§ 16.17 Suspension, revocation, or limitation of an operating certificate.

(a) The commissioner may revoke, suspend, or limit an operating certificate or impose the penalties described in subparagraph a, b, c or d of paragraph one of subdivision (b) or in subdivision (g) of this section upon a determination that the holder of the certificate has failed to comply with the terms of its operating certificate or with the provisions of any applicable statute, rule or regulation. The holder of the certificate shall be given notice and an opportunity to be heard prior to any such determination except that no such notice and opportunity to be heard shall be necessary prior to an emergency suspension or limitation of the facility's or provider of services' operating certificate imposed pursuant to paragraph one of subdivision (b) of this section, nor shall such notice and opportunity to be heard be necessary should the commissioner, in his or her discretion, decide to issue separate operating certificates to each facility or provider of services formerly included under the services authorized by one operating certificate to the provider of services.

(b) (1) An operating certificate may be temporarily suspended or limited without a prior hearing for a period not in excess of sixty days upon written notice to the facility or provider of services following a finding by the office for people with developmental disabilities that a individual's health or safety is in imminent danger. Upon such finding and notice, the power of the commissioner temporarily to suspend or limit an operating certificate shall include, but shall not be limited to, the power to:

a. Prohibit or limit the placement of new individuals in the facility or services;

b. Remove or cause to be removed some or all of the individuals in the facility or services;

c. Suspend or limit or cause to be suspended or limited the payment of any governmental funds to the facility or provider of services provided that such action shall not in any way jeopardize the health, safety and welfare of any person with a developmental disability in such program or

facility or services;

d. Prohibit or limit the placement of new individuals, remove or cause to be removed some or all individuals, or suspend or limit or cause to be suspended or limited the payment of any governmental funds, in or to any one or more of the facilities or provider of services authorized pursuant to an operating certificate.

(2) At any time subsequent to the suspension or limitation of any operating certificate pursuant to paragraph one of this subdivision where said suspension or limitation is the result of correctable physical plant, staffing or program deficiencies, the facility or provider of services may request the office to review the facility or provider of services to redetermine whether a physical plant, staffing or program deficiency continues to exist. After the receipt of such a request, the office shall review the facility or provider of services within ten days and in the event that the previously found physical plant, staffing or program deficiency has been corrected, the suspension or limitation shall be withdrawn. If the physical plant, staffing or program deficiency has not been corrected, the commissioner shall not thereafter be required to review the facility or provider of services during the emergency period of suspension or limitation.

(3) During the sixty day suspension or limitation period provided for in paragraph one of this subdivision the commissioner shall determine whether to reinstate or remove the limitations on the facility's or provider of services' operating certificate or to revoke, suspend or limit the operating certificate pursuant to subdivision (a) of this section. Should the commissioner choose to revoke, suspend or limit the operating certificate, then the emergency suspension or limitation provided for in this subdivision shall remain in effect pending the outcome of an administrative hearing on the revocation, suspension or limitation.

(4) The facility operator or provider of services, within ten days of the date when the emergency suspension or limitation pursuant to paragraph one of this subdivision is first imposed, may request an evidentiary hearing to contest the validity of the emergency suspension or limitation. Such an evidentiary hearing shall commence within ten days of the facility operator's or provider's request and no request for

an adjournment shall be granted without the concurrence of the facility operator or provider of service, office for people with developmental disabilities, and the hearing officer. The evidentiary hearing shall be limited to those violations of federal and state law and regulations that existed at the time of the emergency suspension or limitation and which gave rise to the emergency suspension or limitation. The emergency suspension or limitation shall be upheld upon a determination that the office for people with developmental disabilities had reasonable cause to believe that a individual's health or safety was in imminent danger. A record of such hearing shall be made available to the facility operator or provider of service upon request. Should the commissioner determine to revoke, suspend or limit an operating certificate pursuant to subdivision (a) of this section, no administrative hearing on that action shall commence prior to the conclusion of the evidentiary hearing. The commissioner shall issue a ruling within ten days after the receipt of the hearing officer's report.

(c) When the holder of an operating certificate shall request an opportunity to be heard, the commissioner shall fix a time and place for the hearing. A copy of the charges, together with the notice of the time and place of the hearing, shall be served in person or mailed by registered or certified mail to the facility or provider of services at least ten days before the date fixed for the hearing. The facility or provider of services shall file with the office, not less than three days prior to the hearing, a written answer to the charges.

