

§ 2801-d. Private actions by patients of residential health care facilities. 1. Any residential health care facility that deprives any patient of said facility of any right or benefit, as hereinafter defined, shall be liable to said patient for injuries suffered as a result of said deprivation, except as hereinafter provided. For purposes of this section a "right or benefit" of a patient of a residential health care facility shall mean any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation, where noncompliance by said facility with such statute, code, rule or regulation has not been expressly authorized by the appropriate governmental authority. No person who pleads and proves, as an affirmative defense, that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury for which liability is asserted shall be liable under this section. For the purposes of this section, "injury" shall include, but not be limited to, physical harm to a patient; emotional harm to a patient; death of a patient; and financial loss to a patient.

2. Upon a finding that a patient has been deprived of a right or benefit and that said patient has been injured as a result of said deprivation, and unless there is a finding that the facility exercised all care reasonably necessary to prevent and limit the deprivation and injury to the patient, compensatory damages shall be assessed in an amount sufficient to compensate such patient for such injury, but in no event less than twenty-five percent of the daily per-patient rate of payment established for the residential health care facility under section twenty-eight hundred seven of this article or, in the case of a residential health care facility not having such an established rate, the average daily total charges per patient for said facility, for each day that such injury exists. In addition, where the deprivation of any such right or benefit is found to have been willful or in reckless disregard of the lawful rights of the patient, punitive damages may be assessed.

3. A patient residing in a residential health care facility may also

maintain an action pursuant to this section for any other type of relief, including injunctive and declaratory relief, permitted by law.

4. Any damages recoverable pursuant to this section, including minimum damages as provided by subdivision two of this section, may be recovered in any action which a court may authorize to be brought as a class action pursuant to article nine of the civil practice law and rules. The remedies provided in this section are in addition to and cumulative with any other remedies available to a patient, the patient's legal representative, or the patient's estate at law or in equity or by administrative proceedings, including tort causes of action, and may be granted regardless of whether such other remedies are available or are sought. A violation of subdivision three of section twenty-eight hundred three-c of this article is not a prerequisite for a claim under this section. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder.

4-a. Under this section, any action that may be brought, and any relief that may be sought or received, may be brought, sought or received in an appropriate case by the patient's legal representative or the patient's estate.

5. The amount of any damages recovered by a patient, in an action brought pursuant to this section shall be exempt for purposes of determining initial or continuing eligibility for medical assistance under title eleven of article five of the social services law and shall neither be taken into consideration nor required to be applied toward the payment or part payment of the cost of medical care or services available under said title eleven.

6. If judgment in an action maintained under this section is rendered in favor of the plaintiff, in its discretion the court may, if justice requires, award attorneys' fees to the plaintiff based on the reasonable value of legal services rendered and payable by the defendant.

7. Any waiver by a patient or his legal representative of the right to commence an action under this section, whether oral or in writing, shall

be null and void and without legal force or effect.

8. Any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

9. No insurance premium or part thereof paid by any residential health care facility which is attributable solely to insurance against liability pursuant to this section shall be allowed as a reimbursable cost for purposes of any proposed rate schedule for payments for hospital or health-related service which the commissioner shall determine and certify pursuant to section twenty-eight hundred seven of this chapter.

10. a. No person shall discriminate against any patient of a residential health care facility because such patient, or the patient's legal representative, has brought or caused to be brought any action pursuant to this section, or against any patient or employee of a residential health care facility because such patient or employee has given or provided or is to give or provide testimony or other evidence for purposes of such action.

b. Any patient who has reason to believe that he or she may have been discriminated against in violation of this subdivision may, within thirty days after such alleged violation occurs, file a complaint with the commissioner. The commissioner shall investigate any such complaint, and shall, if such complaint is deemed meritorious, serve upon the administrator of the subject facility, in his capacity as a representative of the facility, either by personal service or by certified mail addressed to the administrator in care of the facility, return receipt requested, a complaint stating the substance of the alleged discrimination with reasonable particularity. A hearing shall be conducted in accordance with section twelve-a of this chapter within thirty days of the service of such complaint. The hearing officer shall make a report of his findings to the commissioner, who, if he determines that a violation of this subdivision has occurred, may grant whatever

relief is necessary and appropriate to remedy the violation, including, but not limited to readmittance of patients wrongfully discharged. Any such order of the commissioner shall be appealable by a proceeding under article seventy-eight of the civil practice law and rules.

c. Whenever the commissioner has issued an order as provided in this subdivision he may apply to any court of competent jurisdiction for the enforcement of such order.

d. Any action taken by the commissioner in accordance with the provisions of this subdivision shall not be exclusive, and may be taken in conjunction with an action for a civil penalty for a violation of paragraph a of this subdivision, or any private civil action brought by an injured party, or both.

e. Any employee who has reason to believe that he or she may have been discriminated against in violation of this subdivision may bring a proceeding in accordance with the provisions of article fifteen of the executive law.