

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 408

SENATORS TAKUBO, MARONEY, STOLLINGS, AND

PLYMALE, *original sponsors*

[Passed March 10, 2018; in effect 90 days from passage]

1 AN ACT to repeal §16-5D-16 and §16-5D-17 of the Code of West Virginia, 1931, as amended; to
2 amend and reenact §16-5C-3 of said code; and to amend and reenact §16-5D-2, §16-5D-
3 3, §16-5D-4, §16-5D-5, §16-5D-6, §16-5D-7, §16-5D-8, §16-5D-9, §16-5D-10, §16-5D-
4 11, §16-5D-12, §16-5D-13, and §16-5D-15 of said code, all relating to the licensure of
5 nursing homes and assisted living residences; requiring real-time online publication of
6 certain information related to nursing homes and assisted living residences by Secretary
7 of Department of Health and Human Resources in lieu of annual report; identifying
8 information to be published online; defining terms; updating definitions; clarifying rule
9 requirements; identifying additional legislative rules to be proposed by Secretary of
10 Department of Health and Human Resources; allowing physical and electronic delivery
11 methods for certain reports; repealing outdated sections of code; eliminating duplicative
12 provisions of code; clarifying enforcement action and due process procedures; setting
13 forth actions to be taken if license is suspended, denied, limited, or revoked; requiring
14 reporting by assisted living residence administrator to Secretary of Board of Pharmacy;
15 barring certain individuals from application to operate another assisted living facility;
16 setting maximum period of suspension on license suspension for assisted living facility;
17 and making technical corrections.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5C. NURSING HOMES.

§16-5C-3. Powers, duties, and rights of secretary.

1 In the administration of this article, the secretary shall have the following powers, duties,
2 and rights:

3 (a) To enforce rules and standards promulgated hereunder for nursing homes;

4 (b) To exercise as sole authority all powers relating to the issuance, suspension, and
5 revocation of licenses of nursing homes;

6 (c) To enforce rules promulgated hereunder governing the qualification of applicants for
7 nursing home licenses, including, but not limited to, educational requirements, financial
8 requirements, personal, and ethical requirements;

9 (d) To receive and disburse federal funds and to take whatever action not contrary to law
10 as may be proper and necessary to comply with the requirements and conditions for the receipt
11 of such federal funds;

12 (e) To receive and disburse for authorized purposes any moneys appropriated to the
13 department by the Legislature;

14 (f) To receive and disburse for purposes authorized by this article any funds that may
15 come to the department by gift, grant, donation, bequest, or devise, according to the terms thereof,
16 as well as funds derived from the department's operation, or otherwise;

17 (g) To make contracts, and to execute all instruments necessary or convenient in carrying
18 out the secretary's functions and duties; and all such contracts, agreements, and instruments will
19 be executed by the secretary;

20 (h) To appoint officers, agents, employees, and other personnel and fix their
21 compensation;

22 (i) To offer and sponsor educational and training programs for nursing homes for clinical,
23 administrative, management, and operational personnel;

24 (j) To undertake survey, research and planning projects, and programs relating to
25 administration and operation of nursing homes and to the health, care, treatment, and service in
26 general of such homes;

27 (k) To assess civil penalties for violations of facility standards, in accordance with §16-5C-
28 10 of this code;

29 (l) To inspect any nursing home and any records maintained therein that are necessary to
30 determine compliance with licensure laws or Medicare or Medicaid certification, subject to the
31 provisions of §16-5C-9 and §16-5C-10 of this code;

32 (m) To establish and implement procedures, including informal conferences,
33 investigations, and hearings, subject to applicable provisions of §29A-3-1 *et seq.* of this code, and
34 to enforce compliance with the provisions of this article and with rules issued hereunder;

35 (n) To subpoena witnesses and documents, administer oaths and affirmations, and to
36 examine witnesses under oath for the conduct of any investigation or hearing. Upon failure of a
37 person without lawful excuse to obey a subpoena to give testimony, and upon reasonable notice
38 to all persons affected thereby, the secretary may apply to the circuit court of the county in which
39 the hearing is to be held for an order compelling compliance;

40 (o) To make complaint or cause proceedings to be instituted against any person or
41 persons for the violation of the provisions of this article or of rules issued hereunder. Such action
42 may be taken by the secretary without the sanction of the prosecuting attorney of the county in
43 which proceedings are instituted if the officer fails or refuses to discharge his or her duty. The
44 circuit court of the county in which the conduct has occurred or, if emergency circumstances
45 require, the Circuit Court of Kanawha County shall have jurisdiction in all civil enforcement actions
46 brought under this article and may order equitable relief without bond. In no such case may the
47 secretary or any person acting under the secretary's direction be required to give security for
48 costs;

49 (p) To delegate authority to the secretary's employees and agents to perform all functions
50 of the secretary;

51 (q) To make available to the Governor, the Legislature, and the public at all times online
52 access through the Office of Health Facility Licensure and Certification website the following
53 information. The online information will describe the licensing and investigatory activities of the
54 department during the year. The online information will include a list of all nursing homes in the
55 state, whether such homes are proprietary or nonproprietary; the name of the administrator or
56 administrators; the total number of beds; the legal name of the facility; state identification number;

57 health investigations information and reports; life safety investigations information and reports;
58 and whether or not those nursing homes listed accept Medicare and Medicaid residents; and

59 (r) To establish a formal process for licensed facilities to file complaints about the
60 inspection process or inspectors.

ARTICLE 5D. ASSISTED LIVING RESIDENCES.

§16-5D-2. Definitions.

