

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2522**

4  
5 (By Delegates Williams, Moye, Perdue, Cann,  
6 Border and Hamilton)

7 (Originating in the Committee on the Judiciary)

8 [January 27, 2011]

9  
10 A BILL to amend and reenact §16-5C-8, §16-5C-10 and §16-5C-12 of  
11 the Code of West Virginia, 1931, as amended; and to amend said  
12 code by adding a new section, designated §16-5C-12a, all  
13 relating to nursing home administrative appeals; complaint  
14 hearing procedures; establishing an independent disputes  
15 resolution process for nursing homes; clarifying the informal  
16 and formal review process; and clarifying the judicial review  
17 process.

18 *Be it enacted by the Legislature of West Virginia:*

19 That §16-5C-8, §16-5C-10 and §16-5C-12 of the Code of West  
20 Virginia, 1931, as amended, be amended and reenacted; and that said  
21 code be amended by adding thereto a new section, designated §16-5C-  
22 12a, all to read as follows:

23 **ARTICLE 5C. NURSING HOMES.**

24 **§16-5C-8. Investigation of complaints.**

25 (a) The director shall establish rules for prompt  
26 investigation of all complaints of alleged violations by nursing  
27 homes of applicable requirements of state law or rules, except for  
28 such complaints that the director determines are willfully intended

1 to harass a licensee or are without any reasonable basis. Such  
2 procedures shall include provisions for ensuring the  
3 confidentiality of the complainant and for promptly informing the  
4 complainant and the nursing home involved of the results of the  
5 investigation.

6 (b) If, after its investigation, the director determines that  
7 the complaint has merit, the director shall take appropriate  
8 disciplinary action and shall advise any injured party of the  
9 possibility of a civil remedy.

10 (1) A nursing home or licensee adversely affected by an order  
11 or citation of a deficient practice issued pursuant to this  
12 section may request the independent informal dispute resolution  
13 process contained in section twelve-a of this article.

14 (2) No later than twenty working days following the last day  
15 of a complaint investigation, the director shall transmit to the  
16 nursing home a statement of deficiencies committed by the facility.  
17 Notification of the availability of the independent informal  
18 dispute resolution process and an explanation of the independent  
19 informal dispute resolution process shall be included in the  
20 transmittal.

21 (c) No nursing home may discharge or in any manner  
22 discriminate against any resident, legal representative or employee  
23 for the reason that the resident, legal representative or employee  
24 has filed a complaint or participated in any proceeding specified  
25 in this article. Violation of this prohibition by any nursing home  
26 constitutes ground for the suspension or revocation of the license  
27 of the nursing home as provided in section eleven of this article.  
28 Any type of discriminatory treatment of a resident, legal

1 representative or employee by whom, or upon whose behalf, a  
2 complaint has been submitted to the director, or any proceeding  
3 instituted under this article, within one hundred twenty days of  
4 the filing of the complaint or the institution of such action,  
5 shall raise a rebuttable presumption that such action was taken by  
6 the nursing home in retaliation for such complaint or action.

7 **§16-5C-10. Reports of inspections; plans of correction;**  
8 **assessment of penalties and use of funds derived therefrom;**  
9 **hearings.**

10 (a) Reports of all inspections made pursuant to section nine  
11 of this article shall be in writing and filed with the director,  
12 and shall list all deficiencies in the nursing home's compliance  
13 with the provisions of this article and the rules adopted  
14 hereunder.

15 (1) No later than ten working days following the last day of  
16 the survey or inspection, the director shall ~~send~~ transmit to the  
17 nursing home a copy of such report to the nursing home and shall  
18 specify a time within which the nursing home shall submit a plan  
19 for correction of such deficiencies.

20 (2) Additionally, notification of the availability of the  
21 independent informal dispute resolution process and an explanation  
22 of the independent informal dispute resolution process shall be  
23 included in the transmittal.

24 (3) A nursing home adversely affected by an order or citation  
25 of a deficient practice issued pursuant to this section may request  
26 the independent informal dispute resolution process contained in  
27 section twelve-a of this article.

28 (4) The plan submitted by the nursing home shall be approved,

1 rejected or modified by the director.

2       (5) The surveyors or the nursing home shall allow audio taping  
3 of the exit conference with the expense to be paid by the  
4 requesting party.

