

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2607

BY DELEGATES HILL, HOWELL, ROWAN, STAGGERS AND

JEFFRIES

[Introduced January 23, 2019; Referred
to the Committee on Health and Human Resources.]

1 A BILL to repeal §16-5C-16 and §16-5C-17 of the Code of West Virginia, 1931, as amended; to
2 amend and reenact §16-5C-2, §16-5C-4, §16-5C-5, §16-5C-6, §16-5C-7, §16-5C-8, §16-
3 5C-9, §16-5C-9a, §16-5C-10, §16-5C-11, §16-5C-12, §16-5C-12a, §16-5C-13, §16-5C-
4 14, §16-5C-15; §16-5C-18, §16-5C-20, §16-5C-21, and §16-5C-22 of said code, all
5 relating to the licensure of nursing homes; repealing duplicative sections of code; defining
6 terms; clarifying rule requirements; and clarifying enforcement action and due process
7 procedures.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5C. NURSING HOMES.

§ 16-5C-2. Definitions.

1 As used in this article, unless a different meaning appears from the context:

2 “Deficiency” means a nursing home's failure to meet the requirements specified in §16-
3 5C-1 *et seq.* of this code and rules promulgated thereunder.

4 “Department” means the Department of Health and Human Resources.

5 “Director” means the ~~secretary of the Department of Health and Human Resources or his~~
6 ~~or her designee~~ director of the office of Health Facility Licensure and Certification within the office
7 of the Inspector General.

8 “Distance learning technologies” means computer-centered technologies delivered over
9 the internet, broadcasts, recordings, instructional videos, or videoconferencing.

10 “Household” means a private home or residence which is separate from or unattached to
11 a nursing home.

12 “Immediate jeopardy” means a situation in which the nursing home's noncompliance with
13 one or more of the provisions of this article or rules promulgated thereunder has caused or is
14 likely to cause serious harm, impairment or death to a resident.

15 “Nursing home” or “facility” means any institution, residence or place, or any part or unit
16 thereof, however named, in this state which is advertised, offered, maintained or operated by the

17 ownership or management, whether for a consideration or not, for the express or implied purpose
18 of providing accommodations and care, for a period of more than 24 hours, for four or more
19 persons who are ill or otherwise incapacitated and in need of extensive, ongoing nursing care due
20 to physical or mental impairment or which provides services for the rehabilitation of persons who
21 are convalescing from illness or incapacitation.

22 The care or treatment in a household, whether for compensation or not, of any person
23 related by blood or marriage, within the degree of consanguinity of second cousin to the head of
24 the household, or his or her spouse, may not be deemed to constitute a nursing home within the
25 meaning of this article. Nothing contained in this article applies to nursing homes operated by the
26 federal government; or extended care facilities operated in conjunction with a hospital; or
27 institutions operated for the treatment and care of alcoholic patients; or offices of physicians; or
28 hotels, boarding homes or other similar places that furnish to their guests only room and board;
29 or to homes or asylums operated by fraternal orders pursuant to §35-3-1 *et seq.* of this code.

30 “Nursing care” means those procedures commonly employed in providing for the physical,
31 emotional and ~~rehabilitational~~ rehabilitation needs of the ill or otherwise incapacitated which
32 require technical skills and knowledge beyond that which the untrained person possesses,
33 including, but not limited to, such procedures as: Irrigations, catheterization, special procedure
34 contributing to rehabilitation, and administration of medication by any method which involves a
35 level of complexity and skill in administration not possessed by the untrained person.

36 “Person” means an individual and every form of organization, whether incorporated or
37 unincorporated, including any partnership, corporation, trust, association, or political subdivision
38 of the state.

39 “Resident” means an individual living in a nursing home.

40 “Review organization” means any committee or organization engaging in peer review or
41 quality assurance, including, but not limited to, a medical audit committee, a health insurance
42 review committee, a professional health service plan review committee or organization, a dental

43 review committee, a physician's advisory committee, a podiatry advisory committee, a nursing
44 advisory committee, any committee or organization established pursuant to a medical assistance
45 program, any committee or organization established or required under state or federal statutes,
46 rules or regulations, and any committee established by one or more state or local professional
47 societies or institutes, to gather and review information relating to the care and treatment of
48 residents for the purposes of:

49 Evaluating and improving the quality of health care rendered; reducing morbidity or
50 mortality; or establishing and enforcing guidelines designed to keep within reasonable bounds the
51 cost of health care.

52 “Secretary” means the Secretary of the Department of Health and Human Resources or
53 his or her designee.

54 “Sponsor” means the person or agency legally responsible for the welfare and support of
55 a resident.

56 ~~“Person” means an individual and every form of organization, whether incorporated or~~
57 ~~unincorporated, including any partnership, corporation, trust, association or political subdivision~~
58 ~~of the state~~

59 “Substantial compliance” means a level of compliance with the rules such that no
60 deficiencies exist or such that identified deficiencies pose no greater risk to resident health or
61 safety than the potential for causing minimal harm.

62 The ~~director~~ secretary may define in the rules any term used herein which is not expressly
63 defined.

§ 16-5C-4. Administrative and inspection staff.

1 The ~~director~~ secretary may, at such time or times as he or she may deem necessary,
2 employ such administrative employees, inspectors, or other persons as may be necessary to
3 properly carry out the provisions of this article. All employees of the department shall be members
4 of the state civil service system and ~~surveyors~~ inspectors shall be trained to perform their assigned

5 duties. Such inspectors and other employees as may be duly designated by the ~~director~~ secretary
6 shall act as the ~~director's~~ secretary's representatives and, under the direction of the ~~director~~
7 secretary, shall enforce the provisions of this article and all duly promulgated regulations and, in
8 the discharge of official duties, shall have the right of entry into any place maintained as a nursing
9 home.

§ 16-5C-5. Rules; minimum standards for nursing homes.

1 (a) All rules shall be proposed for legislative approval in accordance with the provisions of
2 §29A-3-1 *et seq.* of this code. The ~~director~~ secretary shall recommend the adoption, amendment
3 or repeal of such rules as may be necessary or proper to carry out the purposes and intent of this
4 article.

5 (b) The ~~director~~ secretary shall recommend rules establishing minimum standards of
6 operation of nursing homes including, but not limited to, the following:

7 (1) Administrative policies, including: (A) an affirmative statement of the right of access to
8 nursing homes by members of recognized community organizations and community legal
9 services programs whose purposes include rendering assistance without charge to residents,
10 consistent with the right of residents to privacy; ~~and~~ (B) a statement of the rights and
11 responsibilities of residents in nursing homes which prescribe, as a minimum, such a statement
12 of residents' rights as included in the United States Department of Health and Human Services
13 regulations, in force on the effective date of this article, governing participation of nursing homes
14 in the Medicare and Medicaid programs pursuant to 42 U.S.C.A. §§ 1395 *et seq.* and 1396 *et*
15 *seq.*; (C) the process to be followed by applicants seeking a license; (D) the clinical, medical,
16 resident, and business records to be kept by the nursing home; (E) the procedures and
17 inspections for the review of utilization and quality of resident care; and (F) the procedures for
18 informal dispute resolution, independent informal dispute resolution, and administrative due
19 process, and when such remedies are available;

20 (2) Minimum numbers of administrators, medical directors, nurses, aides and other