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

2 (1) "Assisted living residence" means any living facility, residence, or place of
3 accommodation, however named, available for four or more residents, in this state which is
4 advertised, offered, maintained, or operated by the ownership or management, whether for a
5 consideration or not, for the express or implied purpose of having personal assistance or
6 supervision, or both, provided to any residents therein who are dependent upon the services of
7 others by reason of physical or mental impairment and who may also require nursing care at a
8 level that is not greater than limited and intermittent nursing care: *Provided*, That the care or
9 treatment in a household, whether for compensation or not, of any person related by blood or
10 marriage, within the degree of consanguinity of second cousin to the head of the household, or
11 his or her spouse, may not be deemed to constitute an assisted living residence within the
12 meaning of this article. Nothing contained in this article applies to hospitals, as defined under §16-
13 5B-1 of this code; or state institutions, as defined under §25-1-3 or §27-1-6 of this code; or
14 residential care homes operated by the federal government or the state; or institutions operated
15 for the treatment and care of alcoholic patients; or offices of physicians; or hotels, boarding
16 homes, or other similar places that furnish to their guests only room and board; or to homes or
17 asylums operated by fraternal orders pursuant to §35-3-1 *et seq.* of this code;

18 (2) "Deficiency" means a statement of the rule and the fact that compliance has not been
19 established and the reasons therefor;

20 (3) "Department" means the state Department of Health and Human Resources;

21 (4) "Director" means the Director of the Office of Health Facility Licensure and Certification
22 within the Office of the Inspector General.

23 (5) "Division" means the Office of Health Facility Licensure and Certification within the
24 Office of the Inspector General of the state Department of Health and Human Resources;

25 (6) "Limited and intermittent nursing care" means direct hands-on nursing care of an
26 individual who needs no more than two hours of nursing care per day for a period of time no
27 longer than 90 consecutive days per episode: *Provided*, That such time limitations shall not apply
28 to an individual who, after having established a residence in an assisted living residence,
29 subsequently qualifies for and receives services coordinated by a licensed hospice and such time
30 limitations shall not apply to home health services provided by a Medicare-certified home health
31 agency. Limited and intermittent nursing care may only be provided by or under the supervision
32 of a registered professional nurse and in accordance with rules proposed by the secretary for
33 legislative approval in accordance with the provisions of §29A-3-1 *et seq.* of this code;

34 (7) "Nursing care" means those procedures commonly employed in providing for the
35 physical, emotional, and rehabilitational needs of the ill or otherwise incapacitated which require
36 technical skills and knowledge beyond that which the untrained person possesses, including, but
37 not limited to, such procedures as: Irrigations, catheterization, special procedures contributing to
38 rehabilitation, and administration of medication by any method which involves a level of
39 complexity and skill in administration not possessed by the untrained person;

40 (8) "Person" means an individual and every form of organization, whether incorporated or
41 unincorporated, including any partnership, corporation, trust, association, or political subdivision
42 of the state;

43 (9) "Personal assistance" means personal services, including, but not limited to, the
44 following: Help in walking, bathing, dressing, feeding, or getting in or out of bed, or supervision
45 required because of the age or mental impairment of the resident;

46 (10) "Resident" means an individual living in an assisted living residence for the purpose
47 of receiving personal assistance or limited and intermittent nursing services;

48 (11) "Secretary" means the secretary of the state Department of Health and Human
49 Resources or his or her designee; and

50 (12) "Substantial compliance" means a level of compliance with the rules such that
51 identified deficiencies pose no greater risk to resident health or safety than the potential for
52 causing minimal harm.

53 (b) The secretary may define in rules any term used herein which is not expressly defined.

§16-5D-3. Powers, duties, and rights of secretary.

1 In the administration of this article, the secretary has the following powers, duties, and
2 rights:

3 (a) To enforce rules and standards for assisted living residences which are adopted,
4 promulgated, amended, or modified by the secretary;

5 (b) To exercise as sole authority all powers relating to the issuance, suspension, and
6 revocation of licenses of assisted living residences;

7 (c) To enforce rules adopted, promulgated, amended, or modified by the secretary
8 governing the qualification of applicants for assisted living residences, including, but not limited
9 to, educational requirements, financial requirements, personal, and ethical requirements;

10 (d) To receive and disburse federal funds and to take whatever action not contrary to law
11 as may be proper and necessary to comply with the requirements and conditions for the receipt
12 of federal funds;

13 (e) To receive and disburse for authorized purposes any moneys appropriated for the
14 division by the Legislature;

15 (f) To receive and disburse for purposes authorized by this article, any funds that may
16 come to the division by gift, grant, donation, bequest, or devise, according to the terms thereof,
17 as well as funds derived from the division's operation or otherwise;

18 (g) To make contracts and to execute all instruments necessary or convenient in carrying
19 out the secretary's functions and duties; and all such contracts, agreements, and instruments will
20 be executed by the secretary;

21 (h) To appoint officers, agents, employees, and other personnel and fix their
22 compensation;

23 (i) To offer and sponsor educational and training programs for assisted living residences'
24 administrative, management, and operational personnel;

25 (j) To undertake survey, research and planning projects, and programs relating to
26 administration and operation of assisted living residences and to the health, care, treatment, and
27 service in general of residents of assisted living residences;

28 (k) To assess civil penalties for violations of assisted living residence standards in
29 accordance with §16-5D-10 of this code;

30 (l) To inspect any assisted living residence and any records maintained therein subject to
31 the provisions of §16-5D-9 and §16-5D-10 of this code;

32 (m) To establish and implement procedures, including informal conferences,
33 investigations and hearings, subject to applicable provisions of §29A-3-1 *et seq.* of this code, and
34 to enforce compliance with the provisions of this article and with rules issued hereunder by the
35 secretary;

