

STATE OF NEW YORK

2743

2017-2018 Regular Sessions

IN ASSEMBLY

January 23, 2017

Introduced by M. of A. GOTTFRIED, JAFFEE, BRONSON, STECK, GALEF, ROSEN-
THAL, ABINANTI, MOSLEY, BENEDETTO, DINOWITZ, BLAKE, SEPULVEDA --
Multi-Sponsored by -- M. of A. ARROYO, COOK, SIMON, THIELE -- read
once and referred to the Committee on Health

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 Assem-
bly, do enact as follows:

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

4 (b) No operating certificate shall be revoked, suspended or limited
5 without a hearing held in accordance with procedures established by
6 department regulations, which procedures shall require that notice of
7 the time and place of the hearing, and notice of the charges, shall be
8 served in person or by certified mail addressed to the facility at least
9 thirty days prior to the date of the hearing. A written answer to the
10 charges may be filed with the department not less than ten business days
11 prior to the date of the hearing. An operating certificate may, never-
12 theless, be suspended or limited without a hearing for a period not in
13 excess of sixty days, upon written notice to the facility following a
14 finding by the department that the public health, or an individual's
15 health, safety or welfare, are in imminent danger; provided, however,
16 that if the department makes reasonable efforts to commence a hearing
17 within such sixty day period and to complete such hearing within a
18 reasonable period of time, the hearing officer may authorize the depart-
19 ment to extend the period of suspension or limitation for an appropriate
20 period of time, but in no event beyond the date when the hearing is
21 completed and available administrative appeals are exhausted.

22 § 2. Subdivision 7 of section 460-d of the social services law, as
23 added by chapter 669 of the laws of 1977, paragraph (a) as amended by

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

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1 chapter 719 of the laws of 1989, paragraph (b) as amended by chapter 524
2 of the laws of 1984, subparagraph 2 of paragraph (b) as amended by chap-
3 ter 733 of the laws of 1994, is amended to read as follows:

4 7. (a) The department shall adopt regulations establishing civil
5 penalties of up to [one] five thousand dollars per violation per day to
6 be assessed against all adult care facilities except facilities operated
7 by a social services district for violations of (i) regulations of the
8 department pertaining to the care of residents in such facilities, (ii)
9 paragraph (a) of subdivision three of section four hundred sixty-one-a
10 of this [chapter] article, or (iii) an order issued pursuant to subdivi-
11 sion eight of this section. The regulations shall specify the violations
12 subject to penalty and the amount of the penalty to be assessed in
13 connection with each such violation and shall specify that only civil
14 penalties of up to [one] five thousand dollars per violation per day
15 [per violation] shall be assessed pursuant to this paragraph against an
16 adult care facility found responsible for an act of retaliation or
17 reprisal against any resident, employee, or other person for having
18 filed a complaint with or having provided information to any long term
19 care [patient] ombudsman functioning in accordance with section [five
20 hundred forty-four or five hundred forty-five] two hundred eighteen of
21 the [executive] elder law.

22 (b) [(1)] In addition to any other civil or criminal penalty provided
23 by law, the department shall have the power to assess civil penalties in
24 accordance with its regulations adopted pursuant to paragraph (a) of
25 this subdivision, after a hearing conducted in accordance with the
26 procedures established by regulations of the department. Such procedures
27 shall require that notice of the time and place of the hearing, together
28 with a statement of charges of violations, shall be served in person or
29 by certified mail addressed to the facility at least thirty days prior
30 to the date of the hearing. The statement of charges of violations shall
31 set forth the existence of the violations, the amount of penalty for
32 which it may become liable and the steps which must be taken to rectify
33 the violation and, where applicable, a statement that the department
34 contends that a penalty may be imposed under this paragraph regardless
35 of rectification. An answer to the charges of violations, in writing,
36 shall be filed with the department, not less than ten days prior to the
37 date of hearing. The answer shall notify the department of the facili-
38 ty's position with respect to each of the charges and shall include all
39 matters which if not disclosed in the answer would be likely to take the
40 department by surprise. The commissioner, or a member of his staff who
41 is designated and authorized by him to hold such hearing, may in his
42 discretion allow the facility to prove any matter not included in the
43 answer.