- 21 personnel according to the occupancy of the facility;
- 22 (3) Qualifications of the facility's administrators, medical directors, nurses, aides, and other
- 23 personnel;
- 24 (4) Safety requirements;
- 25 (5) Sanitation requirements;
- 26 (6) Personal services to be provided;
- 27 (7) Dietary services to be provided;
- 28 (8) Medical records;
- 29 (9) Social and recreational activities to be made available;
- 30 (10) Pharmacy services;
- 31 (11) Nursing services;
- 32 (12) Medical services;
- 33 (13) Physical facility;
- 34 (14) Resident rights;
- 35 (15) Visitation privileges that:
- 36 (A) Permit immediate access to a resident, subject to the resident's right to deny or
- 37 withdraw consent at any time, by immediate family or other relatives of the resident;
- 38 (B) Permit immediate access to a resident, subject to reasonable restrictions and the
- 39 resident's right to deny or withdraw consent at any time, by others who are visiting with the consent
- 40 of the resident; and
- 41 (C) Permit access to other specific persons or classes of persons consistent with state
- 42 and federal law; and
- 43 (16) Admission, transfer and discharge rights.
- 44 (c) The rules shall also establish exemptions from state law and rule for federally certified
- 45 Medicare and Medicaid nursing facilities for those specified provisions covered by federal
- 46 regulations.

47 ~~(e)~~ (d) The director shall permit the nonclinical instruction portions of a nurse aide training
48 program approved by the Office of Health Facility Licensure and Certification to be provided
49 through distance learning technologies.

§ 16-5C-6. License required; application; fees; duration; renewal.

1 ~~Subject to the provisions of section seventeen of this article~~ No person may establish,
2 operate, maintain, offer, or advertise a nursing home within this state unless and until he or she
3 obtains a valid license therefor as hereinafter provided, which license remains unsuspended,
4 unrevoked, and unexpired. No public official or employee may place any person in, or recommend
5 that any person be placed in, or directly or indirectly cause any person to be placed in, any nursing
6 home, as defined in §16-5C-2 of this code, which is being operated without a valid license from
7 the ~~director~~ secretary. The procedure for obtaining a license is as follows:

8 (a) The applicant shall submit an application to the director on a form to be prescribed by
9 the ~~director~~ secretary, containing such information as may be necessary to show that the applicant
10 is in compliance with the standards for nursing homes, as established by this article and the rules
11 lawfully promulgated hereunder. The application and any exhibits thereto shall provide the
12 following information:

13 (1) The name and address of the applicant;

14 (2) The name, address, and principal occupation:

15 (A) Of each person who, as a stockholder or otherwise, has a proprietary interest of 10
16 percent or more in the applicant;

17 (B) Of each officer and director of a corporate applicant;

18 (C) Of each trustee and beneficiary of an applicant which is a trust; and

19 (D) Where a corporation has a proprietary interest of 25 percent or more in an applicant,
20 the name, address, and principal occupation of each officer and director of the corporation;

21 (3) The name and address of the owner of the premises of the nursing home or proposed
22 nursing home, if he or she is a different person from the applicant, and in such case, the name

23 and address:

24 (A) Of each person who, as a stockholder or otherwise, has a proprietary interest 10
25 percent or more in the owner;

26 (B) Of each officer and director of a corporate applicant; and

27 (C) Of each trustee and applicant, the name, address, and principal occupation of each
28 officer and director of the corporation;

29 (4) Where the applicant is the lessee or the assignee of the nursing home or the premises
30 of the proposed nursing home, a signed copy of the lease and any assignment thereof;

31 (5) The name and address of the nursing home or the premises of the proposed nursing
32 home;

33 (6) A description of the nursing home to be operated;

34 (7) The bed quota of the nursing home; ~~as determined by the health care cost review~~
35 ~~authority~~

36 (8) ~~(A)~~ An organizational plan for the nursing home indicating the number of persons
37 employed or to be employed and the positions and duties of all employees;

38 ~~(B)~~ (9) The name and address of the individual who is to serve as administrator; ~~and~~

39 ~~(C)~~ (10) Such evidence of compliance with applicable laws and rules governing zoning,
40 buildings, safety, fire prevention, and sanitation as the ~~director~~ secretary may require;

41 ~~(9)~~ (11) A listing of other states in which the applicant owns, operates, or manages a
42 nursing home or long-term care facility;

43 ~~(10)~~ (12) Such additional information as the ~~director~~ secretary may require; and

44 ~~(14)~~ (13) Assurances that the nursing home is in compliance with the provisions of §16-
45 20-1 *et seq.* of this code.

46 (b) Upon receipt and review of an application for license made pursuant to §16-5C-6(a)
47 of this code, and inspection of the applicant nursing home pursuant to §16-5C-9 and §16-5C-10
48 of this code, the ~~director~~ secretary shall issue a license if he or she finds:

49 (1) That an individual applicant, and every partner, trustee, officer, director, and controlling
50 person of an applicant which is not an individual, is a person responsible and suitable to operate
51 or to direct or participate in the operation of a nursing home by virtue of financial capacity,
52 appropriate business or professional experience, a record of compliance with lawful orders of the
53 department, if any, and lack of revocation of a license during the previous five years or consistent
54 poor performance in other states;

55 (2) That the facility is under the supervision of an administrator who is licensed pursuant
56 to the provisions of §30-25-1 *et seq.* of this code; and

57 (3) That the facility is in substantial compliance with standards established pursuant to
58 §16-5C-5 of this code, and such other requirements for a license as may be established by rule
59 under this article.

60 Any license ~~granted~~ issued by the ~~director~~ secretary shall state the maximum bed capacity
61 for which it is ~~granted~~ issued, the date the license was issued, and the expiration date. Such
62 licenses shall be issued for a period not to exceed 15 months for nursing homes: *Provided*, That
63 any license in effect for which timely application for renewal, together with payment of the proper
64 fee has been made to the ~~director~~ secretary in conformance with the provisions of this article and
65 the rules issued thereunder, and prior to the expiration date of the license, shall continue in effect
66 until:

67 (A) Six months following the expiration date of the license; or

68 (B) The date of the revocation or suspension of the license pursuant to the provisions of
69 this article; or

70 (C) The date of issuance of a new license, whichever date first occurs.

71 Each license shall be issued only for the premises and persons named in the application
72 and is not transferable or assignable: *Provided*, That in the case of the transfer of ownership of
73 a facility with an unexpired license, the application by the proposed new owner shall be filed with
74 the ~~director~~ secretary no later than 30 days before the proposed date of transfer. Upon receipt of

75 proof of the transfer of ownership, the application shall have the effect of a license for three
76 months. The ~~director~~ secretary shall issue or deny a license within three months of the receipt of
77 the proof of the transfer of ownership. Every license shall be posted in a conspicuous place in the
78 nursing home for which it is issued so as to be accessible to and in plain view of all residents of
79 and visitors to the nursing home.