36 (n) To subpoena witnesses and documents, administer oaths and affirmations, and to
37 examine witnesses under oath for the conduct of any investigation or hearing. Upon failure of a
38 person without lawful excuse to obey a subpoena to give testimony, and upon reasonable notice
39 to all persons affected thereby, the secretary may apply to the circuit court of the county in which
40 the hearing is to be held or to the Circuit Court of Kanawha County for an order compelling
41 compliance;

42 (o) To make complaint or cause proceedings to be instituted against any person for the
43 violation of the provisions of this article or of rules issued hereunder by the secretary. Such action

44 may be taken by the secretary without the sanction of the prosecuting attorney of the county in
45 which proceedings are instituted if the prosecuting attorney fails or refuses to discharge his or her
46 duty. The Circuit Court of Kanawha County or the circuit court of the county in which the conduct
47 has occurred shall have jurisdiction in all civil enforcement actions brought under this article and
48 may order equitable relief without bond. In no such case may the secretary or any person acting
49 under the secretary's direction be required to give security for costs;

50 (p) To delegate authority to the secretary's employees and agents to perform all functions
51 of the secretary except the making of final decisions in adjudications; and

52 (q) To make available to the Governor, the Legislature and the public at all times online
53 access through the Office of Health Facility Licensure and Certification website the following
54 information. The online information will describe the assisted living residence licensing and
55 investigatory activities of the division. The online information will include a list of all assisted living
56 residences in the state and such of the following information as the secretary determines to apply:
57 Whether the assisted living residences are proprietary or nonproprietary; the classification of each
58 assisted living residence; the name of the administrator or administrators; the total number of
59 beds; license type; license number; license expiration date; health investigations information and
60 reports; life safety investigations information and reports; and whether or not those assisted living
61 residences listed accept Medicare and Medicaid residents.

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

1 The secretary may, as he or she determines necessary, employ administrative employees,
2 inspectors, or other persons as may be necessary to properly carry out the provisions of this
3 article. All employees of the division will be members of the state civil service system. Inspectors
4 and other employees as may be duly designated by the secretary will act as the secretary's
5 representatives and, under the direction of the secretary, will enforce the provisions of this article
6 and all duly promulgated rules of the secretary and, in the discharge of official duties, will have
7 the right of entry into any place maintained as an assisted living residence at any time.

§16-5D-5. Rules; minimum standards for assisted living residences.

1 (a) The secretary will propose rules for legislative approval in accordance with the
2 provisions of §29A-3-1 *et seq.* of this code to carry out the purposes and intent of this article and
3 to enable the secretary to exercise the powers and perform the duties conferred upon the
4 secretary by this article.

5 (b) The secretary will propose rules establishing minimum standards of operation of
6 assisted living residences, including, but not limited to, the following:

7 (1) Administrative policies, including:

8 (A) An affirmative statement of the right of access to assisted living residences by
9 members of recognized community organizations and community legal services programs whose
10 purposes include rendering assistance without charge to residents, consistent with the right of
11 residents to privacy;

12 (B) A statement of the rights and responsibilities of residents;

13 (C) The process to be followed by applicants seeking a license;

14 (D) The clinical, medical, resident, and business records to be kept by the assisted living
15 residence;

16 (E) The procedures for inspections and for the review of utilization and quality of resident
17 care; and

18 (F) The procedures for informal dispute resolution and administrative due process and
19 when such remedies are available.

20 (2) Minimum numbers and qualifications of personnel, including management, medical
21 and nursing, aides, orderlies, and support personnel, according to the size and classification of
22 the assisted living residence;

23 (3) Safety requirements;

24 (4) Sanitation requirements;

25 (5) Protective and personal services to be provided;

26 (6) Dietary services to be provided;

- 27 (7) Maintenance of health records;
- 28 (8) Social and recreational activities to be made available;
- 29 (9) Physical facilities;
- 30 (10) Requirements related to provision of limited and intermittent nursing;
- 31 (11) Visitation privileges governing access to a resident by immediate family or other
- 32 relatives of the resident and by other persons who are visiting with the consent of the resident;
- 33 and
- 34 (12) Such other categories as the secretary determines to be appropriate to ensure
- 35 resident's health, safety, and welfare.

36 (c) The secretary will include in rules detailed standards for each of the categories of

37 standards established pursuant to §16-5D-5(b) and §16-5D-5(d) of this code and will classify such

38 standards as follows:

39 (1) Class I standards are standards the violation of which, as the secretary determines,

40 would present either an imminent danger to the health, safety, or welfare of any resident or a

41 substantial probability that death or serious physical harm would result;

42 (2) Class II standards are standards which the secretary determines have a direct or

43 immediate relationship to the health, safety, or welfare of any resident, but which do not create

44 imminent danger;

45 (3) Class III standards are standards which the secretary determines have an indirect or

46 a potential impact on the health, safety, or welfare of any resident.

47 (d) An assisted living residence shall attain substantial compliance with standards

48 established pursuant to this section and such other requirements for a license as may be

49 established by rule under this article.

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

- 1 (a) There shall be one assisted living residence license for each assisted living residence.
- 2 No person may establish, operate, maintain, offer, or advertise an assisted living residence within
- 3 this state unless and until he or she obtains a valid license therefor as provided in this article,

4 which license remains unsuspended, unrevoked, and unexpired. No public official or employee
5 may place any person in, or recommend that any person be placed in, or directly or indirectly
6 cause any person to be placed in any assisted living residence, as defined in §16-5D-2 of this
7 code, which is being operated without a valid license from the secretary. The licensee shall be
8 responsible for, and shall have complete control of, the operation and premises of the assisted
9 living residence and the personal assistance and supervision provided to the residents: *Provided,*
10 That the secretary may review any leases or any contracts, subcontracts, agreements, or
11 arrangements for the provision of on-site services to the residents of an assisted living residence
12 to ensure the proper care, safety, and welfare of current or potential residents. Nothing in this
13 article shall be construed to prevent or prohibit the ability of a resident of an assisted living
14 residence to contract or arrange for, and to receive, privately paid nursing care or personal
15 assistance in addition to those services provided by the licensee, subject to the consent and
16 cooperation of the licensee and consistent with the duties and responsibilities imposed by this
17 section.

