIATE

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

LBD01171-02-6

PERIOD OF TIME, BUT IN NO EVENT BEYOND THE DATE WHEN THE HEARING IS COMPLETED AND AVAILABLE ADMINISTRATIVE APPEALS ARE EXHAUSTED.

S 2. Subdivision 7 of section 460-d of the social services law, as added by chapter 669 of the laws of 1977, paragraph (a) as amended by chapter 719 of the laws of 1989, paragraph (b) as amended by chapter 524 of the laws of 1984, subparagraph 2 of paragraph (b) as amended by chapter 733 of the laws of 1994, is 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.

(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.

(F) RECTIFICATION SHALL NOT PRECLUDE THE ASSESSMENT OF A PENALTY IF THE DEPARTMENT ESTABLISHES THAT A VIOLATION, ALTHOUGH CORRECTED, WAS A VIOLATION IN THE SAME AREA OF OPERATION AS A VIOLATION CITED BY THE DEPARTMENT AT THE PREVIOUS FACILITY INSPECTION.

S 3. Paragraphs (a) and (b) of subdivision 9 of section 460-d of the social services law, paragraph (a) as amended by chapter 558 of the laws of 1999 and paragraph (b) as added by chapter 848 of the laws of 1992, are amended to read as follows:

(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 4. Subdivision 11 of section 460-d of the social services law, as amended by section 154 of subpart B of part C of chapter 62 of the laws of 2011, is amended to read as follows:

11. On or before issuance by the department to an adult care facility operator of official written notice of: the proposed revocation, suspension or denial of the operator's operating certificate; the limitation of the operating certificate with respect to new admissions; the issuance of a department order or commissioner's order; the seeking of equitable relief pursuant to this section; the proposed assessment of civil penalties for violations of the provisions of [subparagraph two of] paragraph (b) of subdivision seven of this section or placement on the "do not refer list" pursuant to subdivision fifteen of this section, written notice also shall be given to the appropriate office of the department of mental hygiene, department of corrections and community supervision and local social services districts, and provided further that the department of health shall notify hospitals, RESIDENTIAL HEALTH

CARE FACILITIES AND ADULT CARE FACILITIES in the locality in which such facility is located that such notice has been issued. Upon resolution of such enforcement action the department shall notify the appropriate office of the department of mental hygiene, department of corrections and community supervision, local social services districts [and], hospitals, RESIDENTIAL HEALTH CARE FACILITIES AND ADULT CARE FACILITIES.

S 5. Subdivision 12 of section 460-d of the social services law, as amended by section 42 of part B of chapter 58 of the laws of 2004, is amended to read as follows:

12. [Social] HOSPITALS, RESIDENTIAL HEALTH CARE FACILITIES, ADULT CARE FACILITIES, SOCIAL services districts and other local government entities established pursuant to this chapter shall be prohibited from making referrals for admissions to adult care facilities that have received official written notice regarding: the proposed revocation, suspension or denial of the operator's operating certificate; the limitation of the operating certificate with respect to new admissions; the issuance of department order or commissioner's orders; the seeking of equitable relief pursuant to this section; the proposed assessment of civil penalties for violations of the provisions of [subparagraph two of] paragraph (b) of subdivision seven of this section; or the facility's placement on the "do not refer list" pursuant to subdivision fifteen of this section.

S 6. Section 460-d of the social services law is amended by adding a new subdivision 17 to read as follows:

17. WHEN THE DEPARTMENT OF HEALTH ISSUES OFFICIAL WRITTEN NOTICE TO AN OPERATOR OF A PROPOSED ACTION SPECIFIED IN SUBDIVISION ELEVEN OF THIS SECTION, AND THE DEPARTMENT DETERMINES THAT THERE IS A CONDITION WHICH CONSTITUTES AN IMMINENT DANGER TO THE HEALTH, SAFETY OR WELFARE OF ANY RESIDENT, THE DEPARTMENT MAY PROHIBIT THAT OPERATOR FROM ADMITTING ANY NEW RESIDENT TO THE FACILITY UNTIL THE DEPARTMENT DETERMINES THAT THERE IS NO LONGER AN IMMINENT DANGER TO THE HEALTH, SAFETY OR WELFARE OF ANY RESIDENT.

S 7. The closing paragraph of subdivision 3 of section 461-d of the social services law, as added by chapter 601 of the laws of 1981, is amended to read as follows:

Waiver of any provision [contained within] OF this subdivision by a resident of an adult care facility OR BY THE RESIDENT'S LEGAL REPRESENTATIVE OR RESIDENT REPRESENTATIVE, WITH RESPECT TO A RESIDENT OF AN ADULT HOME, RESIDENCE FOR ADULTS OR ENRICHED HOUSING PROGRAM, shall be void.

S 8. Paragraphs (a), (b) and (c) of subdivision 2 of section 461-a of the social services law, paragraphs (a) and (c) as amended by chapter 735 of the laws of 1994 and paragraph (b) as amended by chapter 601 of the laws of 1981, are amended to read as follows:

(a) With respect to adult care facilities the department shall conduct a minimum of one unannounced inspection of each such facility to determine the adequacy of care being rendered, pursuant to the following:

(1) Such facilities [receiving the department's highest rating] DETERMINED BY THE DEPARTMENT TO BE IN COMPLIANCE OR SUBSTANTIAL COMPLIANCE WITH APPLICABLE STATUTES AND REGULATIONS, BASED ON THE FACILITY'S MOST RECENT INSPECTION, shall be inspected at least once every eighteen months on an unannounced basis.