(d) (1) When a hearing must be afforded pursuant to this section or other provisions of this article, the commissioner, acting as hearing officer, or any person designated by him or her as hearing officer, shall have power to:

a. administer oaths and affirmations;

b. issue subpoenas, which shall be regulated by the civil practice law and rules;

c. take testimony; or

d. control the conduct of the hearing.

(2) The rules of evidence observed by courts need not be observed except that the rules of privilege recognized by law shall be respected. Irrelevant or unduly repetitious evidence may be excluded.

(3) All parties shall have the right of counsel and be afforded an opportunity to present evidence and cross-examine witnesses.

(4) If evidence at the hearing relates to the identity, condition, or clinical record of an individual, the hearing officer may exclude all persons from the room except parties to the proceeding, their counsel and the witness. The record of such proceeding shall not be available to anyone outside the office, other than a party to the proceeding or his counsel, except by order of a court of record.

(5) The commissioner may establish regulations to govern the hearing procedure and the process of determination of the proceeding.

(6) The commissioner shall issue a ruling within ten days after the termination of the hearing or, if a hearing officer has been designated, within ten days from the hearing officer's report.

(e) All orders or determinations hereunder shall be subject to review as provided in article seventy-eight of the civil practice law and rules.

(f) (1) Except as provided in paragraph two of this subdivision, anything contained in this section to the contrary notwithstanding, an operating certificate of a facility or provider of service shall be revoked upon a finding by the office that any individual, member of a partnership or shareholder of a corporation to whom or to which an operating certificate has been issued, has been convicted of a class A, B or C felony or a felony related in any way to any activity or program subject to the regulations, supervision, or administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or in violation of the public officers law in a court of competent jurisdiction of the state, or in a court in another jurisdiction for an act which would have been a class A, B or C felony in this state or a felony in any way related to any activity or program which would be subject to the regulations, supervision, or administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or for an act which would be in violation of the public officers law. The

commissioner shall not revoke or limit the operating certificate of any facility or provider of service, solely because of the conviction, whether in the courts of this state or in the courts of another jurisdiction, more than ten years prior to the effective date of such revocation or limitation, of any person of a felony, or what would amount to a felony if committed within the state, unless the commissioner makes a determination that such conviction was related to an activity or program subject to the regulations, supervision, and administration of the office or of the office of temporary and disability assistance, the department of health, or another office of the department of mental hygiene, or in violation of the public officers law.

(2) In the event one or more members of a partnership or shareholders of a corporation shall have been convicted of a felony as described in paragraph one of this subdivision, the commissioner shall, in addition to his or her other powers, limit the existing operating certificate of such partnership or corporation so that it shall apply only to the remaining partner or shareholders, as the case may be, provided that every such convicted person immediately and completely ceases and withdraws from participation in the management and operation of the facility or provider of services and further provided that a change of ownership or transfer of stock is completed without delay, and provided that such partnership or corporation shall immediately reapply for a certificate of operation pursuant to subdivision (a) of section 16.05 of this article.

(g) The commissioner may impose a fine upon a finding that the holder of the certificate has failed to comply with the terms of the operating certificate or with the provisions of any applicable statute, rule or regulation. The maximum amount of such fine shall be one thousand dollars per day or fifteen thousand dollars per violation.

Such penalty may be recovered by an action brought by the commissioner in any court of competent jurisdiction.

Such penalty may be released or compromised by the commissioner before the 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 or discontinued by the attorney general with the consent of the commissioner.

(h) Where a proceeding has been brought pursuant to section 16.27 of this article, and a receiver appointed pursuant thereto, the commissioner may assume operation of the facility subject to such receivership, upon termination of such receivership, and upon showing to the court having jurisdiction over such receivership that no voluntary association, not-for-profit corporation or other appropriate provider is willing to assume operation of the facility subject to receivership and is capable of meeting the requirements of this article; provided that the commissioner notifies the chairman of the assembly ways and means committee, the chairman of the senate finance committee and the director of the budget of his intention to assume operation of such facility upon service of the order to show cause upon the owner or operator of the facility, pursuant to subdivision (b) of section 16.27 of this article.