18 (b) Nothing in this article shall be construed to require the licensing of landlords or property
19 owners who are not involved in the provision of supervision, personal assistance, limited and
20 intermittent nursing care, or other on-site professional services for the residents of an assisted
21 living residence or in the advertising, recruitment of residents, transportation of residents, or other
22 substantial and ongoing services for the operation or maintenance of the assisted living residence.

23 (c) The procedure for obtaining a license shall be as follows:

24 The applicant shall submit an application to the secretary on a form to be prescribed by
25 the secretary, containing such information as may be necessary to show that the applicant is in
26 compliance with the standards for assisted living residences as established by this article and the
27 rules lawfully promulgated by the secretary hereunder. The application and any exhibits thereto
28 shall provide the following information:

29 (A) The name and address of the applicant;

30 (B) The name, address, and principal occupation:

31 (i) Of each person who, as a stockholder or otherwise, has a proprietary interest of 10
32 percent or more in the applicant;

33 (ii) Of each officer and director of a corporate applicant;

34 (iii) Of each trustee and beneficiary of an applicant which is a trust; and

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

37 (C) The name and address of the owner of the premises of the assisted living residence
38 or proposed assisted living residence, if he or she is a different person from the applicant, and in
39 such case, the name and address:

40 (i) Of each person who, as a stockholder or otherwise, has a proprietary interest of 10
41 percent or more in the owner;

42 (ii) Of each officer and director of a corporate applicant;

43 (iii) Of each trustee and beneficiary of the owner if it is a trust; and

44 (iv) Where a corporation has a proprietary interest of 25 percent or more in the owner, the
45 name and address of each officer and director of the corporation;

46 (D) Where the applicant is the lessee or the assignee of the assisted living residence or
47 the premises of the proposed assisted living residence, a signed copy of the lease and any
48 assignment thereof;

49 (E) The name and address of the assisted living residence or the premises of the proposed
50 assisted living residence;

51 (F) The proposed bed quota of the assisted living residence and the proposed bed quota
52 of each unit thereof;

53 (G) An organizational plan for the assisted living residence indicating the number of
54 persons employed or to be employed, the positions and duties of all employees;

55 (H) The name and address of the individual who is to serve as administrator;

56 (I) Such evidence of compliance with applicable laws and rules governing zoning,
57 buildings, safety, fire prevention, and sanitation as the secretary may require; and

58 (J) Such additional information as the secretary may require.

59 (d) Upon receipt and review of an application for license made pursuant to §16-5D-6(a) of
60 this code and inspection of the applicant assisted living residence pursuant to §16-5D-9 and §16-
61 5D-10 of this code, the secretary will issue a license if he or she finds:

62 (1) That an individual applicant, and every partner, trustee, officer, secretary, and
63 controlling person of an applicant which is not an individual, is a person responsible and suitable
64 to operate or to direct or participate in the operation of an assisted living residence by virtue of
65 financial capacity, appropriate business or professional experience, a record of compliance with
66 lawful orders of the department, if any, and lack of revocation of a license during the previous five
67 years;

68 (2) That the assisted living residence is under the supervision of an administrator who is
69 qualified by training and experience; or

70 (3) That the assisted living residence is in substantial compliance with standards
71 established pursuant to §16-5D-5 of this code and such other requirements for a license as the
72 secretary may establish by rule under this article.

73 (e) The secretary may deny an initial or renewal license if the information provided in an
74 application or report is known by the applicant to be false or the applicant fails to report required
75 information or for any other reason permitted by law or rules promulgated pursuant to this article.

76 (f) Any license granted by the secretary will state the maximum bed capacity for which it
77 is granted, the date the license was issued, and the expiration date. Licenses will be issued for a
78 period not to exceed one year for assisted living residences: *Provided*, That any such license in
79 effect for which timely application for renewal, together with payment of the proper fee has been
80 made to the department in conformance with the provisions of this article and the rules issued
81 thereunder and prior to the expiration date of the license, shall continue in effect until: (1) One

82 year following the expiration date of the license; or (2) the date of the revocation or suspension of
83 the license pursuant to the provisions of this article; or (3) the date of issuance of a new license,
84 whichever date first occurs. Each license will be issued only for the premises and persons named
85 in the application and is not transferable or assignable: *Provided, however,* That in the case of
86 the transfer of ownership of an assisted living residence with an unexpired license, the application
87 of the new owner for a license shall have the effect of a license for a period of three months when
88 filed with the secretary. Every license shall be posted in a conspicuous place in the assisted living
89 residence for which it is issued so as to be accessible to and in plain view of all residents and
90 visitors of the assisted living residence.

91 (g) An original license shall be renewable, conditioned upon the licensee filing timely
92 application for the extension of the term of the license accompanied by the fee and contingent
93 upon evidence of compliance with the provisions of this article and rules promulgated by the
94 secretary hereunder; the application shall be accompanied by:

95 (1) The information required in §16-5D-6(c)(A) through §16-5D-6(c)(C) of this code.