80 (c) A license is renewable, conditioned upon the licensee filing timely application for the
81 extension of the term of the license accompanied by the fee, and contingent upon evidence of
82 compliance with the provisions of this article and rules promulgated hereunder. Any application
83 for renewal of a license shall include a report by the licensee in such form and containing such
84 information as shall be prescribed by the ~~director~~ secretary, including the following:

85 ~~(1) A balance sheet of the nursing home as of the end of its fiscal year, setting forth assets~~
86 ~~and liabilities at such date, including all capital, surplus, reserve, depreciation and similar~~
87 ~~accounts;~~

88 ~~(2) A statement of operations of the nursing home as of the end of its fiscal year, setting~~
89 ~~forth all revenues, expenses, taxes, extraordinary items and other credits or charges; and~~

90 ~~(3) If a nursing home is in compliance with the requirements of the health care facility~~
91 ~~financial disclosure act, as provided in article five-f, chapter sixteen of this code, it will be~~
92 ~~considered to have met the requirements established in subdivisions (1) and (2) of this subsection~~

93 ~~(4) A a statement of any changes in the name, address, management, or ownership~~
94 ~~information on file with the ~~director~~ secretary. All holders of facility licenses as of the effective date~~
95 ~~of this article shall include, in the first application for renewal filed thereafter, such information as~~
96 ~~is required for initial applicants under the provisions of §16-5C-6(a) of this code.~~

97 (d) In the case of an application for a renewal license, if all requirements of §16-5C-5 of
98 this code are not met, the ~~director~~ secretary may at his or her discretion issue a provisional
99 license, provided that care given in the nursing home is adequate for resident needs and the
100 nursing home has demonstrated improvement and evidences potential for substantial compliance

101 within the term of the license: *Provided*, That a provisional license may not be issued for a period
102 greater than six months, may not be renewed, and may not be issued to any nursing home that
103 is a poor performer.

104 (e) A nonrefundable application fee in the amount of \$200 for an original nursing home
105 license shall be paid at the time application is made for the license. Direct costs of initial licensure
106 inspections or inspections for changes in licensed bed capacity shall be borne by the applicant
107 and shall be received by the ~~director~~ secretary prior to the issuance of an initial or amended
108 license. The license fee for renewal of a license shall be at the rate of \$15 per bed per year for
109 nursing homes, except the annual rate per bed may be assessed for licenses issued for less than
110 15 months. Annually, the ~~director~~ secretary may adjust the licensure fees for inflation based upon
111 the increase in the consumer price index during the last 12 months. All such license fees shall be
112 due and payable to the ~~director~~ secretary, annually, and in the manner set forth in the rules
113 promulgated hereunder. The fee and application shall be submitted to the ~~director~~ secretary who
114 shall retain both the application and fee pending final action on the application. All fees received
115 by the ~~director~~ secretary under the provisions of this article shall be deposited in accordance with
116 §16-1-13 of this code.

§ 16-5C-7. Cost disclosure; surety for resident funds.

1 (a) Each nursing home shall disclose in writing to all residents at the time of admission a
2 complete and accurate list of all costs which may be incurred by them; and shall notify the
3 residents 30 days in advance of changes in costs. The nursing home shall make available copies
4 of the list in the nursing home's business office for inspection. Residents may not be liable for any
5 cost not so disclosed.

6 (b) If the nursing home handles any money for residents within the facility, the licensee
7 or his or her authorized representative shall either: (1) Give a bond; or (2) obtain and maintain
8 commercial insurance with a company licensed in this state in an amount consistent with this
9 subsection and with the surety as the ~~director~~ secretary shall approve. The bond or insurance

10 shall be upon condition that the licensee shall hold separately and in trust all residents' funds
11 deposited with the licensee; shall administer the funds on behalf of the resident in the manner
12 directed by the depositor; shall render a true and complete account to the depositor and the
13 ~~director~~ secretary when requested, and at least quarterly to the resident; and upon termination of
14 the deposit, shall account for all funds received, expended, and held on hand. The licensee shall
15 file a bond or obtain insurance in a sum at least 1.25 times the average amount of funds deposited
16 with the nursing home during the nursing home's previous fiscal year.

17 This insurance policy shall specifically designate the resident as the beneficiary or payee
18 reimbursement of lost funds. Regardless of the type of coverage established by the facility, the
19 facility shall reimburse, within 30 days, the resident for any losses directly and seek
20 reimbursement through the bond or insurance itself. Whenever the ~~director~~ secretary determines
21 that the amount of any bond or insurance required pursuant to this subsection is insufficient to
22 adequately protect the money of residents which is being handled, or whenever the amount of
23 any such bond or insurance is impaired by any recovery against the bond or insurance, the
24 ~~director~~ secretary may require the licensee to file an additional bond or insurance in such amount
25 as necessary to adequately protect the money of residents being handled.

26 The provisions of this subsection do not apply if the licensee handles less than \$35 per
27 resident per month in the aggregate. Nursing homes certified to accept payment by Medicare and
28 Medicaid must meet the requirements for surety bonds as listed in the applicable federal
29 regulations.

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

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

6 involved of the results of the investigation.

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

10 (1) A nursing home or licensee adversely affected by an order or citation of a deficient
11 practice issued pursuant to this section may request the independent informal dispute resolution
12 process contained in §16-5C-12a of this code.

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

18 (c) No nursing home may discharge or in any manner discriminate against any resident,
19 legal representative, or employee for the reason that the resident, legal representative, or
20 employee has filed a complaint or participated in any proceeding specified in this article. Violation
21 of this prohibition by any nursing home constitutes ground for the suspension or revocation of the
22 license of the nursing home as provided in §16-5C-11 and §16-5C-12 of this code. Any type of
23 discriminatory treatment of a resident, legal representative, or employee by whom, or upon whose
24 behalf, a complaint has been submitted to the ~~director~~ secretary, or any proceeding instituted
25 under this article, within 120 days of the filing of the complaint or the institution of such action,
26 shall raise a rebuttable presumption that such action was taken by the nursing home in retaliation
27 for such complaint or action.

§ 16-5C-9. Inspections.

1 The ~~director~~ secretary and any duly designated employee or agent shall have the right
2 to enter upon and into the premises of any nursing home at any time for which a license has been
3 issued, for which an application for license has been filed with the ~~director~~ secretary, or which the

4 ~~director~~ secretary has reason to believe is being operated or maintained as a nursing home
5 without a license. If entry is refused by the owner or person in charge of the nursing home, the
6 ~~director~~ secretary may apply to the circuit court of the county in which the nursing home is located
7 or the Circuit Court of Kanawha County for a warrant authorizing inspection to conduct the
8 following inspections:

9 (1) An initial inspection prior to the issuance of a license pursuant to §16-5C-6 of this
10 code;

11 (2) A license inspection for a nursing home, which shall be conducted at least once every
12 15 months, if the nursing home has not applied for and received an exemption from the
13 requirement as provided for in this section;

14 (3) The ~~director~~ secretary, by the ~~director's~~ secretary's authorized employees or agents,
15 shall conduct at least one inspection prior to issuance of a license pursuant to §16-5C-6 of this
16 code, and shall conduct periodic unannounced inspections thereafter, to determine compliance
17 by the nursing home with applicable rules promulgated thereunder. All facilities shall comply with
18 regulations of the State Fire Commission. The State Fire Marshal, by his or her employees or
19 authorized agents, shall make all fire, safety, and like inspections. The ~~director~~ secretary may
20 provide for such other inspections as the ~~director~~ secretary may deem necessary to carry out the
21 intent and purpose of this article. Any nursing home aggrieved by a determination or assessment
22 made pursuant to this section, shall have the right to an administrative appeal as set forth in §16-
23 5C-12 of this code;

24 (4) A complaint inspection based on a complaint received by the ~~director~~ secretary. If,
25 after investigation of a complaint, the ~~director~~ secretary determines that the complaint is
26 substantiated, the ~~director~~ secretary may invoke any applicable remedies available pursuant to
27 §16-5C-11 of this code.

