

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN, III
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

FILED
2002 MAY 31 A 10:58
OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Department of Health and Human Resources TITLE NUMBER: 69
RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §§9-6-2, 16-1-4, 16-5B-8
AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒ and 16-5C-5
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____
TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 06
TITLE OF RULE BEING PROPOSED: Nurse Aide Abuse Registry

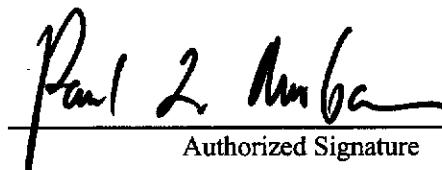
IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH
ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS
COMMENT PERIOD WILL END ON July 1, 2002 AT 4:30 pm ONLY WRITTEN
COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

~~Office of Health Facility Licensure and~~
Certification - DHHR

350 Capitol Street - Room 206

Charleston, WV 25301

THE ISSUES TO BE HEARD SHALL BE
LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Statement of Circumstances Which Require the Proposed Rule

The proposed rule, the Nurse Aide Abuse Registry, is necessary because an Order by the Circuit Court of Harrison County stated that the Department of Health and Human Resources protocol for the Nurse Aide Abuse Registry is a legislative rule.

BRIEF SUMMARY OF THE RULE

The proposed rule, Nurse Aide Abuse Registry, establishes procedures for reporting, investigating, and adjudicating allegations of abuse, neglect or misappropriation of property against nurse aides in nursing homes or extended care units of hospitals.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Nurse Aide Abuse Registry

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: Department of Health and Human Resources

Address: Building 3, Room 206
1900 Kanawha Boulevard, E.
Charleston, W. Va. 25305

1. Effect of the Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$ 313,723	313,723	313,723
Personal Services			234,617	234,617	234,617
Current Expense			78,576	78,576	78,576
Repairs & Alterations			530	530	530
Equipment					
Other					
Revenue					

2. Explanation of above estimates.

The costs identified on this fiscal note do not reflect new costs to the Department. Currently, the Office of Health Facility Licensure & Certification operates the Nurse Aid Program and expends approximately \$313,723 annually to perform the activities associated with this proposed rule. A breakdown of these annual costs follows:

Personal Services

2.00 FTE Health Facility Nurse Surveyors (\$81,658 * 1.38 Employee Benefits)	\$ 112,688
0.95 FTE Office Assistant II (\$19,548 * 0.95 * 1.38 Employee Benefits)	25,627
0.50 FTE Program Manager I (\$46,062 * 0.50 * 1.38 Employee Benefits)	31,783
0.70 FTE Attorney II (\$46,270 * 0.70 * 1.38 Employee Benefits)	44,697
0.70 FTE Secretary I (\$20,520 * 0.70 * 1.38 Employee Benefits)	19,822
Total	\$ 234,617

Current Expense

Postage, Office Supplies & Photocopies	\$ 1,000
Office Space (Diamond Rent, Utilities) 50% of NAP/NATCEP allocation	2,656
Hearing Examiners @75.00 per hour	42,580
Court Reporter (FY 2001 Payments)	12,493
Process Server (Estimate)	250
Travel (2 Surveyors and 1 Attorney)	13,669
Vehicle Rental (\$365.00/Month)	4,380
Vehicle Operating Expense (\$129.00/Month Average)	1,548
Total	\$ 78,576

Repairs and Alterations

Office Machine Repair (50% of NAP/NATCEP estimated)	\$ 530
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TOTAL

\$ 313,723

3. Objectives of this rule:

a. To establish procedures for reporting, investigating and adjudicating allegations of physical, verbal, sexual or emotional abuse, as well as neglect or misappropriation of property against nursing assistants in long term care facilities or the extended care units of hospitals.

b. To have a written means to distribute this information to nursing assistants, facility staff, attorneys, and others involved in all aspects of nursing assistant programs.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None of these are new or additional costs to the state. These are ongoing activities funded by the contract between the Department of Health and Human Resources and the Centers for Medicare and Medicaid Services, which requires the state to perform these duties as a condition for federal nursing home reimbursement.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.