44 (c) Where the facility satisfactorily demonstrates that it either had
45 rectified the violations within thirty days of receiving certified writ-
46 ten notification of the results of the inspection pursuant to section
47 four hundred sixty-one-a of this [chapter] article, or had submitted
48 within thirty days an acceptable plan for rectification and was rectify-
49 ing the violations in accordance with the steps and within the addi-
50 tional periods of time as accepted by the department in such plan, [no]
51 the department may determine that the penalty under this section shall
52 be reduced from what otherwise would be imposed[, except as provided in
53 subparagraph two of this paragraph.

54 (2) Rectification shall not preclude the assessment of a penalty if
55 the department establishes at a hearing that] or waived. In making a
56 determination under this paragraph, the department shall consider:

1 (i) Whether a particular violation[, although corrected,] endangered
2 or resulted in harm to any resident [as the result of:

3 (i)], in which case the penalty shall not be reduced or waived. Endan-
4 germent is defined as:

5 (A) the total or substantial failure of the facility's fire detection
6 or prevention systems, or emergency evacuation procedures prescribed by
7 department safety standard regulations;

8 [(ii)] (B) the retention of any resident who has been evaluated by the
9 resident's physician as being medically or mentally unsuited for care in
10 the facility or as requiring placement in a hospital or residential
11 health care facility and for whom the operator is not making persistent
12 efforts to secure appropriate placement;

13 [(iii)] (C) the failure in systemic practices and procedures;

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

16 [(v)] (E) the failure of the operator to provide at all times super-
17 vision of residents by numbers of staff at least equivalent to the night
18 staffing requirement set forth in department regulations; or

19 [(vi)] (F) unreasonable threats of retaliation or taking reprisals,
20 including but not limited to unreasonable threats of eviction or hospi-
21 talization against any resident, employee or other person who makes a
22 complaint concerning the operation of an adult care facility, partic-
23 ipates in the investigation of a complaint or is the subject of an
24 action identified in a complaint.

25 The department shall specify in its regulations those [regulations]
26 violations to which this [subparagraph two] paragraph shall apply[.

27 (3) In assessing penalties pursuant to this paragraph, the department
28 shall consider promptness];

29 (ii) Whether a particular violation is one of the following:

30 (A) A violation wherein harm, short of endangerment as defined in
31 subparagraph (i) of this paragraph, was actually committed;

32 (B) A violation wherein a resident or residents were put at risk of
33 harm; or

34 (C) A violation wherein a resident was neither harmed nor put at risk
35 of harm;

36 (iii) The facility's history of providing quality care, violations;
37 and

38 (iv) Promptness of rectification, delay occasioned by the department,
39 and the specific circumstances of the violations as mitigating factors.

40 [(c)] (d) Upon the request of the department, the attorney general may
41 commence an action in any court of competent jurisdiction against any
42 facility subject to the provisions of this section, and against any
43 person or corporation operating such facility, for the recovery of any
44 penalty assessed by the department in accordance with the provisions of
45 this subdivision.

46 [(d)] (e) Any such penalty assessed by the department may be released
47 or compromised by the department before the matter has been referred to
48 the attorney general, and where such matter has been referred to the
49 attorney general, any such penalty may be released or compromised and
50 any action commenced to recover the same may be settled and discontinued
51 by the attorney general with the consent of the department.

52 (f) Rectification shall not preclude the assessment of a penalty if
53 the department establishes that a violation, although corrected, was a
54 violation in the same area of operation as a violation cited by the
55 department at the previous facility inspection.