§ 16-5C-9a. Exemptions.

1 (a) The ~~director~~ secretary may grant an exemption from a license inspection if a nursing

2 home was found to be in substantial compliance with the provisions of this chapter at its most
3 recent inspection and there have been no substantiated complaints thereafter. The ~~director~~
4 secretary may not grant more than one exemption in any two-year period.

5 (b) The ~~director~~ secretary may grant an exemption to the extent allowable by federal law
6 from a standard survey, only if the nursing home was found to be in substantial compliance with
7 certification participation requirements at its previous standard ~~survey~~ inspection and there have
8 been no substantiated complaints thereafter.

9 (c) The ~~director~~ secretary may grant an exemption from periodic license inspections if a
10 nursing home receives accreditation by an accrediting body approved by the ~~director~~ secretary
11 and submits a complete copy of the accreditation report. The accrediting body shall identify quality
12 of care measures that assure continued quality care of residents. The ~~director~~ secretary may not
13 grant more than one exemption in any two-year period.

14 (d) If a complaint is substantiated, the ~~director~~ secretary has the authority to immediately
15 remove the exemption.

**§ 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 §16-5C-8 and §16-5C-9 of this code shall
2 be in writing and filed with the ~~director~~ secretary and shall list all deficiencies in the nursing home's
3 compliance with the provisions of this article and the rules adopted hereunder.

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

7 (2) Additionally, notification of the availability of the independent informal dispute
8 resolution process and an explanation of the independent informal dispute resolution process
9 shall be included in the transmittal.

10 (3) A nursing home adversely affected by an order or citation of a deficient practice issued

11 pursuant to this section may request the independent informal dispute resolution process
12 contained in §16-5C-12a of this code.

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

15 (5) The ~~surveyors~~ inspectors or the nursing home shall allow audio taping of the exit
16 conference with the expense to be paid by the requesting party.

17 (b) With regard to a nursing home with deficiencies and upon its failure to submit a plan
18 of correction which is approved by the director, or to correct any deficiency within the time
19 specified in an approved plan of correction, the ~~director~~ secretary may assess civil penalties as
20 hereinafter provided or may initiate any other legal or disciplinary action as provided by this article:
21 *Provided, That any action by the ~~director~~ secretary shall be stayed until federal proceedings*
22 *arising from the same deficiencies are concluded.*

23 (c) Nothing in this section may be construed to prohibit the ~~director~~ secretary from
24 enforcing a rule, administratively or in court, without first affording formal opportunity to make
25 correction under this section, where, in the opinion of the ~~director~~ secretary, the violation of the
26 rule jeopardizes the health or safety of residents, or where the violation of the rule is the second
27 or subsequent such violation occurring during a period of 12 full months.

28 (d) Civil penalties assessed against nursing home shall not be less than \$50 nor more
29 than \$8,000: *Provided, That the ~~director~~ secretary may not assess a penalty under state licensure*
30 *for the same deficiency or violation cited under federal law and may not assess a penalty against*
31 *a nursing home if the nursing home corrects the deficiency within 20 days of receipt of written*
32 *notice of the deficiency unless it is a repeat deficiency or the nursing home is a poor performer.*

33 (e) In determining whether to assess a penalty, and the amount of penalty to be assessed,
34 the ~~director~~ secretary shall consider:

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

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

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

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

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

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

41 (1) For a deficiency which presents immediate jeopardy to the health, safety, or welfare
42 of one or more residents, the ~~director~~ secretary may impose a civil penalty of not less than \$3,000
43 nor more than \$8,000;

44 (2) For a deficiency which actually harms one or more residents, the ~~director~~ secretary
45 may impose a civil penalty of not less than \$1,000 nor more than \$3,000;

46 (3) For a deficiency which has the potential to harm one or more residents, the ~~director~~
47 secretary may impose a civil penalty of not less than \$50 nor more than \$1,000;

48 (4) For a repeated deficiency, the ~~director~~ secretary may impose a civil penalty of up to
49 150 percent of the penalties provided in §16-5C-10(f)(1) through §16-5C-10(f)(3) of this code; and

50 (5) If no plan of correction is submitted as established in this rule, a penalty may be
51 assessed in the amount of \$100 a day unless a reasonable explanation has been provided and
52 accepted by the ~~director~~ secretary.

53 (g) The ~~director~~ secretary shall assess a civil penalty of not more than \$1,000 against an
54 individual who willfully and knowingly certifies a material and false statement in a resident
55 assessment. Such penalty shall be imposed with respect to each such resident assessment. The
56 ~~director~~ secretary shall impose a civil penalty of not more than \$5,000 against an individual who
57 willfully and knowingly causes another individual to certify a material and false statement in a
58 resident assessment. Such penalty shall be imposed with respect to each such resident
59 assessment.

60 (h) The ~~director~~ secretary shall assess a civil penalty of not more than \$2,000 against any
61 individual who notifies, or causes to be notified, a nursing home of the time or date on which an
62 inspection is scheduled to be conducted under this article or under 42 U.S.C.A. §§ 1395 *et seq.*

63 and 1396 *et seq.*

64 (i) If the ~~director~~ secretary assesses a penalty under this section, the ~~director~~ secretary
 65 shall cause delivery of notice of such penalty by personal service or by certified mail. Said notice
 66 shall state the amount of the penalty, the action or circumstance for which the penalty is assessed,
 67 the requirement that the action or circumstance violates, and the basis upon which the ~~director~~
 68 secretary assessed the penalty and selected the amount of the penalty.

69 (j) The ~~director~~ secretary shall, in a civil judicial proceeding, recover any unpaid
 70 assessment which has not been contested under §16-5C-12 of this code within 30 days of receipt
 71 of notice of such assessment, or which has been affirmed under the provisions of that section and
 72 not appealed within 30 days of receipt of the ~~director's~~ Board of Review's final order, or which has
 73 been affirmed on judicial review, as provided in §16-5C-13 of this code. All money collected by
 74 assessments of civil penalties or interest shall be paid into a special resident benefit account and
 75 shall be applied by the ~~director~~ secretary for:

76 (1) The protection of the health or property of facility residents;

77 (2) Long-term care educational activities;

78 (3) The costs arising from the relocation of residents to other nursing homes when no
 79 other funds are available; and

80 (4) In an emergency situation in which there are no other funds available, the operation
 81 of a facility pending correction of deficiencies or closure.

82 (k) The opportunity for a hearing on an action taken under this section shall be as provided
 83 in §16-5C-12 of this code.