96 (2) A balance sheet of the assisted living residence as of the end of its fiscal year, setting
97 forth assets and liabilities at such date, including all capital, surplus, reserve, depreciation, and
98 similar accounts;

99 (3) A statement of operations of the assisted living residence as of the end of its fiscal
100 year, setting forth all revenues, expenses, taxes, extraordinary items, and other credits or
101 charges; and

102 (4) A statement of any changes in the name, address, management, or ownership
103 information on file with the secretary.

104 (h) In the case of an application for a renewal license, if all requirements of §16-5D-5 and
105 §16-5D-6 of this code are not met, the secretary may in his or her discretion issue a provisional
106 license, provided that care given in the assisted living residence is adequate for resident needs
107 and the assisted living residence has demonstrated improvement and evidences potential for

108 substantial compliance within the term of the license: *Provided*, That a provisional renewal may
109 not be issued for a period greater than one year, may not be renewed, and may not be issued to
110 any assisted living residence with uncorrected violations of any Class I standard, as defined in
111 §16-5D-5(c) of this code.

112 (i) A nonrefundable application fee in the amount of \$65 for an original assisted living
113 residence license shall be paid at the time application is made for the license. An average cost of
114 all direct costs for the initial licensure for the preceding 10 facilities based on the size of the
115 facility's licensed bed capacity shall be borne by the applicant and shall be received by the
116 secretary prior to the issuance of an initial or amended license. The license fee for renewal of a
117 license shall be at the rate of \$6 per bed per year for assisted living residences except the annual
118 rate per bed may be assessed for licenses issued for less than one year. The secretary may
119 annually adjust the licensure fees for inflation based upon the consumer price index. The bed
120 capacity for the holder of each license will be determined by the secretary. All license fees shall
121 be due and payable to the secretary annually, and in the manner set forth in the rules promulgated
122 by the secretary. The fee and application shall be submitted to the secretary who will retain both
123 the application and fee pending final action on the application. All fees received by the secretary
124 under the provisions of this article will be deposited in accordance with §16-1-13 of this code.

§16-5D-7. Cost disclosure; surety for residents' funds.

1 (a) Each assisted living residence shall disclose in writing to all prospective residents a
2 complete and accurate list of all costs which may be incurred by them. Residents are not liable
3 for any cost not so disclosed.

4 (b) If the assisted living residence handles any money for residents within the assisted
5 living residence, the licensee or his or her authorized representative shall give a bond in an
6 amount consistent with this subsection and with such surety as the secretary will approve. The
7 bond shall be upon condition that the licensee shall hold separately and in trust all residents' funds
8 deposited with the licensee, shall administer the funds on behalf of the resident in the manner

9 directed by the depositor, shall render a true and complete account to the depositor and the
10 secretary when requested, and at least quarterly to the resident, and upon termination of the
11 deposit, shall account for all funds received, expended, and held on hand. The licensee shall file
12 a bond in a sum to be fixed by the secretary based upon the magnitude of the operations of the
13 applicant, but which sum may not be less than \$2,500.

14 (c) Every person injured as a result of any improper or unlawful handling of the money of
15 a resident of an assisted living residence may bring an action in a proper court on the bond
16 required to be posted by the licensee pursuant to this subsection for the amount of damage
17 suffered as a result thereof to the extent covered by the bond. Whenever the secretary determines
18 that the amount of any bond which is filed pursuant to this subsection is insufficient to adequately
19 protect the money of residents which is being handled, or whenever the amount of any bond is
20 impaired by any recovery against the bond, the secretary may require the licensee to file an
21 additional bond in such amount as necessary to adequately protect the money of residents being
22 handled.

23 (d) The provisions of §16-5D-7(b) of this code do not apply if the licensee handles less
24 than \$25 per resident and less than \$500 for all residents in any month.

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

1 (a) The secretary will establish, by rule, procedures for prompt investigation of all
2 complaints of alleged violations by assisted living residences of applicable requirements of state
3 law or rules, except for such complaints that the secretary determines are willfully intended to
4 harass a licensee or are without any reasonable basis. Such procedures will include provisions
5 for ensuring the confidentiality of the complainant and of any other person so named in the
6 complaint and for promptly informing the complainant and the assisted living residence involved
7 of the results of the investigation.

8 (b) If, after its investigation, the secretary determines that the complaint has merit, the
9 secretary will take appropriate disciplinary action and will advise any injured party of the possibility
10 of a civil remedy under this article.

11 (c) No assisted living residence may discharge or in any manner discriminate against any
12 resident or employee for the reason that the resident or employee has filed a complaint or
13 participated in any proceeding specified in this article. Violation of this prohibition by any assisted
14 living residence constitutes grounds for the suspension or revocation of the license of the assisted
15 living residence as provided in §16-5D-11 and §16-5D-12 of this code. Any type of discriminatory
16 treatment of a resident or employee by whom, or upon whose behalf, a complaint has been
17 submitted to the secretary, or any proceeding instituted under this article, within 120 days of the
18 filing of the complaint or the institution of the action, shall raise a rebuttable presumption that the
19 action was taken by the assisted living residence in retaliation for the complaint or action.

§16-5D-9. Inspections.

1 (a) The secretary and any duly designated employee or agent thereof will have the right
2 to enter upon and into the premises of any assisted living residence at any time for which a license
3 has been issued, for which an application for license has been filed with the secretary, or which
4 the secretary has reason to believe is being operated or maintained as an assisted living
5 residence without a license. If entry is refused by the owner or person in charge of the assisted
6 living residence, the secretary will apply to the circuit court of the county in which the assisted
7 living residence is located or the Circuit Court of Kanawha County for an administrative inspection
8 warrant.

