

COMMITTEE SUBSTITUTE

FOR

H. B. 2522

(BY DELEGATES WILLIAMS, MOYE, PERDUE, CANN,
BORDER AND HAMILTON)

(Originating in the Committee on the Judiciary)
[January 27, 2011]

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

Be it enacted by the Legislature of West Virginia:

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

ARTICLE 5C. NURSING HOMES.

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

1 (a) The director shall establish rules for prompt
2 investigation of all complaints of alleged violations by
3 nursing homes of applicable requirements of state law or
4 rules, except for such complaints that the director determines
5 are willfully intended to harass a licensee or are without any
6 reasonable basis. Such procedures shall include provisions
7 for ensuring the confidentiality of the complainant and for
8 promptly informing the complainant and the nursing home
9 involved of the results of the investigation.

10 (b) If, after its investigation, the director determines that
11 the complaint has merit, the director shall take appropriate
12 disciplinary action and shall advise any injured party of the
13 possibility of a civil remedy.

14 (1) A nursing home or licensee adversely affected by an
15 order or citation of a deficient practice issued pursuant to
16 this section may request the independent informal dispute

17 resolution process contained in section twelve-a of this
18 article.

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

26 (c) No nursing home may discharge or in any manner
27 discriminate against any resident, legal representative or
28 employee for the reason that the resident, legal representative
29 or employee has filed a complaint or participated in any
30 proceeding specified in this article. Violation of this
31 prohibition by any nursing home constitutes ground for the
32 suspension or revocation of the license of the nursing home
33 as provided in section eleven of this article. Any type of
34 discriminatory treatment of a resident, legal representative or
35 employee by whom, or upon whose behalf, a complaint has
36 been submitted to the director, or any proceeding instituted
37 under this article, within one hundred twenty days of the
38 filing of the complaint or the institution of such action, shall

39 raise a rebuttable presumption that such action was taken by
40 the nursing home in retaliation for such complaint or action.

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

1 (a) Reports of all inspections made pursuant to section
2 nine of this article shall be in writing and filed with the
3 director, and shall list all deficiencies in the nursing home's
4 compliance with the provisions of this article and the rules
5 adopted hereunder.

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

11 (2) Additionally, notification of the availability of the
12 independent informal dispute resolution process and an
13 explanation of the independent informal dispute resolution
14 process shall be included in the transmittal.

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

19 (4) The plan submitted by the nursing home shall be
20 approved, rejected or modified by the director.

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

24 (b) With regard to a nursing home with deficiencies and
25 upon its failure to submit a plan of correction which is
26 approved by the director, or to correct any deficiency within
27 the time specified in an approved plan of correction, the
28 director may assess civil penalties as hereinafter provided or
29 may initiate any other legal or disciplinary action as provided
30 by this article: *Provided*, That any action by the director shall
31 be stayed until federal proceedings arising from the same
32 deficiencies are concluded.

33 (c) Nothing in this section may be construed to prohibit
34 the director from enforcing a rule, administratively or in
35 court, without first affording formal opportunity to make
36 correction under this section, where, in the opinion of the
37 director, the violation of the rule jeopardizes the health or
38 safety of residents, or where the violation of the rule is the
39 second or subsequent such violation occurring during a
40 period of twelve full months.

41 (d) Civil penalties assessed against nursing home shall
42 not be less than fifty nor more than eight thousand dollars:
43 *Provided*, That the director may not assess a penalty under
44 state licensure for the same deficiency or violation cited
45 under federal law and may not assess a penalty against a
46 nursing home if the nursing home corrects the deficiency
47 within twenty days of receipt of written notice of the
48 deficiency unless it is a repeat deficiency or the nursing home
49 is a poor performer.