5       (b) With regard to a nursing home with deficiencies and upon  
6 its failure to submit a plan of correction which is approved by the  
7 director, or to correct any deficiency within the time specified in  
8 an approved plan of correction, the director may assess civil  
9 penalties as hereinafter provided or may initiate any other legal  
10 or disciplinary action as provided by this article: Provided, That  
11 any action by the director shall be stayed until federal  
12 proceedings arising from the same deficiencies are concluded.

13       (c) Nothing in this section may be construed to prohibit the  
14 director from enforcing a rule, administratively or in court,  
15 without first affording formal opportunity to make correction under  
16 this section, where, in the opinion of the director, the violation  
17 of the rule jeopardizes the health or safety of residents, or where  
18 the violation of the rule is the second or subsequent such  
19 violation occurring during a period of twelve full months.

20       (d) Civil penalties assessed against nursing home shall not be  
21 less than fifty nor more than eight thousand dollars: Provided,  
22 That the director may not assess a penalty under state licensure  
23 for the same deficiency or violation cited under federal law and  
24 may not assess a penalty against a nursing home if the nursing home  
25 corrects the deficiency within twenty days of receipt of written  
26 notice of the deficiency unless it is a repeat deficiency or the  
27 nursing home is a poor performer.

28       (e) In determining whether to assess a penalty, and the amount

1 of penalty to be assessed, the director shall consider:

2 (1) How serious the noncompliance is in relation to direct  
3 resident care and safety;

4 (2) The number of residents the noncompliance is likely to  
5 affect;

6 (3) Whether the noncompliance was noncompliance during a  
7 previous inspection;

8 (4) The opportunity the nursing home has had to correct the  
9 noncompliance; and

10 (5) Any additional factors that may be relevant.

11 (f) The range of civil penalties shall be as follows:

12 (1) For a deficiency which presents immediate jeopardy to the  
13 health, safety or welfare of one or more residents, the director  
14 may impose a civil penalty of not less than three thousand nor more  
15 than eight thousand dollars;

16 (2) For a deficiency which actually harms one or more  
17 residents, the director may impose a civil penalty of not less than  
18 one thousand nor more than three thousand dollars;

19 (3) For a deficiency which has the potential to harm one or  
20 more residents, the director may impose a civil penalty of not less  
21 than fifty nor more than one thousand dollars;

22 (4) For a repeated deficiency, the director may impose a civil  
23 penalty of up to one hundred fifty percent of the penalties  
24 provided in subdivisions (1), (2) and (3) of this subsection; and

25 (5) If no plan of correction is submitted as established in  
26 this rule, a penalty may be assessed in the amount of one hundred  
27 dollars a day unless a reasonable explanation has been provided and  
28 accepted by the director.

1 (g) The director shall assess a civil penalty of not more than  
2 one thousand dollars against an individual who willfully and  
3 knowingly certifies a material and false statement in a resident  
4 assessment. Such penalty shall be imposed with respect to each  
5 such resident assessment. The director shall impose a civil  
6 penalty of not more than five thousand dollars against an  
7 individual who willfully and knowingly causes another individual to  
8 certify a material and false statement in a resident assessment.  
9 Such penalty shall be imposed with respect to each such resident  
10 assessment.

11 (h) The director shall assess a civil penalty of not more than  
12 two thousand dollars against any individual who notifies, or causes  
13 to be notified, a nursing home of the time or date on which an  
14 inspection is scheduled to be conducted under this article or under  
15 titles eighteen or nineteen of the federal Social Security Act.

16 (i) If the director assesses a penalty under this section, the  
17 director shall cause delivery of notice of such penalty by personal  
18 service or by certified mail. Said notice shall state the amount  
19 of the penalty, the action or circumstance for which the penalty is  
20 assessed, the requirement that the action or circumstance violates,  
21 and the basis upon which the director assessed the penalty and  
22 selected the amount of the penalty.