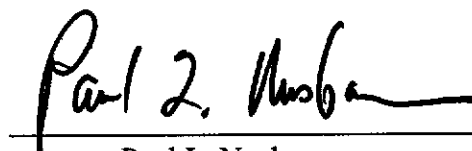
No new costs are attributable to this rule.

C. Economic Impact on Citizens/Public at Large.

None.

Date: May 31, 2002

Signature of Agency Head or Authorized Representative

A handwritten signature in black ink, reading "Paul L. Nusbaum", written over a horizontal line.

Paul L. Nusbaum
Department of Health and Human Resources

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: May 31, 2002

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency name, Address & Phone No.) Department of Health and Human Resources

State Capitol Complex, Building 3, Room 201, Charleston, WV 25305

Telephone: (304) 558-5598

LEGISLATIVE RULE TITLE: Nurse Aide Abuse Registry

1. Authorizing statute(s) citation: WV Code §9-6-2, 16-1-4, 16-5B-8 and 16-5C-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 31, 2002

b. What other notice, including advertising, did you give of the hearing?

Notice of the proposed rule was sent to all long term care facilities with instruction that it be communicated to the nurse aides for review and possible comment, and to nurse aide educational programs that are not conducted by long term care facilities.

c. Date of Public Hearing(s) or Public Comment Period ended:

June 3, 2002

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached N/A

No comments received _____

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing (be exact):

- f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule (please type):

Martha Barnitt

Office of the Secretary - DHHR

State Capitol Complex - Bldg. 3 - Room 201

Charleston, West Virginia 25305

- g. IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule (please type):

John Wilkinson, Director

Office of Health Facility Licensure and Certification

350 Capitol Street, Room 206

Charleston, West Virginia 25301-3715

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**TITLE 69
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES**

**SERIES 06
NURSE AIDE ABUSE REGISTRY**

FILED
2002 MAY 31 A 10: 58
OFFICE WEST VIRGINIA
SECRETARY OF STATE

§ 69-06-1. General.

1.1. Scope. - - This legislative rule establishes specific standards and procedures for maintenance of the Nurse Aide Abuse Registry to protect certain rights of facility residents and nurse aides. This rule should be read in conjunction with W. Va. Code §§9-6-1, et seq., 16-5B-1, et seq., 16-5C-1, et seq., 42 CFR §§483.13(b), 483.156 and 488.301. The W. Va. Code is available in public libraries and on the Legislature's web page, <http://www.legis.state.wv.us/>. The Code of Federal Regulations is available at <http://www.gpo.gov/nara/cfr/index.html>.

1.2. Authority. - - W. Va. Code §§9-6-2, 16-1-4, 16-5B-8, and 16-5C-5.

1.3. Filing Date. - -

1.4. Effective Date. - -

1.5. Applicability. - - This rule applies to nurse aides, staff and residents of facilities and anyone who provides services to a resident of a facility on a regular or intermittent basis.

1.6. Enforcement. - - This rule is enforced by the secretary of the West Virginia Department of Health and Human Resources or his or her lawful designee.

§ 69-06-2. Definitions.

2.1. Abuse. - - The willful infliction of injury, unreasonable confinement, intimidation, or punishment, which results in pain, mental anguish or physical harm, even if the resident is unaware that the physical harm has occurred.

2.2. Facility. - - A "nursing home" as defined in W. Va. Code §16-5C-2(e) of the nursing home licensure law or an "extended care facility operated in connection with a hospital" as referred to in the licensure law for hospitals and similar institutions, W. Va. Code §16-5B-1, et seq.

2.3. Misappropriation of Property. - - The deliberate misplacement, exploitation or wrongful use of a resident's belongings or money without the resident's consent.

2.4. Neglect. - - The failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness unless such actions are beyond the NA's control.

2.5. Nurse Aide (NA). - Any individual who is not a licensed health care provider or registered dietitian or volunteer who provides nursing or nursing related services for hire to

evaluation program.

2.6. Nurse Aide Abuse Registry. - - Those names of NAs along with any additional information such as documentation of the state's investigation, the hearing date and the results as well as any written comments by the NA of the NAs who have admitted or have been adjudicated to have abused, neglected, or misappropriated the property of, residents of a facility.