50 (e) In determining whether to assess a penalty, and the
51 amount of penalty to be assessed, the director shall consider:

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

54 (2) The number of residents the noncompliance is likely
55 to affect;

56 (3) Whether the noncompliance was noncompliance
57 during a previous inspection;

58 (4) The opportunity the nursing home has had to correct
59 the noncompliance; and

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

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

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

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

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

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

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

80 (g) The director shall assess a civil penalty of not more
81 than one thousand dollars against an individual who willfully
82 and knowingly certifies a material and false statement in a
83 resident assessment. Such penalty shall be imposed with

84 respect to each such resident assessment. The director shall
85 impose a civil penalty of not more than five thousand dollars
86 against an individual who willfully and knowingly causes
87 another individual to certify a material and false statement in
88 a resident assessment. Such penalty shall be imposed with
89 respect to each such resident assessment.

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

96 (i) If the director assesses a penalty under this section, the
97 director shall cause delivery of notice of such penalty by
98 personal service or by certified mail. Said notice shall state
99 the amount of the penalty, the action or circumstance for
100 which the penalty is assessed, the requirement that the action
101 or circumstance violates, and the basis upon which the
102 director assessed the penalty and selected the amount of the
103 penalty.

104 (j) The director shall, in a civil judicial proceeding,
105 recover any unpaid assessment which has not been contested

106 under section twelve of this article within thirty days of
107 receipt of notice of such assessment, or which has been
108 affirmed under the provisions of that section and not
109 appealed within thirty days of receipt of the director's final
110 order, or which has been affirmed on judicial review, as
111 provided in section thirteen of this article. All money
112 collected by assessments of civil penalties or interest shall be
113 paid into a special resident benefit account and shall be
114 applied by the director for: (1) The protection of the health
115 or property of facility residents; (2) long-term care
116 educational activities; (3) the costs arising from the
117 relocation of residents to other nursing homes when no other
118 funds are available; and (4) in an emergency situation in
119 which there are no other funds available, the operation of a
120 facility pending correction of deficiencies or closure.

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

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

1 (a) Any licensee or applicant aggrieved by an order
2 issued pursuant to sections five, six, ten or eleven of this

3 article ~~shall have the opportunity to~~ may request an informal
4 and formal hearing at which the licensee or applicant may
5 contest ~~such~~ the order as contrary to law or unwarranted by
6 the facts or both. All of the pertinent provisions of article
7 five, chapter twenty-nine-a of this code ~~shall~~ apply to and
8 govern ~~such~~ a formal hearing and the administrative
9 procedures in connection with any formal hearing.

10 A facility or licensee adversely affected by an order or
11 citation of a deficient practice issued pursuant to this article
12 or by a citation issued for a deficient practice pursuant to
13 federal law may request the independent informal dispute
14 resolution process contained in section twelve-a of this
15 article. A facility may contest a cited deficiency as contrary
16 to law or unwarranted by the facts or both.

17 The director may impose the following prior to or during
18 the pendency of a an informal hearing, an independent
19 informal dispute resolution process or of a formal hearing:

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

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

24 (b) Informal hearings shall be held within twenty
25 working days of the director's receipt of timely request for
26 appeal, unless the licensee or applicant aggrieved by the
27 order consents to a postponement or continuance. In no
28 event may the informal hearing occur more than thirty
29 business days after the director receives timely request for
30 appeal. At the informal hearing, neither the licensee or
31 applicant nor the director may be represented by an attorney.
32 Within ten days of the conclusion of the informal hearing, the
33 director shall issue an informal hearing order, including a
34 basis for the decision.

35 (c) If the applicant or licensee requested a formal hearing
36 only, the director and the licensee shall proceed in accordance
37 with the provisions of the Department of Health and Human
38 Resources rules of procedure for contested case hearings and
39 declaratory rulings. If the applicant or licensee also requested an
40 informal hearing or the independent informal dispute resolution
41 process contained in section twelve-a of this article, and if the
42 order is not favorable to the applicant or licensee, the director
43 shall notify the administrative hearing examiner of the request
44 for an appeal within five business days of issuing the ~~informal~~
45 ~~hearing~~ order.

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

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

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

12 (c) The independent informal dispute resolution process
13 is not a formal evidentiary proceeding and utilizing the
14 independent informal dispute resolution process does not
15 wave the facility's right to a formal hearing.