23 (j) The director shall, in a civil judicial proceeding,  
24 recover any unpaid assessment which has not been contested under  
25 section twelve of this article within thirty days of receipt of  
26 notice of such assessment, or which has been affirmed under the  
27 provisions of that section and not appealed within thirty days of  
28 receipt of the director's final order, or which has been affirmed

1 on judicial review, as provided in section thirteen of this  
2 article. All money collected by assessments of civil penalties or  
3 interest shall be paid into a special resident benefit account and  
4 shall be applied by the director for: (1) The protection of the  
5 health or property of facility residents; (2) long-term care  
6 educational activities; (3) the costs arising from the relocation  
7 of residents to other nursing homes when no other funds are  
8 available; and (4) in an emergency situation in which there are no  
9 other funds available, the operation of a facility pending  
10 correction of deficiencies or closure.

11 (k) The opportunity for a hearing on an action taken under  
12 this section shall be as provided in section twelve of this  
13 article.

14 **§16-5C-12. Administrative appeals for civil assessments, license**  
15 **limitation, suspension or revocation.**

16 (a) Any licensee or applicant aggrieved by an order issued  
17 pursuant to sections five, six, ten or eleven of this article ~~shall~~  
18 ~~have the opportunity to~~ may request an informal and formal hearing  
19 at which the licensee or applicant may contest ~~such~~ the order as  
20 contrary to law or unwarranted by the facts or both. All of the  
21 pertinent provisions of article five, chapter twenty-nine-a of this  
22 code ~~shall~~ apply to and govern ~~such~~ a formal hearing and the  
23 administrative procedures in connection with any formal hearing.

24 A facility or licensee adversely affected by an order or  
25 citation of a deficient practice issued pursuant to this article or  
26 by a citation issued for a deficient practice pursuant to federal  
27 law may request the independent informal dispute resolution process  
28 contained in section twelve-a of this article. A facility may

1 contest a cited deficiency as contrary to law or unwarranted by the  
2 facts or both.

3 The director may impose the following prior to or during the  
4 pendency of ~~a~~ an informal hearing, an independent informal dispute  
5 resolution process or of a formal hearing:

6 (1) A reduction in the bed quota pursuant to section eleven of  
7 this article; or

8 (2) Transfer of residents and a ban on new admissions pursuant  
9 to section eleven of this article.

10 (b) Informal hearings shall be held within twenty working days  
11 of the director's receipt of timely request for appeal, unless the  
12 licensee or applicant aggrieved by the order consents to a  
13 postponement or continuance. In no event may the informal hearing  
14 occur more than thirty business days after the director receives  
15 timely request for appeal. At the informal hearing, neither the  
16 licensee or applicant nor the director may be represented by an  
17 attorney. Within ten days of the conclusion of the informal  
18 hearing, the director shall issue an informal hearing order,  
19 including a basis for the decision.

20 (c) If the applicant or licensee requested a formal hearing  
21 only, the director and the licensee shall proceed in accordance  
22 with the provisions of the Department of Health and Human Resources  
23 rules of procedure for contested case hearings and declaratory  
24 rulings. If the applicant or licensee also requested an informal  
25 hearing or the independent informal dispute resolution process  
26 contained in section twelve-a of this article, and if the order is  
27 not favorable to the applicant or licensee, the director shall  
28 notify the administrative hearing examiner of the request for an



1 appeal within five business days of issuing the ~~informal hearing~~  
2 order.

3 **§16-5C-12a. Independent informal dispute resolution.**

4 (a) A facility or licensee adversely affected by an order or  
5 citation of a deficient practice issued pursuant to this article  
6 or by a citation issued for a deficient practice pursuant to  
7 federal law may request the independent informal dispute resolution  
8 process. A facility may contest a cited deficiency as contrary to  
9 law or unwarranted by the facts or both.

10 (b) The director shall contract with at least three  
11 independent review organizations to conduct an independent informal  
12 dispute resolution process for facilities. The independent review  
13 organization shall be accredited by the Utilization Review  
14 Accreditation Commission.

15 (c) The independent informal dispute resolution process is not  
16 a formal evidentiary proceeding and utilizing the independent  
17 informal dispute resolution process does not waive the facility's  
18 right to a formal hearing.