§ 16-5C-11. ~~License limitation, suspension, revocation; continuation of disciplinary proceedings~~ Ban on admissions; closure; transfer of residents; appointment of temporary management; assessment of interest; collection of assessments; promulgation of rules to conform with federal requirements. ~~hearings~~

1 (a) The ~~director~~ secretary may reduce the bed quota of the nursing home or impose a

2 ban on new admissions, where he or she finds upon inspection of the nursing home that the
3 licensee is not providing adequate care under the nursing home's existing bed quota, and that
4 reduction in quota or ban on new admissions, or both, would place the licensee in a position to
5 render adequate care. A reduction in bed quota or a ban on new admissions, or both, may remain
6 in effect until the nursing home is determined by the ~~director~~ secretary to be in substantial
7 compliance with the rules. In addition, the ~~director~~ secretary shall determine that the facility has
8 the management capability to ensure continued substantial compliance with all applicable
9 requirements. The ~~director~~ secretary shall evaluate the continuation of the admissions ban or
10 reduction in bed quota on a continuing basis, and may make a partial lifting of the admissions ban
11 or reduction in bed quota consistent with the purposes of this section. If the residents of the facility
12 are in immediate jeopardy of their health, safety, welfare, or rights, the ~~director~~ secretary may
13 seek an order to transfer residents out of the nursing home as provided for in ~~subsection (e) of~~
14 ~~this section~~ §16-5C-11(d) of this code. Any notice to a licensee of reduction in bed quota or a ban
15 on new admissions shall include the terms of such order, the reasons therefor, and a date set for
16 compliance.

17 (b) The ~~director~~ secretary may deny, limit, suspend, or revoke a license issued under this
18 article or take other action as set forth in this section, if he or she finds upon inspection that there
19 has been a substantial failure to comply with the provisions of this article or the standards or rules
20 promulgated pursuant hereto.

21 ~~(c) Whenever a license is limited, suspended or revoked pursuant to this section or the~~
22 ~~director imposes other action set forth in this section, the director shall file a complaint stating~~
23 ~~facts constituting a ground or grounds for such limitation, suspension or revocation or other action.~~
24 ~~Upon the filing of the complaint, the director shall notify the licensee in writing of the filing of the~~
25 ~~complaint within twenty days of exit conference, enclosing a copy of the complaint, and shall~~
26 ~~advise the licensee of the availability of a hearing pursuant to section twelve of this article. Such~~
27 ~~notice and copy of the complaint shall be served on such licensee by certified mail, return receipt~~

28 requested

29 ~~(d)~~ (c) The suspension, expiration, forfeiture, or cancellation by operation of law or order
30 of the ~~director~~ secretary of a license issued by the director, or the withdrawal of an application for
31 a license after it has been filed with the ~~director~~ secretary, may not deprive the ~~director~~ secretary
32 of the ~~director's~~ secretary's authority to institute or continue a disciplinary proceeding, or a
33 proceeding for the denial of a license application, against the licensee or applicant upon any
34 ground provided by law or to enter an order denying the license application, ~~or~~ suspending, or
35 revoking the license, or otherwise taking disciplinary action on any such ground.

36 ~~(e)~~ (d) In addition to other remedies provided in this article, upon petition from the ~~director~~
37 secretary, a circuit court in the county in which a facility is located, or in Kanawha County if
38 emergency circumstances occur, may determine that a nursing home's deficiencies under this
39 article, or under 42 U.S.C.A. §§ 1395 *et seq.* and 1396 *et seq.*, if applicable, constitute an
40 emergency immediately jeopardizing the health, safety, welfare, or rights of its residents, and
41 issue an order to:

42 (1) Close the nursing home;

43 (2) Transfer residents in the nursing home to other nursing homes; or

44 (3) Appoint temporary management to oversee the operation of the facility and to assure
45 the health, safety, welfare, and rights of the nursing home's residents, where there is a need for
46 temporary management while:

47 (A) There is an orderly closure of the facility; or

48 (B) Improvements are made in order to bring the nursing home into compliance with all
49 the applicable requirements of this article and, if applicable, 42 U.S.C.A. §§ 1395 *et seq.* and 1396
50 *et seq.*

51 If the ~~director~~ secretary petitions a circuit court for the closure of a nursing home, the
52 transfer of residents, or the appointment of temporary management, the circuit court shall hold a
53 hearing no later than seven days thereafter, at which time the ~~director~~ secretary and the licensee

54 or operator of the nursing home may participate and present evidence. The burden of proof is on
55 the ~~director~~ secretary.

56 A circuit court may divest the licensee or operator of possession and control of a nursing
57 home in favor of temporary management. The temporary management shall be responsible to
58 the court and shall have such powers and duties as the court may grant to direct all acts necessary
59 or appropriate to conserve the property and promote the health, safety, welfare, and rights of the
60 residents of the nursing home, including, but not limited to, the replacement of management and
61 staff, the hiring of consultants, the making of any necessary expenditures to close the nursing
62 home, or to repair or improve the nursing home so as to return it to compliance with applicable
63 requirements, and the power to receive, conserve, and expend funds, including Medicare,
64 Medicaid, and other payments on behalf of the licensee or operator of the nursing home. Priority
65 shall be given to expenditures for current direct resident care or the transfer of residents.
66 Expenditures other than normal operating expenses totaling more than \$20,000 shall be approved
67 by the circuit court.

68 The person charged with temporary management shall be an officer of the court, is not
69 liable for conditions at the nursing home which existed or originated prior to his or her
70 appointment, and is not personally liable, except for his or her own gross negligence and
71 intentional acts which result in injuries to persons or damage to property at the nursing home
72 during his or her temporary management. All compensation and per diem costs of the temporary
73 manager shall be paid by the nursing home. The costs for the temporary manager for any 30-day
74 period may not exceed the 75th percentile of the allowable administrator's salary as reported on
75 the most recent cost report for the nursing home's peer group as determined by the ~~director~~
76 secretary. The temporary manager shall bill the nursing home for compensation and per diem
77 costs. Within 15 days of receipt of the bill, the nursing home shall pay the bill or contest the costs
78 for which it was billed to the court. Such costs shall be recoverable through recoupment from
79 future reimbursement from the state Medicaid agency in the same fashion as a benefits

80 overpayment.

81 The temporary management shall promptly employ at least one person who is licensed
82 as a nursing home administrator in West Virginia.

83 A temporary management established for the purpose of making improvements in order
84 to bring a nursing home into compliance with applicable requirements may not be terminated until
85 the court has determined that the nursing home has the management capability to ensure
86 continued compliance with all applicable requirements, except if the court has not made such
87 determination within six months of the establishment of the temporary management, the
88 temporary management terminates by operation of law at that time, and the nursing home shall
89 be closed. After the termination of the temporary management, the person who was responsible
90 for the temporary management shall make an accounting to the court, and after deducting from
91 receipts the costs of the temporary management, expenditures, and civil penalties, and interest
92 no longer subject to appeal, in that order, any excess shall be paid to the licensee or operator of
93 the nursing home.

94 ~~(f)~~ (e) The assessments for penalties and for costs of actions taken under this article shall
95 have interest assessed at five percent per annum beginning 30 days after receipt of notice of such
96 assessment or 30 days after receipt of the ~~director's~~ Board of Review's final order following a
97 hearing, whichever is later. All such assessments against a nursing home that are unpaid shall
98 be added to the nursing home's licensure fee and may be filed as a lien against the property of
99 the licensee or operator of the nursing home. Funds received from such assessments shall be
100 deposited as funds received in §16-5C-10 of this code.

101 ~~(g) The director may propose additional rules and emergency rules that expand the power~~
102 ~~of the director in excess of that provided in this article to the extent required to comply with federal~~
103 ~~requirements, but any such rules shall expand the power of the director to the minimum extent~~
104 ~~required by federal requirements. Such rules are subject to the provisions of article three, chapter~~
105 ~~twenty-nine-a of this code~~

106 ~~(h)~~ (f) The opportunity for a hearing on an action by the ~~director~~ secretary taken under this
 107 section shall be as provided in §16-5C-12 of this code.

