

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 for

4 **H. B. 2522**

5
6 [Passed March 8, 2011; in effect ninety days from passage.]
7
8
9

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

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

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

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

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

25 (a) The director shall establish rules for prompt
26 investigation of all complaints of alleged violations by nursing
27 homes of applicable requirements of state law or rules, except for
28 such complaints that the director determines are willfully intended
29 to harass a licensee or are without any reasonable basis. Such

1 procedures shall include provisions for ensuring the
2 confidentiality of the complainant and for promptly informing the
3 complainant and the nursing home involved of the results of the
4 investigation.

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

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

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

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

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

6 **§16-5C-10. Reports of inspections; plans of correction;**
7 **assessment of penalties and use of funds derived**
8 **therefrom; hearings.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 (g) The director shall assess a civil penalty of not more than

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

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

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

21 (j) The director shall, in a civil judicial proceeding,
22 recover any unpaid assessment which has not been contested under
23 section twelve of this article within thirty days of receipt of
24 notice of such assessment, or which has been affirmed under the
25 provisions of that section and not appealed within thirty days of
26 receipt of the director's final order, or which has been affirmed
27 on judicial review, as provided in section thirteen of this
28 article. All money collected by assessments of civil penalties or

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

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

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

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

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

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

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

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

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

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

28 **§16-5C-12a. Independent informal dispute resolution.**

1 (a) A facility or licensee adversely affected by an order or
2 citation of a deficient practice issued pursuant to this article
3 or by a citation issued for a deficient practice pursuant to
4 federal law may request the independent informal dispute resolution
5 process. A facility may contest a cited deficiency as contrary to
6 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 informal
9 dispute resolution process for facilities. The independent review
10 organization shall be accredited by the Utilization Review
11 Accreditation Commission.

12 (c) The independent informal dispute resolution process is not
13 a formal evidentiary proceeding and utilizing the independent
14 informal dispute resolution process does not waive the facility's
15 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 of
19 the survey or inspection, or no later than twenty working days
20 following the last day of a complaint investigation, the director
21 shall transmit to the facility a statement of deficiencies
22 committed by the facility. Notification of the availability of the
23 independent informal dispute resolution process and an explanation
24 of the independent informal dispute resolution process shall be
25 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 the

1 cited deficiencies;

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

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

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

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

26 (B) A telephonic conference; or

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

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

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

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

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

22 (10) If the independent review organization determines that
23 the original statement of deficiencies should be changed as a
24 result of the independent informal dispute resolution process and
25 the director accepts the determination, the director shall transmit
26 a revised statement of deficiencies to the facility within ten
27 calendar days of the independent review organization's
28 determination.

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

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

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

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

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

27 (g) The Director shall report to the Legislative Oversight
28 Commission on Health and Human Resources Accountability during the

1 July interim meetings in 2013 on the informal dispute resolution
2 process. This report shall at a minimum include the number of
3 times the informal dispute resolution process is requested, the
4 result of the process, and the number of times the director does
5 not agree and changes the determination of the independent review
6 organization.