(2) All other such facilities shall be inspected on an unannounced basis no less than annually. The commissioner may provide for more frequent inspections of any such facilities. Such inspection shall not be required with respect to any facility for which the commissioner has

delegated responsibility for inspection and supervision to a social services official pursuant to section four hundred sixty-c of this [chapter] ARTICLE. Any employee of the department or a social services district who gives or causes to be given advance notice of such unannounced inspections to any unauthorized persons shall, in addition to any other penalty provided by law, be suspended by the department or the social services district from all duties without pay for at least five days or for such greater period of time as the department or social services district shall determine. Any such suspension shall be made by the department or social services district in accordance with all other applicable provisions of law.

(b) [The department or a social services district, where appropriate, shall each year conduct a minimum of one full inspection of each adult care facility. Such inspection] AN INSPECTION OF AN ADULT CARE FACILITY UNDER THIS SECTION shall include, but shall not be limited to, examination of the medical, dietary and social services records of the facility as well as the minimum standards of construction, life safety standards, quality and adequacy of care, rights of residents, payments and all other areas of operation. The purpose of any inspection shall be to determine compliance with requirements of applicable provisions of law and regulations of the department.

(c) (I) An inspection report shall be made of each inspection which shall clearly identify and indicate in detail each area of operation, including, but not limited to, the premises, equipment, personnel, resident care and services, and whether [each] ANY such area of operation or any of its component parts is [or is] not in compliance with the regulations of the department and all other applicable requirements. It also shall identify those areas of operation or any of its component parts found not in compliance as a result of failure in systemic practices and procedures. The operator shall be notified of the results of the inspection in a manner to be determined by regulations of the department AND SHALL SUBMIT A WRITTEN PLAN OF CORRECTION TO THE DEPARTMENT WITHIN THIRTY CALENDAR DAYS FROM THE DATE THE INSPECTION REPORT IS RECEIVED. THE DEPARTMENT SHALL NOTIFY THE OPERATOR OF THE ACCEPTABILITY OF THE PLAN OF CORRECTION WITHIN THIRTY CALENDAR DAYS OF THE DEPARTMENT'S RECEIPT OF SUCH PLAN. Such notification [shall] MAY contain directions as may be appropriate as to the manner and time in which compliance with applicable requirements of law or regulations of the department shall be effected.

(II) The department shall also require the operator of an adult home, ENRICHED HOUSING PROGRAM or residence for adults to develop, biannually update and implement plans for quality assurance activities for each area of operation. Quality assurance activities include but are not limited to, development and maintenance of performance standards, measurement of adherence to such standards and to applicable state and local laws and regulations, identification of performance failures, design, and implementation of corrective action.

S 9. Subparagraphs (I) and (II) of paragraph 2 of subdivision (i) of section 29.15 of the mental hygiene law, as amended by chapter 168 of the laws of 2010, are amended to read as follows:

(I) A patient about to be discharged or conditionally released from a department facility licensed or operated by the office for people with developmental disabilities or from an inpatient facility operated or licensed by the office of alcoholism and substance abuse services or the office of mental health to an adult home, ENRICHED HOUSING PROGRAM or residence for adults, as defined in section two of the social services

law, shall be referred only to such home or residence that is consistent with that patient's needs and that operates pursuant to section four hundred sixty of the social services law, provided further that: (A) for a department facility licensed or operated by the office for people with developmental disabilities or for an inpatient facility operated by the office of alcoholism and substance abuse services or the office of mental health, the facility director retains authority to determine whether the home, program or residence is consistent with that patient's needs and (B) such referral shall be made to the patient's home county whenever possible or appropriate.

(II) No patient about to be discharged or conditionally released from a department facility licensed or operated by the office for people with developmental disabilities or from an inpatient facility operated or licensed by the office of alcoholism and substance abuse services or the office of mental health shall be referred to any adult home, ENRICHED HOUSING PROGRAM or residence for adults, as defined in section two of the social services law, which has received an official written notice from the department of health of: (A) the proposed revocation, suspension or denial of its operating certificate; (B) the limitation of its operating certificate with respect to new admissions; (C) the issuance of a department of health order or commissioner of health's order or the seeking of equitable relief pursuant to section four hundred sixty-d of the social services law; (D) the proposed assessment of civil penalties for violations of the provisions of subparagraph two of paragraph (b) of subdivision seven of section four hundred sixty-d of the social services law; or placement on the "do not refer list" pursuant to subdivision fifteen of section four hundred sixty-d of the social services law. Referrals may resume when such enforcement actions are resolved.

S 10. This act shall take effect on the ninetieth day after it shall have become a law, provided, however, that the commissioner of health may adopt, amend, suspend or repeal any regulations or take other action necessary to enforce or implement the law prior to and in preparation for the taking effect of the law; provided, however, such adoption, amendment, suspension or repeal of regulations shall not have legal effect until the law takes effect.