§ 16-5C-12. ~~Administrative appeals for civil assessments~~ License denial, limitation, suspension, or revocation.

1 ~~(a) Any licensee or applicant aggrieved by an order issued pursuant to sections, five, six,~~
 2 ~~ten or eleven of this article may request an informal and formal hearing at which the licensee or~~
 3 ~~applicant may contest the order as contrary to law or unwarranted by the facts or both. All of the~~
 4 ~~pertinent provisions of article five, chapter twenty-nine-a of this code apply to and govern a formal~~
 5 ~~hearing and the administrative procedures in connection with any formal hearing.~~

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

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

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

14 ~~(2) Transfer of residents and a ban on new admissions pursuant to section eleven of this~~
 15 ~~article. The secretary shall deny, limit, suspend, or revoke a license issued if the provisions of this~~
 16 ~~article or if the rules promulgated pursuant to this article are violated. The secretary may revoke~~
 17 ~~a nursing home's license and prohibit all physicians and licensed disciplines associated with that~~
 18 ~~nursing home from practicing at the nursing home location based upon an annual, periodic,~~
 19 ~~complaint, verification, or other inspection and evaluation.~~

20 ~~(b) Informal hearings shall be held within twenty working days of the director's receipt of~~
 21 ~~timely request for appeal, unless the licensee or applicant aggrieved by the order consents to a~~
 22 ~~postponement or continuance. In no event may the informal hearing occur more than thirty~~

23 ~~business days after the director receives timely request for appeal. At the informal hearing,~~
24 ~~neither the licensee or applicant nor the director may be represented by an attorney. Within ten~~
25 ~~days of the conclusion of the informal hearing, the director shall issue an informal hearing order,~~
26 ~~including a basis for the decision~~ Before any such license is denied, limited, suspended, or
27 revoked, however, written notice shall be given to the licensee, stating the grounds for such denial,
28 limitation, suspension, or revocation.

29 (c) ~~If the applicant or licensee requested a formal hearing only, the director and the~~
30 ~~licensee shall proceed in accordance with the provisions of the Department of Health and Human~~
31 ~~Resources rules of procedure for contested case hearings and declaratory rulings. If the applicant~~
32 ~~or licensee also requested an informal hearing or the independent informal dispute resolution~~
33 ~~process contained in section twelve a of this article, and if the order is not favorable to the~~
34 ~~applicant or licensee, the director shall notify the administrative hearing examiner of the request~~
35 ~~for an appeal within five business days of issuing the order~~ An applicant or licensee has 10
36 working days after receipt of the order denying, limiting, suspending, or revoking a license to
37 request a formal hearing contesting the denial, limitation, suspension, or revocation of a license
38 under this article. If a formal hearing is requested, the applicant or licensee and the secretary shall
39 proceed in accordance with the provisions of §29A-5-1 et seq. of this code.

40 (d) If a license is denied or revoked as herein provided, a new application for license shall
41 be considered by the secretary if, when, and after the conditions upon which the denial or
42 revocation was based have been corrected and evidence of this fact has been furnished. A new
43 license shall then be granted after proper inspection, if applicable, has been made and all
44 provisions of this article and rules promulgated pursuant to this article have been satisfied.

45 (e) If the license of a nursing home is denied, limited, suspended, or revoked, the
46 administrator or owner or lessor of the nursing home property shall cease to operate the facility
47 as a nursing home as of the effective date of the denial, limitation, suspension, or revocation. The
48 owner or lessor of the nursing home property is responsible for removing all signs and symbols

49 identifying the premises as a nursing home within 30 days. Any administrative appeal of such
50 denial, limitation, suspension, or revocation shall not stay the denial, limitation, suspension, or
51 revocation.

52 (f) Upon the effective date of the denial, limitation, suspension, or revocation, the
53 administrator of the nursing home shall advise the secretary and the Board of Pharmacy of the
54 disposition of all medications located on the premises. The disposition is subject to the supervision
55 and approval of the secretary. Medications that are purchased or held by a nursing home that is
56 not licensed may be deemed adulterated.

57 (g) The period of suspension for the license of a nursing home shall be prescribed by the
58 secretary but may not exceed one year.

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

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

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

9 (c) The independent informal dispute resolution process is not a formal evidentiary
10 proceeding and utilizing the independent informal dispute resolution process does not waive the
11 facility's right to a formal hearing.

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

13 (1) No later than 10 working days following the last day of the survey or inspection, or no
14 later than 20 working days following the last day of a complaint investigation, the ~~director~~ secretary
15 shall transmit to the facility a statement of deficiencies committed by the facility. Notification of the

16 availability of the independent informal dispute resolution process and an explanation of the
17 independent informal dispute resolution process shall be included in the transmittal;

18 (2) When the facility returns its plan to correct the cited deficiencies to the ~~director~~
19 secretary, the facility may request in writing the independent informal dispute resolution process
20 to refute the cited deficiencies;

21 (3) Within five working days of receipt of the written request for the independent informal
22 dispute resolution process made by a facility, the ~~director~~ secretary shall refer the request to an
23 independent review organization from the list of certified independent review organizations
24 approved by the state. The ~~director~~ secretary shall vary the selection of the independent review
25 organization on a rotating basis. The ~~director~~ secretary shall acknowledge in writing to the facility
26 that the request for independent review has been received and forwarded to an independent
27 review organization for review. The notice shall include the name and address of the independent
28 review organization.

29 (4) Within 10 working days of receipt of the written request for the independent informal
30 dispute resolution process made by a facility, the independent review organization shall hold an
31 independent informal dispute resolution conference unless additional time is requested by the
32 facility. Before the independent informal dispute resolution conference, the facility may submit
33 additional information.

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

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

38 (B) A telephonic conference; or

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

40 (6) If the independent review organization determines the need for additional information,
41 clarification, or discussion after conclusion of the independent informal dispute resolution

42 conference, the director and the facility shall present the requested information.

43 (7) Within 10 calendar days of the independent informal dispute resolution conference,
44 the independent review organization shall provide and make a determination, based upon the
45 facts and findings presented, and shall transmit a written decision containing the rationale for its
46 determination to the facility and the director.

47 (8) If the ~~director~~ secretary disagrees with the determination, the ~~director~~ secretary may
48 reject the determination made by the independent review organization and shall issue an order
49 setting forth the rationale for the reversal of the independent review organization's decision to the
50 facility within 10 calendar days of receiving the independent review organization's determination.

51 (9) If the ~~director~~ secretary accepts the determination, the ~~director~~ secretary shall issue
52 an order affirming the independent review organization's determination within 10 calendar days
53 of receiving the independent review organization's determination.

54 (10) If the independent review organization determines that the original statement of
55 deficiencies should be changed as a result of the independent informal dispute resolution process
56 and the ~~director~~ secretary accepts the determination, the ~~director~~ secretary shall transmit a
57 revised statement of deficiencies to the facility within 10 calendar days of the independent review
58 organization's determination.

59 (11) Within 10 calendar days of receipt of the ~~director's~~ secretary's order and the revised
60 statement of deficiencies, the facility shall submit a revised plan to correct any remaining
61 deficiencies to the ~~director~~ secretary.

