§ 460-d. Enforcement powers. 1. The commissioner or any person designated by the commissioner may undertake an investigation of the affairs and management of any facility subject to the inspection and supervision provision of this article, or of any person, corporation, society, association or organization which operates or holds itself out as being authorized to operate any such facility, or of the conduct of any officers or employers of any such facility. Persons empowered by the commissioner to conduct any such investigation are hereby empowered to issue compulsory process for the attendance of witnesses and the production of papers, to administer oaths and to examine persons under oath, and to exercise the same powers in respect to the conduct of such an investigation as belong to referees appointed by the supreme court.

2. If it shall appear after such investigation that the residents of the facility are cruelly, negligently or improperly treated, or that inadequate provision is made for their sustenance, clothing, care, supervision or other condition necessary for their comfort and well-being, the department may issue an order in the name of the people, and under the official seal of the state, directing the appropriate officers or managers of such facility to modify such treatment or provide such other remedy as may be specified therein. Before any such order is issued, it must be approved by a justice of the supreme court, after such notice as he may prescribe and after an opportunity to be heard, and any person to whom such an order is directed who shall intentionally fail or refuse to obey its terms shall be guilty of a misdemeanor.

3. The attorney general and every district attorney shall upon request of the department furnish such legal assistance, counsel or advice as the department may require in the discharge of its duties.

4. (a) The operating certificate of any facility may be revoked, suspended or limited upon a determination by the department that the facility has failed to comply with the requirements of state or local laws or regulations applicable to the operation of such facility.

(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.

(c) Any order or determination to suspend any operating certificate will specify the conditions of the suspension. These conditions may include but need not be limited to the following:

(i) if required for the protection of the health, safety or welfare of the residents, the immediate transfer of some or all residents to other appropriate facilities or to the custody of their legal guardians, if any;

(ii) the appointment of a temporary operator to operate the facility during the term of the suspension;

(iii) the immediate transfer of all records concerning the operation of the facility, including resident records, facility business records and any other records related to the operation of the facility to the department immediately. The department shall control the records for the term of the suspension;

(iv) the operator or operators of the facility shall be barred from access to the facility during the term of the suspension; or

(v) the requirement that the operator, if replaced by a temporary operator, provide the temporary operator with any funds received by the operator for the operation of the facility.

(d) Any order or determination to limit an operating certificate shall specify the manner in which the operating certificate is to be limited. An operating certificate may be found subject to one or more of the following limitations:

(i) a limitation on the period of time for which such certificate remains effective, contingent on a determination that specified violations have been corrected or specified conditions have been met;

(ii) a limitation on the number of persons for which such facility is

authorized to provide care; or

(iii) a prohibition against the admission of new residents after a specified date.

(e) Any order or determination of revocation, suspension or limitation of the operating certificate shall be subject to judicial review in accordance with article seventy-eight of the civil practice law and rules.

5. In addition to or as an alternative to any power which the department may exercise under this article, the supreme court may grant equitable relief against violations or threatened violations of this article or of the regulations of the department by any facility subject to the inspection and supervision of the department. The attorney general may seek such equitable relief, in the name of the people, upon the request of the department. Service in such an action shall state the nature of the violation and shall be accomplished in the manner prescribed by the civil practice law and rules; provided, however, that an ex parte order for equitable relief may issue, notwithstanding the civil practice law and rules, if the court finds, on motion and affidavit, that such violation may reasonably be expected to result in imminent danger to the public health or to the health, safety or welfare of any individual in a facility subject to the department's inspection and supervision. The court, after a hearing, may make an order granting such equitable relief as it may deem necessary, including, but not limited to a preliminary injunction or a permanent injunction, enjoining a facility from admitting new residents, directing the department and such facility to arrange for the transfer of residents to other facilities, appointment of a temporary or permanent receiver for the protection of the public health or the health, safety and welfare of any individual in such facility, or directing a facility operator to transfer all records concerning the operation of the facility, including resident records, facility business records and any other records related to the operation of the facility to the department immediately. The people shall not be required to post security or bond.

6. Orders prohibiting placing-out or boarding-out of children or orders of removal of any child may be issued and enforced in accordance

with section three hundred eighty-five of this chapter.

7. (a) The department shall adopt regulations establishing civil penalties of up to one thousand dollars 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, 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 thousand dollars 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 of the executive 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. Where the facility satisfactorily demonstrates that it either had rectified the violations within thirty days of receiving written notification of the results of the inspection pursuant to section four hundred sixty-one-a of this chapter, 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 penalty shall 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 a particular violation, although corrected, endangered or resulted in harm to any resident as the result of:

(i) 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) 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) the failure in systemic practices and procedures;

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

(v) 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) 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 to which this subparagraph two shall apply.