19 (d) The independent informal dispute resolution process  
20 consists of the following:

21 (1) No later than ten working days following the last day of  
22 the survey or inspection, or no later than twenty working days  
23 following the last day of a complaint investigation, the director  
24 shall transmit to the facility a statement of deficiencies  
25 committed by the facility. Notification of the availability of the  
26 independent informal dispute resolution process and an explanation  
27 of the independent informal dispute resolution process shall be  
28 included in the transmittal;

1       (2) When the facility returns its plan to correct the cited  
2 deficiencies to the director, the facility may request in writing  
3 the independent informal dispute resolution process to refute the  
4 cited deficiencies;

5       (3) Within five working days of receipt of the written request  
6 for the independent informal dispute resolution process made by a  
7 facility, the director shall refer the request to an independent  
8 review organization from the list of certified independent review  
9 organizations approved by the state. The director shall vary the  
10 selection of the independent review organization on a rotating  
11 basis. The director shall acknowledge in writing to the facility  
12 that the request for independent review has been received and  
13 forwarded to an independent review organization for review. The  
14 notice shall include the name and address of the independent review  
15 organization.

16       (4) Within ten working days of receipt of the written request  
17 for the independent informal dispute resolution process made by a  
18 facility, the independent review organization shall hold an  
19 independent informal dispute resolution conference unless  
20 additional time is requested by the facility. Before the  
21 independent informal dispute resolution conference, the facility  
22 may submit additional information.

23       (5) The facility may not be accompanied by counsel during the  
24 independent informal dispute resolution conference. The manner in  
25 which the independent informal dispute resolution conference is  
26 held is at the discretion of the facility, but is limited to:

27       (A) A desk review of written information submitted by the  
28 facility; or

1 (B) A telephonic conference; or

2 (C) A face-to-face conference held at the facility or a  
3 mutually agreed upon location.

4 (6) If the independent review organization determines the need  
5 for additional information, clarification or discussion after  
6 conclusion of the independent informal dispute resolution  
7 conference, the director and the facility shall present the  
8 requested information.

9 (7) Within ten calendar days of the independent informal  
10 dispute resolution conference, the independent review organization  
11 shall provide and make a determination, based upon the facts and  
12 findings presented, and shall transmit a written decision  
13 containing the rationale for its determination to the facility and  
14 the director.

15 (8) If the director disagrees with the determination, the  
16 director may reject the determination made by the independent  
17 review organization and shall issue an order setting forth the  
18 rationale for the reversal of the independent review organization's  
19 decision to the facility within ten calendar days of receiving the  
20 independent review organization's determination.

21 (9) If the director accepts the determination, the director  
22 shall issue an order affirming the independent review  
23 organization's determination within ten calendar days of receiving  
24 the independent review organization's determination.

25 (10) If the independent review organization determines that  
26 the original statement of deficiencies should be changed as a  
27 result of the independent informal dispute resolution process and  
28 the director accepts the determination, the director shall transmit

1 a revised statement of deficiencies to the facility within ten  
2 calendar days of the independent review organization's  
3 determination.

4 (11) Within ten calendar days of receipt of the director's  
5 order and the revised statement of deficiencies, the facility shall  
6 submit a revised plan to correct any remaining deficiencies to the  
7 director.

8 (e) A facility has ten calendar days after receipt of the  
9 director's order to request a formal hearing for any deficient  
10 practice cited under this article. If the facility requests a  
11 formal hearing, the director and the facility shall proceed in  
12 accordance with the provisions of article five, chapter  
13 twenty-nine-a of this code.

14 (f) Under the following circumstances, the facility is  
15 responsible for certain costs of the independent informal dispute  
16 resolution review, which shall be remitted to the director within  
17 sixty days of the informal hearing order:

18 (1) If the facility requests a face-to-face conference, the  
19 facility shall pay any costs incurred by the independent review  
20 organization that exceed the cost of a telephonic conference,  
21 regardless of which party ultimately prevails.

22 (2) If the independent review organization's decision supports  
23 the originally written contested deficiency or adverse action taken  
24 by the director, the facility shall reimburse the director for the  
25 cost charged by the independent review organization. If the  
26 independent review organization's decision supports some of the  
27 originally written contested deficiencies, but not all of them, the  
28 facility shall reimburse the director for the cost charged by the

1 independent review organization on a pro rata basis.

2       (g) The Director shall report to the Legislative Oversight  
3 Commission on Health and Human Resources Accountability during the  
4 July interim meetings in 2013 on the informal dispute resolution  
5 process. This report shall at a minimum include the number of  
6 times the informal dispute resolution process is requested, the  
7 result of the process, and the number of times the director does  
8 not agree and changes the determination of the independent review  
9 organization.