9 (b) The secretary, by the secretary's authorized employees or agents, will conduct at least
10 one inspection prior to issuance of a license pursuant to §16-5D-6 of this code and will conduct
11 periodic unannounced inspections thereafter to determine compliance by the assisted living
12 residence with applicable statutes and rules promulgated thereunder. All assisted living
13 residences shall comply with rules of the State Fire Commission. The State Fire Marshal, by his

14 or her employees or authorized agents, shall make all fire, safety, and like inspections. The
15 secretary may provide for such other inspections as the secretary may deem necessary to carry
16 out the intent and purpose of this article. If after investigating a complaint the secretary determines
17 that the complaint is substantiated and that an immediate and serious threat to a resident's health
18 or safety exists, the secretary may invoke any remedies available pursuant to §16-5D-11 and
19 §16-5D-12 of this code. Any assisted living residence aggrieved by a determination or
20 assessment made pursuant to this section shall have the right to an administrative appeal as set
21 forth in §16-5D-12 of this code.

**§16-5D-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 §16-5D-9 of this code will be in writing and
2 will list all deficiencies in the assisted living residence's compliance with the provisions of this
3 article and the rules adopted by the secretary hereunder. The director will send a copy of the
4 report to the assisted living residence by physical or electronic method with verifiable delivery,
5 and will specify a time within which the assisted living residence shall submit a plan for correction
6 of deficiencies, which plan will be approved, rejected, or modified by the secretary. The inspectors
7 will allow audio taping of the exit conference for licensure inspections with all costs directly
8 associated with the taping to be paid by the assisted living residence, provided that an original
9 tape is provided to inspectors at the end of taping.

10 (b) Upon an assisted living residence's failure to submit a plan of correction which is
11 approved by the secretary, or to correct any deficiency within the time specified in an approved
12 plan of correction, the secretary may assess civil penalties as hereinafter provided or may initiate
13 any other legal or disciplinary action as provided by this article.

14 (c) Nothing in this section may be construed to prohibit the secretary from enforcing a rule,
15 administratively or in court, without first affording formal opportunity to make correction under this
16 section, where, in the opinion of the secretary, the violation of the rule jeopardizes the health or

17 safety of residents or where the violation of the rule is the second or subsequent violation
18 occurring during a period of 12 full months.

19 (d) Civil penalties assessed against assisted living residences will be classified according
20 to the nature of the violation as defined in §16-5D-5(c) of this code and rules promulgated
21 thereunder by the secretary, as follows: For each violation of a Class I standard, a civil penalty of
22 not less than \$50 nor more than \$500 will be imposed; for each violation of a Class II standard, a
23 civil penalty of not less than \$25 nor more than \$50 will be imposed; for each violation of a Class
24 III standard, a civil penalty of not less than \$10 nor more than \$25 will be imposed. Each day a
25 violation continues, after the date of citation, shall constitute a separate violation. The date of
26 citation is the date the facility receives the written statement of deficiencies.

27 (e) The secretary will assess a civil penalty not to exceed \$2,000 against any individual
28 who notifies, or causes to be notified, an assisted living residence of the time or date on which an
29 inspection is scheduled to be conducted under this article.

30 (f) If the secretary assesses a penalty under this section, the secretary will cause delivery
31 of notice of the penalty by personal service or by certified mail. The notice will state the amount
32 of the penalty, the action or circumstance for which the penalty is assessed, the requirement that
33 the action or circumstance violates, and the basis upon which the secretary assessed the penalty
34 and selected the amount of the penalty.

35 (g) The secretary will, in a civil judicial proceeding, recover any unpaid assessment which
36 has not been contested under §16-5D-12 of this code within 30 days of receipt of notice of the
37 assessment or which has been affirmed under the provisions of that section and not appealed
38 within 30 days of receipt of the Board of Review's final order or which has been affirmed on judicial
39 review, as provided in §16-5D-13 of this code. All money collected by assessments of civil
40 penalties or interest will be paid into a special resident benefit account and will be applied by the
41 secretary only for the protection of the health or property of residents of assisted living residences
42 operated within the state that the secretary finds to be deficient, including payment for the costs

43 of relocation of residents to other facilities, operation of an assisted living residence pending
44 correction of deficiencies, or closure and reimbursement of residents for personal funds lost.

45 (h) The opportunity for a hearing on an action taken under this section shall be as provided
46 in §16-5D-12 of this code. In addition to any other rights of appeal conferred upon an assisted
47 living residence pursuant to this section, an assisted living residence shall have the right to
48 request a hearing and seek judicial review pursuant to §16-5D-12 and §16-5D-13 of this code to
49 contest the citing by the secretary of a deficiency on an inspection report, irrespective of whether
50 the deficiency results in the imposition of a civil penalty.

**§16-5D-11. Enforcement actions; assessment of interest; collection of assessments;
hearings.**

1 (a) The secretary will, by order, impose a ban on the admission of residents or reduce the
2 bed quota of the assisted living residence, or any combination thereof, where he or she finds upon
3 inspection of the assisted living residence that the licensee is not providing adequate care under
4 the assisted living residence's existing bed quota and that reduction in quota or imposition of a
5 ban on admissions, or any combination thereof, would place the licensee in a position to render
6 adequate care. Any notice to a licensee of reduction in quota or ban on new admissions will
7 include the terms of the order, the reasons therefor, and the date set for compliance.

8 (b) The secretary may suspend or revoke a license issued under this article or take other
9 action as set forth in this section if he or she finds upon inspection that there has been a
10 substantial failure to comply with the provisions of this article or the standards or rules
11 promulgated pursuant hereto.

12 (c) The suspension, expiration, forfeiture, or cancellation by operation of law or order of
13 the secretary of a license issued by the secretary or the withdrawal of an application for a license
14 after it has been filed with the secretary, may not deprive the secretary of the secretary's authority
15 to institute or continue an enforcement action or a proceeding for the denial of a license application
16 against the licensee or applicant upon any ground provided by law or to deny the license

17 application or suspend or revoke the license or otherwise take enforcement action on any such
18 ground.