16 (d) The independent informal dispute resolution process
17 consists of the following:

18 (1) No later than ten working days following the last day
19 of the survey or inspection, or no later than twenty working
20 days following the last day of a complaint investigation, the
21 director shall transmit to the facility a statement of

22 deficiencies committed by the facility. Notification of the
23 availability of the independent informal dispute resolution
24 process and an explanation of the independent informal
25 dispute resolution process shall be included in the transmittal;

26 (2) When the facility returns its plan to correct the cited
27 deficiencies to the director, the facility may request in writing
28 the independent informal dispute resolution process to refute
29 the cited deficiencies;

30 (3) Within five working days of receipt of the written
31 request for the independent informal dispute resolution
32 process made by a facility, the director shall refer the request
33 to an independent review organization from the list of
34 certified independent review organizations approved by the
35 state. The director shall vary the selection of the independent
36 review organization on a rotating basis. The director shall
37 acknowledge in writing to the facility that the request for
38 independent review has been received and forwarded to an
39 independent review organization for review. The notice shall
40 include the name and address of the independent review
41 organization.

42 (4) Within ten working days of receipt of the written
43 request for the independent informal dispute resolution

44 process made by a facility, the independent review
45 organization shall hold an independent informal dispute
46 resolution conference unless additional time is requested by
47 the facility. Before the independent informal dispute
48 resolution conference, the facility may submit additional
49 information.

50 (5) The facility may not be accompanied by counsel
51 during the independent informal dispute resolution
52 conference. The manner in which the independent informal
53 dispute resolution conference is held is at the discretion of
54 the facility, but is limited to:

55 (A) A desk review of written information submitted by
56 the facility; or

57 (B) A telephonic conference; or

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

60 (6) If the independent review organization determines the
61 need for additional information, clarification or discussion
62 after conclusion of the independent informal dispute
63 resolution conference, the director and the facility shall
64 present the requested information.

65 (7) Within ten calendar days of the independent informal
66 dispute resolution conference, the independent review
67 organization shall provide and make a determination, based
68 upon the facts and findings presented, and shall transmit a
69 written decision containing the rationale for its determination
70 to the facility and the director.

71 (8) If the director disagrees with the determination, the
72 director may reject the determination made by the
73 independent review organization and shall issue an order
74 setting forth the rationale for the reversal of the independent
75 review organization's decision to the facility within ten
76 calendar days of receiving the independent review
77 organization's determination.

78 (9) If the director accepts the determination, the director
79 shall issue an order affirming the independent review
80 organization's determination within ten calendar days of
81 receiving the independent review organization's
82 determination.

83 (10) If the independent review organization determines
84 that the original statement of deficiencies should be changed
85 as a result of the independent informal dispute resolution
86 process and the director accepts the determination, the

87 director shall transmit a revised statement of deficiencies to
88 the facility within ten calendar days of the independent
89 review organization's determination.

90 (11) Within ten calendar days of receipt of the director's
91 order and the revised statement of deficiencies, the facility
92 shall submit a revised plan to correct any remaining
93 deficiencies to the director.

94 (e) A facility has ten calendar days after receipt of the
95 director's order to request a formal hearing for any deficient
96 practice cited under this article. If the facility requests a
97 formal hearing, the director and the facility shall proceed in
98 accordance with the provisions of article five, chapter
99 twenty-nine-a of this code.

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

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

108 (2) If the independent review organization's decision
109 supports the originally written contested deficiency or
110 adverse action taken by the director, the facility shall
111 reimburse the director for the cost charged by the
112 independent review organization. If the independent review
113 organization's decision supports some of the originally
114 written contested deficiencies, but not all of them, the facility
115 shall reimburse the director for the cost charged by the
116 independent review organization on a pro rata basis.

117 (g) The Director shall report to the Legislative Oversight
118 Commission on Health and Human Resources Accountability
119 during the July interim meetings in 2013 on the informal
120 dispute resolution process. This report shall at a minimum
121 include the number of times the informal dispute resolution
122 process is requested, the result of the process, and the
123 number of times the director does not agree and changes the
124 determination of the independent review organization.