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

5 (a) The department shall have authority to impose a civil penalty not
6 exceeding [one] five thousand dollars per violation per day against, and
7 to issue an order requiring the closing of, after notice and opportunity
8 to be heard, any facility which does not possess a valid operating
9 certificate issued by the department and is an adult care facility
10 subject to the provisions of this article and the regulations of the
11 department. A hearing shall be conducted in accordance with procedures
12 established by department regulations which procedures shall require
13 that notice of the determination that the facility is an adult care
14 facility and the reasons for such determination and notice of the time
15 and place of the hearing be served in person on the operator, owner or
16 prime lessor, if any, or by certified mail, return receipt requested,
17 addressed to such person and received at least twenty days prior to the
18 date of the hearing. If such operator, owner or prime lessor, if any, is
19 not known to the department, then service may be made by posting a copy
20 thereof in a conspicuous place within the facility or by sending a copy
21 thereof by certified mail, return receipt requested, addressed to the
22 facility. A written answer to the notice of violation may be filed with
23 the department not less than five days prior to the date of the hearing.
24 Demonstration by the facility that it possessed an operating certificate
25 issued pursuant to this article, article twenty-eight of the public
26 health law or article sixteen, [twenty-three,] thirty-one or thirty-two
27 of the mental hygiene law at the time the hearing was commenced shall
28 constitute a complete defense to any charges made pursuant to this
29 subdivision.

30 (b) [The penalty authorized by this section shall begin to run thirty
31 days after the department provides the operator, in writing, with a
32 summary of the inspection of the facility by which the department deter-
33 mined that he or she is operating an uncertified adult care facility.]
34 The submission of an application by the operator for an operating
35 certificate for the facility shall not act as a bar to the imposition of
36 a penalty against the operator of an unlicensed adult care facility.

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

40 11. On or before issuance by the department to an adult care facility
41 operator of official written notice of: the proposed revocation, suspen-
42 sion or denial of the operator's operating certificate; the limitation
43 of the operating certificate with respect to new admissions; the issu-
44 ance of a department order or commissioner's order; the seeking of equi-
45 table relief pursuant to this section; the proposed assessment of civil
46 penalties for violations of the provisions of [subparagraph two of]
47 paragraph (b) of subdivision seven of this section or placement on the
48 "do not refer list" pursuant to subdivision fifteen of this section,
49 written notice also shall be given to the appropriate office of the
50 department of mental hygiene, department of corrections and community
51 supervision and local social services districts, and provided further
52 that the department of health shall notify hospitals, residential health
53 care facilities and adult care facilities in the locality in which such
54 facility is located that such notice has been issued. Upon resolution of
55 such enforcement action the department shall notify the appropriate
56 office of the department of mental hygiene, department of corrections

1 and community supervision, local social services districts [and], hospi-
2 tals, residential health care facilities and adult care facilities.

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

6 12. [Social] Hospitals, residential health care facilities, adult care
7 facilities, social services districts and other local government enti-
8 ties established pursuant to this chapter shall be prohibited from
9 making referrals for admissions to adult care facilities that have
10 received official written notice regarding: the proposed revocation,
11 suspension or denial of the operator's operating certificate; the limi-
12 tation of the operating certificate with respect to new admissions; the
13 issuance of department order or commissioner's orders; the seeking of
14 equitable relief pursuant to this section; the proposed assessment of
15 civil penalties for violations of the provisions of [subparagraph two
16 of] paragraph (b) of subdivision seven of this section; or the facili-
17 ty's placement on the "do not refer list" pursuant to subdivision
18 fifteen of this section.

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

21 17. When the department of health issues official written notice to an
22 operator of a proposed action specified in subdivision eleven of this
23 section, and the department determines that there is a condition which
24 constitutes an imminent danger to the health, safety or welfare of any
25 resident, the department may prohibit that operator from admitting any
26 new resident to the facility until the department determines that there
27 is no longer an imminent danger to the health, safety or welfare of any
28 resident.

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

32 Waiver of any provision [contained within] of this subdivision by a
33 resident of an adult care facility or by the resident's legal represen-
34 tative or resident representative, with respect to a resident of an
35 adult home, residence for adults or enriched housing program, shall be
36 void.