62 (e) A facility has 10 calendar days after receipt of the ~~director's~~ secretary's order to
63 request a formal hearing for any deficient practice cited under this article. If the facility requests a
64 formal hearing, the ~~director~~ secretary and the facility shall proceed in accordance with the
65 provisions of §29A-5-1 *et seq.* of this code.

66 (f) Under the following circumstances, the facility is responsible for certain costs of the
67 independent informal dispute resolution review, which shall be remitted to the ~~director~~ secretary

68 within 60 days of the informal hearing order:

69 (1) If the facility requests a face-to-face conference, the facility shall pay any costs
70 incurred by the independent review organization that exceed the cost of a telephonic conference,
71 regardless of which part ultimately prevails.

72 (2) If the independent review organization's decision supports the originally written
73 contested deficiency or adverse action taken by the director, the facility shall reimburse the
74 ~~director~~ secretary for the cost charged by the independent review organization. If the independent
75 review organization's decision supports some of the originally written contested deficiencies, but
76 not all of them, the facility shall reimburse the ~~director~~ secretary for the cost charged by the
77 independent review organization on a pro rata basis.

78 ~~(g) The director shall report to the Legislative Oversight Commission on Health and~~
79 ~~Human Resources Accountability during the July interim meetings in 2013 on the informal dispute~~
80 ~~resolution process. This report shall at a minimum include the number of times the informal~~
81 ~~dispute resolution process is requested, the result of the process, and the number of times the~~
82 ~~director does not agree and changes the determination of the independent review organization~~

§ 16-5C-13. Judicial Review.

1 ~~Any licensee adversely affected by an order of the director rendered after a hearing held~~
2 ~~in accordance with the provisions of section twelve of this article is entitled to judicial review~~
3 ~~thereof. All of the pertinent provisions of section four, article five, chapter twenty-nine-a of this~~
4 ~~code shall apply to and govern with like effect as if the provisions of said section four were set~~
5 ~~forth in extensor in this section.~~

6 (a) Any applicant or licensee who is dissatisfied with the decision of the formal hearing as
7 a result of the hearing provided for in §16-5C-12 of this code may, within 30 days after receiving
8 notice of the decision, petition the Circuit Court of Kanawha County, in term or in vacation, for
9 judicial review of the decision.

10 (b) The court may affirm, modify, or reverse the decision of the Board of Review and

11 either the applicant, licensee, or secretary may appeal from the court's decision to the Supreme
12 Court of Appeals.

13 (c) The judgment of the circuit court shall be final unless reversed, vacated, or modified
14 on appeal to the Supreme Court of Appeals in accordance with the provisions of §29A-6-1 *et seq.*
15 of this code.

§ 16-5C-14. Legal counsel and services of the ~~director~~ department.

1 (a) Legal counsel and services for the ~~director~~ department in all administrative hearings
2 may be provided by the Attorney General or a staff attorney and all proceedings in any circuit
3 court and the Supreme Court of Appeals shall be provided by the Attorney General, or his or her
4 assistants, or an attorney employed by the ~~director~~ department in proceedings in any circuit court,
5 by the prosecuting attorney of the county as well, all without additional compensation.

6 (b) The Governor may appoint counsel for the ~~director~~ department, who shall perform
7 such legal services in representing the interests of residents in nursing homes in matters under
8 the jurisdiction of the ~~director~~ secretary as the Governor shall direct. It shall be the duty of such
9 counsel to appear for the residents in all cases where they are not represented by counsel. The
10 compensation of such counsel shall be fixed by the Governor.

§16-5C-15. Unlawful acts; penalties; injunctions; private right of action.

11 (a) Whoever ~~advertises, announces~~ establishes, or maintains, or is engaged in
12 establishing or maintaining a nursing home without a license granted under §16-5C-6, or who
13 prevents, interferes with or impedes in any way the lawful enforcement of this article is guilty of a
14 misdemeanor and, upon conviction thereof, shall be punished for the first offense by a fine of not
15 more than \$100, or by confinement in jail for a period of not more than 90 days, or by both fine
16 and confinement, at the discretion of the court. For each subsequent offense, the fine may be
17 increased to not more than \$250, with confinement in jail for a period of not more than 90 days,
18 or by both fine and confinement, at the discretion of the court. Each day of a continuing violation
19 after conviction is considered a separate offense.

20 (b) The ~~director~~ secretary may in his or her discretion bring an action to enforce
21 compliance with this article or any rule or order hereunder whenever it appears to the ~~director~~
22 secretary that any person has engaged in, or is engaging in, an act or practice in violation of this
23 article or any rule or order hereunder, or whenever it appears to the ~~director~~ secretary that any
24 person has aided, abetted or caused, or is aiding, abetting or causing, such an act or practice.
25 Upon application by the ~~director~~ secretary, the circuit court of the county in which the conduct has
26 occurred or is occurring, or if emergency circumstances occur the circuit court of Kanawha
27 County, has jurisdiction to grant without bond a permanent or temporary injunction, decree or
28 restraining order.

29 Whenever the ~~director~~ secretary has refused to grant or renew a license, or has revoked
30 a license required by law to operate or conduct a nursing home, or has ordered a person to refrain
31 from conduct violating the rules of the ~~director~~ secretary, and the person has appealed the action
32 of the ~~director~~ secretary, the court may, during pendency of the appeal, issue a restraining order
33 or injunction upon proof that the operation of the nursing home or its failure to comply with the
34 order of the ~~director~~ secretary adversely affects the well being or safety of the residents of the
35 nursing home. Should a person who is refused a license or the renewal of a license to operate or
36 conduct a nursing home or whose license to operate is revoked or who has been ordered to
37 refrain from conduct or activity which violates the rules of the ~~director~~ secretary fails to appeal or
38 should the appeal be decided favorably to the ~~director~~ secretary, then the court shall issue a
39 permanent injunction upon proof that the person is operating or conducting a nursing home
40 without a license as required by law, or has continued to violate the rules of the ~~director~~ secretary.

41 (c) Any nursing home that deprives a resident of any right or benefit created or established
42 for the well-being of this resident by the terms of any contract, by any state statute or rule, or by
43 any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as
44 a result of such deprivation. Upon a finding that a resident has been deprived of such a right or
45 benefit, and that the resident has been injured as a result of such deprivation, and unless there is

46 a finding that the nursing home exercised all care reasonably necessary to prevent and limit the
47 deprivation and injury to the resident, compensatory damages shall be assessed in an amount
48 sufficient to compensate the resident for such injury. In addition, where the deprivation of the right
49 or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident,
50 punitive damages may be assessed. A resident may also maintain an action pursuant to this
51 section for any other type of relief, including injunctive and declaratory relief, permitted by law.
52 Exhaustion of any available administrative remedies is not required prior to commencement of
53 suit under this subsection.

54 (d) The amount of damages recovered by a resident, in an action brought pursuant to this
55 section, is exempt for purposes of determining initial or continuing eligibility for medical assistance
56 under §9-4-1 *et seq.* of this code, and may neither be taken into consideration, nor required to be
57 applied toward the payment or part payment of the cost of medical care or services available
58 under that article.

59 (e) Any waiver by a resident or his or her legal representative of the right to commence
60 an action under this section, whether oral or in writing, is void as contrary to public policy.

61 (f) The penalties and remedies provided in this section are cumulative and are in addition
62 to all other penalties and remedies provided by law.

