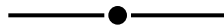


# **WEST VIRGINIA LEGISLATURE**

FIRST REGULAR SESSION, 2011



# **ENROLLED**

**COMMITTEE SUBSTITUTE**

**FOR**

**House Bill No. 2522**

(By Delegates Williams, Moyer, Perdue, Cann,  
Border and Hamilton)



Passed March 8, 2011

In Effect Ninety Days From Passage

# **E N R O L L E D**

COMMITTEE SUBSTITUTE

FOR

## **H. B. 2522**

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

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[Passed March 8, 2011; in effect ninety days from passage.]

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

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

That §16-5C-8, §16-5C-10 and §16-5C-12 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that

said code be amended by adding thereto a new section, designated §16-5C-12a, all to read as follows:

**ARTICLE 5C. NURSING HOMES.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 (d) Civil penalties assessed against nursing home shall  
42 not be less than fifty nor more than eight thousand dollars:  
43 *Provided*, That the director may not assess a penalty under  
44 state licensure for the same deficiency or violation cited  
45 under federal law and may not assess a penalty against a  
46 nursing home if the nursing home corrects the deficiency

47 within twenty days of receipt of written notice of the  
48 deficiency unless it is a repeat deficiency or the nursing home  
49 is a poor performer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 A facility or licensee adversely affected by an order or  
10 citation of a deficient practice issued pursuant to this article



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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 (4) Within ten working days of receipt of the written  
42 request for the independent informal dispute resolution  
43 process made by a facility, the independent review  
44 organization shall hold an independent informal dispute  
45 resolution conference unless additional time is requested by  
46 the facility. Before the independent informal dispute  
47 resolution conference, the facility may submit additional  
48 information.

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

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

56 (B) A telephonic conference; or

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

59 (6) If the independent review organization determines the  
60 need for additional information, clarification or discussion

61 after conclusion of the independent informal dispute  
62 resolution conference, the director and the facility shall  
63 present the requested information.

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

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

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

82 (10) If the independent review organization determines  
83 that the original statement of deficiencies should be changed  
84 as a result of the independent informal dispute resolution  
85 process and the director accepts the determination, the  
86 director shall transmit a revised statement of deficiencies to  
87 the facility within ten calendar days of the independent  
88 review organization's determination.

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

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

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

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

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

\_\_\_\_\_  
*Chairman, House Committee*

\_\_\_\_\_  
*Chairman, Senate Committee*

Originating in the House.

To take effect ninety days from passage.

\_\_\_\_\_  
*Clerk of the House of Delegates*

\_\_\_\_\_  
*Clerk of the Senate*

\_\_\_\_\_  
*Speaker of the House of Delegates*

\_\_\_\_\_  
*President of the Senate*

The within \_\_\_\_\_ this the \_\_\_\_\_  
day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
*Governor*