19 (d) In addition to other remedies provided in this article, upon petition from the secretary,
20 the circuit court of the county in which the conduct has occurred or is occurring or the Circuit Court
21 of Kanawha County may determine that an assisted living residence's deficiencies under this
22 article constitute an emergency immediately jeopardizing the health, safety, welfare, or rights of
23 its residents and issue an order to:

24 (1) Close the assisted living residence;

25 (2) Transfer residents in the assisted living residence to other facilities; or

26 (3) Appoint temporary management to oversee the operation of the assisted living
27 residence and to assure the health, safety, welfare, and rights of the assisted living residence's
28 residents where there is a need for temporary management while:

29 (A) There is an orderly closure of the assisted living residence; or

30 (B) Improvements are made to bring the assisted living residence into compliance with all
31 the applicable requirements of this article.

32 (e) If the secretary petitions a circuit court for the closure of an assisted living residence,
33 the transfer of residents, or the appointment of a temporary management, the circuit court shall
34 hold a hearing no later than seven days thereafter, at which time the secretary and the licensee
35 or operator of the assisted living residence may participate and present evidence.

36 (f) A circuit court may divest the licensee or operator of possession and control of an
37 assisted living residence in favor of temporary management. The temporary management shall
38 be responsible to the court and shall have such powers and duties as the court may grant to direct
39 all acts necessary or appropriate to conserve the property and promote the health, safety, welfare,
40 and rights of the residents of the assisted living residence, including, but not limited to, the
41 replacement of management and staff, the hiring of consultants, the making of any necessary
42 expenditures to close the assisted living residence, or to repair or improve the assisted living

43 residence so as to return it to compliance with applicable requirements and the power to receive,
44 conserve, and expend funds, including payments on behalf of the licensee or operator of the
45 assisted living residence. Priority shall be given to expenditures for current direct resident care or
46 the transfer of residents.

47 (g)The person charged with temporary management:

48 (1) Shall be an officer of the court;

49 (2) Shall be paid by the licensee;

50 (3) Is not liable for conditions at the assisted living residence which existed or originated
51 prior to his or her appointment; and

52 (4) Is not personally liable, except for his or her own gross negligence and intentional acts
53 which result in injuries to persons or damage to property at the assisted living residence during
54 his or her temporary management.

55 (h) No person may impede the operation of temporary management. There shall be an
56 automatic stay for a 90-day period subsequent to the establishment of temporary management of
57 any action that would interfere with the functioning of the assisted living residence, including, but
58 not limited to, cancellation of insurance policies, termination of utility services, attachments to
59 working capital accounts, foreclosures, evictions, and repossessions of equipment used in the
60 assisted living residence.

61 (i) A temporary management established for the purpose of making improvements to bring
62 the assisted living residence into compliance with applicable requirements may not be terminated
63 until the court has determined that the assisted living residence has the management capability
64 to ensure continued compliance with all applicable requirements; except if the court has not made
65 such determination within six months of the establishment of the temporary management, the
66 temporary management terminates by operation of law at that time, and the assisted living
67 residence shall be closed. After the termination of the temporary management, the person who
68 was responsible for the temporary management shall make an accounting to the court and after

69 deducting from receipts the costs of the temporary management, expenditures, and civil penalties
70 and interest no longer subject to appeal, in that order, any excess shall be paid to the licensee or
71 operator of the assisted living residence.

72 (j) The assessments for penalties and for costs of actions taken under this article shall
73 have interest assessed at five percent per year beginning 30 days after receipt of notice of the
74 assessment or 30 days after receipt of the Board of Review's final order following a hearing,
75 whichever is later. All assessments against an assisted living residence that are unpaid shall be
76 added to the assisted living residence's licensure fee and may be filed as a lien against the
77 property of the licensee or operator of the assisted living residence. Funds received from
78 assessments shall be deposited as funds received as provided in §16-5D-10 of this code.

79 (k) The opportunity for a hearing on an action by the secretary taken under this section
80 shall be as provided in §16-5D-12 of this code.

§16-5D-12. License denial; limitation, suspension, or revocation.

1 (a) The secretary shall issue an order denying, limiting, suspending, or revoking a license
2 issued pursuant to this article if the provisions of this article or of the rules promulgated pursuant
3 to this article are violated. The secretary may issue an order revoking a program's license and
4 prohibit all licensed disciplines associated with the assisted living residence from practicing at the
5 assisted living residence based upon an annual, periodic, complaint, verification, or other
6 inspection and evaluation.

7 (b) Before any order is issued by the secretary denying, limiting, suspending, or revoking
8 a license, written notice will be given to the licensee, stating the grounds for such denial, limitation,
9 suspension, or revocation.

10 (c) An applicant or licensee has 10 working days after receipt of the secretary's order
11 denying, limiting, suspending, or revoking a license to request a formal hearing contesting the
12 denial, limitation, suspension, or revocation under this article. If a formal hearing is requested, the

13 applicant or licensee and the secretary shall proceed in accordance with the provisions of §29A-
14 5-1 *et seq.* of this code.

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

20 (e) Any applicant or licensee who is dissatisfied with the decision as a result of the formal
21 hearing provided in this section may, within 30 days after receiving notice of the decision, petition
22 the Circuit Court of Kanawha County, in term or in vacation, for judicial review of the decision.