37 § 8. Paragraphs (a), (b) and (c) of subdivision 2 of section 461-a of
38 the social services law, paragraphs (a) and (c) as amended by chapter
39 735 of the laws of 1994 and paragraph (b) as amended by chapter 601 of
40 the laws of 1981, are amended to read as follows:

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

44 (1) Such facilities [receiving the department's highest rating] deter-
45 mined by the department to be in compliance or substantial compliance
46 with applicable statutes and regulations, based on the facility's most
47 recent inspection, shall be inspected at least once every eighteen
48 months on an unannounced basis.

49 (2) All other such facilities shall be inspected on an unannounced
50 basis no less than annually. The commissioner may provide for more
51 frequent inspections of any such facilities. Such inspection shall not
52 be required with respect to any facility for which the commissioner has
53 delegated responsibility for inspection and supervision to a social
54 services official pursuant to section four hundred sixty-c of this
55 [chapter] article. Any employee of the department or a social services
56 district who gives or causes to be given advance notice of such unan-

1 nounced inspections to any unauthorized persons shall, in addition to
2 any other penalty provided by law, be suspended by the department or the
3 social services district from all duties without pay for at least five
4 days or for such greater period of time as the department or social
5 services district shall determine. Any such suspension shall be made by
6 the department or social services district in accordance with all other
7 applicable provisions of law.

8 (b) [The department or a social services district, where appropriate,
9 shall each year conduct a minimum of one full inspection of each adult
10 care facility. Such inspection] An inspection of an adult care facility
11 under this section shall include, but shall not be limited to, examina-
12 tion of the medical, dietary and social services records of the facility
13 as well as the minimum standards of construction, life safety standards,
14 quality and adequacy of care, rights of residents, payments and all
15 other areas of operation. The purpose of any inspection shall be to
16 determine compliance with requirements of applicable provisions of law
17 and regulations of the department.

18 (c) (i) An inspection report shall be made of each inspection which
19 shall clearly identify and indicate in detail each area of operation,
20 including, but not limited to, the premises, equipment, personnel, resi-
21 dent care and services, and whether [each] any such area of operation or
22 any of its component parts is [or is] not in compliance with the regu-
23 lations of the department and all other applicable requirements. It also
24 shall identify those areas of operation or any of its component parts
25 found not in compliance as a result of failure in systemic practices and
26 procedures. The operator shall be notified of the results of the
27 inspection in a manner to be determined by regulations of the department
28 and shall submit a written plan of correction to the department within
29 thirty calendar days from the date the inspection report is received.
30 The department shall notify the operator of the acceptability of the
31 plan of correction within thirty calendar days of the department's
32 receipt of such plan. Such notification [shall] may contain directions
33 as may be appropriate as to the manner and time in which compliance with
34 applicable requirements of law or regulations of the department shall be
35 effected.

36 (ii) The department shall also require the operator of an adult home,
37 enriched housing program or residence for adults to develop, biannually
38 update and implement plans for quality assurance activities for each
39 area of operation. Quality assurance activities include but are not
40 limited to, development and maintenance of performance standards, meas-
41 urement of adherence to such standards and to applicable state and local
42 laws and regulations, identification of performance failures, design,
43 and implementation of corrective action.

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

47 (I) A patient about to be discharged or conditionally released from a
48 department facility licensed or operated by the office for people with
49 developmental disabilities or from an inpatient facility operated or
50 licensed by the office of alcoholism and substance abuse services or the
51 office of mental health to an adult home, enriched housing program or
52 residence for adults, as defined in section two of the social services
53 law, shall be referred only to such home or residence that is consistent
54 with that patient's needs and that operates pursuant to section four
55 hundred sixty of the social services law, provided further that: (A) for
56 a department facility licensed or operated by the office for people with

1 developmental disabilities or for an inpatient facility operated by the
2 office of alcoholism and substance abuse services or the office of
3 mental health, the facility director retains authority to determine
4 whether the home, program or residence is consistent with that patient's
5 needs and (B) such referral shall be made to the patient's home county
6 whenever possible or appropriate.

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

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