(3) In assessing penalties pursuant to this paragraph, the department shall consider promptness of rectification, delay occasioned by the department, and the specific circumstances of the violations as mitigating factors.

(c) 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) 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.

8. Whenever the commissioner, after investigation, finds that any person, agency or facility subject to this article is causing, engaging in or maintaining a condition or activity which constitutes a danger to the physical or mental health of the residents of a facility subject to the inspection and supervision of the department, and that it therefore appears to be prejudicial to the interests of such residents to delay action for thirty days until an opportunity for a hearing can be provided in accordance with the provisions of this section, the commissioner shall order the person, agency or facility by written notice, setting forth the basis for such finding, to discontinue such dangerous condition or activity or take certain action immediately or within a specified period of less than thirty days. The commissioner shall within thirty days of issuance of the order provide the person, agency or facility an opportunity to be heard and to present any proof that such condition or activity does not constitute a danger to the health of such residents.

9. (a) The department shall have authority to impose a civil penalty

not exceeding one thousand dollars 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.

(c) (i) For the purposes of assessing the applicability of this article and the regulations of the department, the department shall be authorized to inspect any facility which reasonably appears to the department to be subject to the provisions of this article and to assess the needs of the residents of such facility pursuant to the provisions of section four hundred sixty-c of this title.

(ii) At the time that a representative of the department appears at the facility for purposes of conducting such inspection, the representative shall inform the operator, administrator or other person in charge that the inspection will be conducted unless such person objects to the inspection and that if such person does object the department, pursuant to the provisions of subparagraph (iii) of this paragraph, shall be authorized to request the attorney general to apply to the court for an order granting the department access to the facility.

(iii) If the department is not permitted access to such facility by the operator, administrator or other person in charge thereof, the attorney general, upon the request of the department, shall be authorized to apply, without notice to the operator, administrator or chairman of the board of directors of a not-for-profit facility, to the supreme court in the county in which the facility is located for an order granting the department access to such facility. The court may grant such an order if it determines, based on evidence presented by the attorney general, that there is reasonable cause to believe that such facility is an adult care facility which does not possess a valid operating certificate issued by the department.

(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 subdivision, 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.

(e) Any penalty assessed by the department pursuant to this subdivision 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.

10. By March first, nineteen hundred ninety-five and annually thereafter, the department shall submit a report to the governor and the legislature on the regulation of adult homes and residences for adults.

Such report shall include both a narrative and statistical summary detailing the results of inspections and enforcement actions of adult homes and residences for adults. The report shall also include results of audits of financial conditions and practices of a selected sample of adult homes and residences of adults and recommendations for legislative action relating to the need for changes in statute.

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 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.

12. 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.

* 13. The department shall notify the department of health of any enforcement action pursuant to this section taken against an operator of an adult home or enriched housing program which has been licensed by the department of health as a limited home care services agency pursuant to section thirty-six hundred five of the public health law.

* NB Expires June 30, 2027

* 14. If the department receives notice from the department of health that an action has been taken against an operator of a limited home care services agency, pursuant to section thirty-six hundred five-a of the public health law, the department shall review the delivery of services provided by the certified operator of an adult home or enriched housing program to determine whether such operator is meeting all applicable regulations and standards.

* NB Expires June 30, 2027

15. The department of health shall maintain, on its website, a list of all adult homes, enriched housing programs, residences for adults and assisted living programs that have received written notice of: enforcement action based on a violation of an applicable law or regulation that creates an endangerment of resident health or safety pursuant to subparagraph two of paragraph (b) of subdivision seven of this section or a pending enforcement action against a facility's operating certificate or a determination that the facility is required to be certified as an adult home, enriched housing program or residence for adults. Provided however, if a facility contends, in writing, that the violation resulting in the facility being included on the "do not refer list" has been corrected, the department shall, within thirty days, reinspect the facility, and if the department determines that the violation has been corrected, the facility shall be immediately removed from the list. This list shall be known as the "do not refer" list and shall be promptly updated to reflect any of the above violations and the reopening of admissions in any adult care facility in which the enforcement action for which they were added to the list has been resolved.

16. Any operator or controlling person of an adult care facility, as

defined in clause two of subparagraph (x) of paragraph (a) of subdivision four of section four hundred sixty-one-e of this article shall be prohibited from applying to the department of health or to any other agency of this state for an operating certificate or approval to operate an alternate type of facility during the period in which such certificate has been revoked, suspended or limited.

17. The department of health shall direct the temporary operator to, and the temporary operator shall, provide written notification to residents of all adult homes, enriched housing programs, residences for adults and assisted living programs where a temporary operator has been appointed pursuant to subdivision four of this section.