23 (f) If the license of an assisted living residence is denied, limited, suspended, or revoked,
24 the administrator, any owner of the assisted living residence, or owner or lessor of the assisted
25 living residence property shall cease to operate the facility as an assisted living residence as of
26 the effective date of the denial, limitation, suspension, or revocation. The owner or lessor of the
27 assisted living residence property is responsible for removing all signs and symbols identifying
28 the premises as an assisted living residence within 30 days. Any administrative appeal of such
29 denial, limitation, suspension, or revocation shall not stay the denial, limitation, suspension, or
30 revocation.

31 (g) Upon the effective date of the denial, limitation, suspension, or revocation, the
32 administrator of the assisted living residence shall advise the secretary and the Board of
33 Pharmacy of the disposition of all medications located on the premises. The disposition is subject
34 to the supervision and approval of the secretary. Medications that are purchased or held by an
35 assisted living residence that is not licensed may be deemed adulterated.

36 (h) If the license of an assisted living residence is suspended or revoked, any person
37 named in the licensing documents of the assisted living residence, including persons owning or
38 operating the assisted living residence, may not, as an individual or as part of a group, apply to

39 operate another assisted living residence for up to five years after the date of suspension or
40 revocation.

41 (i) The period of suspension for the license of an assisted living residence will be
42 prescribed by the secretary, but may not exceed one year.

§16-5D-13. Judicial review.

1 (a) Any applicant or licensee or the secretary who is adversely affected by the decision as
2 a result of the formal hearing provided for in §16-5D-12 of this code may, within 30 days after
3 receiving notice of the decision, petition the Circuit Court of Kanawha County, in term or in
4 vacation, for judicial review of the decision.

5 (b) The court may affirm, modify, or reverse the decision of the Board of Review and either
6 the applicant, licensee, or the secretary may appeal from the court's decision to the Supreme
7 Court of Appeals.

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

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

1 (a) Whoever advertises, announces, establishes or maintains or is engaged in establishing
2 or maintaining an assisted living residence without a license granted under §16-5D-6 of this code,
3 or who prevents, interferes with or impedes in any way the lawful enforcement of this article shall
4 be guilty of a misdemeanor and, upon conviction thereof, shall be punished for the first offense
5 by a fine of not more than \$100 or by imprisonment in jail for a period of not more than 90 days,
6 or by both such fine and imprisonment, at the discretion of the court. For each subsequent offense,
7 the fine may be increased to not more than \$250, with imprisonment in jail for a period of not more
8 than 90 days, or both such fine and imprisonment at the discretion of the court. Each day of a
9 continuing violation after conviction shall be considered a separate offense.

10 (b) The secretary may in his or her discretion bring an action to enforce compliance with
11 this article or any rule, or order hereunder, whenever it appears to the secretary that any person
12 has engaged in, or is engaging in, an act or practice in violation of this article or any rule or order
13 hereunder, or whenever it appears to the secretary that any person has aided, abetted, or caused
14 or is aiding, abetting, or causing such an act or practice. Upon application by the secretary, the
15 circuit court of the county in which the conduct has occurred or is occurring, or the Circuit Court
16 of Kanawha County shall have jurisdiction to grant without bond a permanent or temporary
17 injunction, decree, or restraining order.

18 (c) Whenever the secretary refuses to grant or renew a license or revokes a license
19 required by law to operate or conduct an assisted living residence or orders a person to refrain
20 from conduct violating the rules of the secretary, and the person deeming himself or herself
21 aggrieved by the refusal, revocation, or order appeals the action of the secretary, the court may,
22 during pendency of the appeal, issue a restraining order or injunction upon proof that the operation
23 of the assisted living residence or its failure to comply with the order of the secretary adversely
24 affects the well-being or safety of the residents of the assisted living residence. Should a person
25 who is refused a license or the renewal of a license to operate or conduct an assisted living
26 residence or whose license to operate is revoked or who has been ordered to refrain from conduct
27 or activity which violates the rules of the secretary, fails to appeal or should such appeal be
28 decided favorably to the secretary, then the court shall issue a permanent injunction upon proof
29 that the person is operating or conducting an assisted living residence without a license as
30 required by law or has continued to violate the rules of the secretary.

31 (d) Any assisted living residence that deprives a resident of any right or benefit created or
32 established for the well-being of the resident by the terms of any contract, by any state statute or
33 rule, or by any applicable federal statute or regulation shall be liable to the resident for injuries
34 suffered as a result of the deprivation. Upon a finding that a resident has been deprived of such
35 a right or benefit and that the resident has been injured as a result of the deprivation and unless

36 there is a finding that the assisted living residence exercised all care reasonably necessary to
37 prevent and limit the deprivation and injury to the resident, compensatory damages shall be
38 assessed in an amount sufficient to compensate the resident for the injury. In addition, where the
39 deprivation of any right or benefit is found to have been willful or in reckless disregard of the lawful
40 rights of the resident, punitive damages may be assessed. A resident may also maintain an action
41 pursuant to this section for any other type of relief, including injunctive and declaratory relief,
42 permitted by law. Exhaustion of any available administrative remedies may not be required prior
43 to commencement of suit hereunder.

44 (e) The amount of damages recovered by a resident, in an action brought pursuant to this
45 section, are exempt for purposes of determining initial or continuing eligibility for medical
46 assistance pursuant to §9-5-1 *et seq.* of this code and may neither be taken into consideration
47 nor required to be applied toward the payment or part payment of the cost of medical care or
48 services available pursuant to §9-5-1 *et seq.* of this code.

49 (f) Any waiver by a resident or his or her legal representative of the right to commence an
50 action under this section, whether oral or in writing, shall be null and void as contrary to public
51 policy.

52 (g) The penalties and remedies provided in this section are cumulative and shall be in
53 addition to all other penalties and remedies provided by law.

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

1 [Repealed.]

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

1 [Repealed.]

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

.....
Chairman, Senate Committee

.....
Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2018.

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Governor