63 (g) Nothing in this section or any other section of the code shall limit the protections
64 afforded nursing homes or their health care providers under §55-7b-1 *et seq.* of this code. Nursing
65 homes and their health care providers shall be treated in the same manner as any other health
66 care facility or health care provider under §55-7b-1 *et seq.* of this code. The terms "health care
67 facility" and "health care provider" as used in this subsection shall have the same meaning as set
68 forth in §55-7b-2(f) and (g) of this code.

69 ~~(h) The amendments to this section enacted during the 2013 Regular Session of the~~
70 ~~Legislature shall be effective July 1, 2013: *Provided*, That there shall be no inference, either~~
71 ~~positive or negative, to any legal action pending pursuant to this section as of July 1, 2013. The~~

72 ~~amendments to this section in 2013 are not in any way intended to modify, change, expand or~~
 73 ~~contract the Medical Professional Liability Act~~ The proper construction of this section and the
 74 limitations and provisions of §55-7b-1 *et seq.* of this code shall be determined by principles of
 75 statutory construction.

§ 16-5C-16. Availability of reports and records.

1 [Repealed.]

§ 16-5C-17. Licenses and rules in force.

1 [Repealed.]

§ 16-5C-18. Separate accounts for residents' personal funds; consent for use; records; penalties.

1 (a) Each nursing home subject to the provisions of this article shall hold in a separate
 2 account and in trust each resident's personal funds deposited with the nursing home.

3 (b) No person may use or cause to be used for any purpose the personal funds of any
 4 resident admitted to any such nursing home unless consent for the use thereof has been obtained
 5 from the resident or from a committee or guardian or relative.

6 (c) Each nursing home shall maintain a true and complete record of all receipts for any
 7 disbursements from the personal funds account of each resident in the nursing home, including
 8 the purpose and payee of each disbursement, and shall render a true account of such record to
 9 the resident or his or her representative upon demand and upon termination of the resident's stay
 10 in the nursing home.

11 (d) Any person or corporation who violates any subsection of this section is guilty of a
 12 misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned in
 13 jail not more than one year, or both fined and imprisoned.

14 (e) Reports provided to review organizations are confidential unless inaccessibility of
 15 information interferes with the ~~director's~~ secretary's ability to perform his or her oversight function
 16 as mandated by federal regulations and this section.

17 (f) Notwithstanding §16-5C-18(b) of this code or any other provision of this code, upon
 18 the death of a resident, any funds remaining in his or her personal account shall be made payable
 19 to the person or probate jurisdiction administering the estate of said resident: *Provided*, That if
 20 after 30 days there has been no qualification over the decedent resident's estate, those funds are
 21 presumed abandoned and are reportable to the State Treasurer pursuant to the West Virginia
 22 Uniform Unclaimed Property Act, §36-8-1 *et seq.* of this code.

§ 16-5C-20. Hospice palliative care required to be offered.

1 (a) When the health status of a nursing home facility resident declines to the state of
 2 terminal illness or when the resident receives a physician's order for "comfort measures only," the
 3 facility shall notify the resident with information about the option of receiving hospice palliative
 4 care. If a nursing home resident is incapacitated, the facility shall also notify any person who has
 5 been given the authority of guardian, a medical power of attorney, or health care surrogate over
 6 the resident, information stating that the resident has the option of receiving hospice palliative
 7 care.

8 (b) The facility shall document that it has notified the resident, and any person who has
 9 been given a medical power of attorney or health care surrogate over the resident, information
 10 about the option of hospice palliative care and maintain the documentation so that the ~~director~~
 11 secretary may inspect the documentation, to verify the facility has complied with this section.

§ 16-5C-21. Employment restrictions.

1 ~~(a) Notwithstanding a legislative rule or provider manual issued by the department, a~~
 2 ~~person cannot be employed by a nursing home unless granted a variance by the secretary, or his~~
 3 ~~or her designee, if convicted of:~~

4 ~~(1) Abduction or kidnapping;~~

5 ~~(2) Any violent felony crime including, but not limited to, rape, sexual assault, homicide,~~
 6 ~~felonious physical assault or felonious battery;~~

7 ~~(3) Child or adult abuse or neglect;~~

- 8 ~~(4) Crimes which involve the exploitation of a child or an incapacitated adult;~~
9 ~~(5) Felony domestic battery or domestic assault;~~
10 ~~(6) Felony arson;~~
11 ~~(7) Felony or misdemeanor crime against a child or incapacitated adult which causes~~
12 ~~harm;~~
13 ~~(8) Felony drug-related offenses;~~
14 ~~(9) Felony driving under the influence of drugs or alcohol;~~
15 ~~(10) Hate crimes;~~
16 ~~(11) Murder or manslaughter;~~
17 ~~(12) Neglect or abuse by a caregiver;~~
18 ~~(13) Pornography crimes involving children or incapacitated adults including, but not~~
19 ~~limited to, use of minors or incapacitated adults in filming sexual explicit conduct, distribution and~~
20 ~~exhibition of material depicting minors or incapacitated adults in sexually explicit conduct or~~
21 ~~sending, distributing, exhibiting, possessing, displaying or transporting material by a parent,~~
22 ~~guardian or custodian, depicting a minor or incapacitated adult engaged in sexually explicit~~
23 ~~conduct;~~
24 ~~(14) Purchase or sale of a child;~~
25 ~~(15) Sexual offenses including, but not limited to, incest, sexual abuse or indecent~~
26 ~~exposure;~~
27 ~~(16) Felony or misdemeanor involving financial exploitation of a minor or elderly person;~~
28 ~~or~~
29 ~~(17) Felony offense related to fraud, theft, embezzlement, breach of fiduciary~~
30 ~~responsibility or other financial misconduct in connection with the delivery of a health care item or~~
31 ~~service, or with respect to any act or omission in a health care program operated or financed, in~~
32 ~~whole or in part, by any federal, state or local government agency; or~~
33 ~~(18) Any criminal offense related to the delivery of an item or service under Medicare or~~

34 ~~a state health care program.~~

35 ~~(b) The secretary shall propose rules for legislative approval in accordance with article~~
 36 ~~three, chapter twenty-nine-a of this code, to allow persons to appeal decisions, demonstrate~~
 37 ~~rehabilitation, request a review of their initial negative determinations and to implement any~~
 38 ~~variance procedure as may be required by state or federal law All personnel of a nursing home~~
 39 ~~by virtue of ownership, employment, engagement, or agreement with a provider or contractor shall~~
 40 ~~be subject to the provisions of the West Virginia Clearance for Access: Registry and Employment~~
 41 ~~Screening Act, §16-49-1 et seq. of this code and the rules promulgated pursuant thereto.~~

§ 16-5C-22. Jury trial waiver to be a separate document.

1 (a) Every written agreement containing a waiver of a right to a trial by jury that is entered
 2 into between a nursing home and a person for the nursing care of a resident, must have as a
 3 separate and stand alone document any waiver of a right to a trial by jury.

4 (b) Nothing in this section may be construed to require a court of competent jurisdiction
 5 to determine that the entire agreement or any portion thereof is enforceable, unenforceable,
 6 conscionable, or unconscionable.

7 ~~(c) This section applies to all agreements entered into on or after January 1, 2015~~

NOTE: The purpose of this bill is to update references to the secretary and bureau within the agency responsible for regulating nursing homes. This bill also updates the reference to the code of state rules for contested cases, updates the due process procedure, and makes technical cleanup.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.