2.7. Nurse Aide Program (NAP). - - The program within OHFLAC responsible for oversight of the NA training and competency evaluation programs throughout the state and maintenance of the NA registries including the Nurse Aide Abuse Registry.

2.8. Office of Health Facility Licensure and Certification (OHFLAC). - - The agency of the West Virginia Bureau for Public Health, within the West Virginia Department of Health and Human Resources, responsible for oversight of the NAP.

2.9. Physical abuse. - - Abuse resulting from NA to patient contact including but not limited to striking the resident with a part of the body or with an object, shoving, pushing, pulling, tugging or twisting any part of the resident's body with fingers or nails, burning or sticking the resident with an object, physical contact that is knowingly, intentionally, recklessly or through carelessness that causes or is likely to cause death, physical injury, pain or psychological harm to the resident, inappropriate or improper use of restraints or isolation, and acts of retaliation even in response to a physical attack.

2.10. Psychological and Emotional Abuse. - - Humiliating, harassing, teasing or threatening a resident with punishment or deprivation; not considering a resident's wishes; restricting a resident's contact with family, friends or other residents; ignoring a resident's needs for verbal and emotional contact; or violating a resident's right to confidentiality.

2.11. Secretary. - The secretary of the Department of Health and Human Resources or his or her designee.

2.12. Sexual Abuse. - - Sexual harassment, sexual coercion, or sexual assault of a resident, or sexual interaction between a NA and a resident or inciting any of this type of activity.

2.13. Verbal Abuse. - - Statements made to, or in the presence of, a resident that result in ridicule or humiliation of the resident or the use of oral, written or gestured language that includes cursing, the use of demeaning, derogatory references to, or descriptions of a resident or his or her family.

§ 69-06-3. Reporting.

3.1. Reporting Allegations of Suspected Abuse, Neglect or Misappropriation of Property to Facility Administration.

3.1.a. Any employee of a facility, or anyone who provides services to a resident of a facility on a regular or intermittent basis, who suspects that a resident in a facility has been

of a facility on a regular or intermittent basis, who suspects that a resident in a facility has been abused or neglected or that the resident's property has been misappropriated shall immediately report the incident to facility administration and Adult Protective Services as W. Va. Code §9-6-9 applies.

3.1.b. This rule does not preclude other persons from reporting.

3.1.c. No facility shall discharge or discriminate or retaliate in any manner against any employee who in good faith reports suspected abuse, neglect or misappropriation of residents' property, or who testifies or will testify in good faith in any proceeding concerning abuse, neglect, or misappropriation of property of, residents in the facility, except an employee may be suspended, discharged, or restricted in duties if the employee:

3.1.c.1. Reported himself or herself; or

3.1.c.2. Is determined by the facility to have committed abuse, neglect, or misappropriation of property, of a resident, until such time as the NAP, the secretary, or a court determines otherwise.

3.2. Reporting Allegations of Suspected Abuse, Neglect, or Misappropriation of Property, to the NAP.

3.2.a. When allegations of abuse, neglect, or misappropriation of property, of a resident have been reported to the facility, the facility shall immediately complete and fax an Immediate Fax Report of Allegations (OHFLAC Form 225) to the NAP within twenty-four (24) hours.

3.2.b. The facility shall also report the allegations to Adult Protective Services in accordance with W. Va. Code §9-6-9 and to a state or regional long-term care ombudsman operating under the authority of W. Va. Code §16-5L-1, et seq.

3.2.c. Reports involving rape or sexual assault:

3.2.c.1. When rape or sexual assault of a resident is suspected, the designated staff person shall immediately take the resident to the nearest emergency room for examination.

3.2.c.2. If rape or sexual assault is confirmed, facility staff shall assure that the matter is reported to local law enforcement.

3.2.d. Within five (5) working days after the Immediate Report, the facility shall fax the Follow-up Report (OHFLAC Form 225A) to the NAP.

3.2.e. Unless required by a court order, the identity of the reporter shall be kept confidential.

3.3. Contents of a Report shall include the following:

3.3.b. The name and telephone number of the facility where the alleged incident occurred;

3.3.c. The name, home address and home telephone number and position of the reporting individual;

3.3.d. The name, home address and other identifying information of the NA alleged to have committed abuse, neglect or misappropriation of property;

3.3.e. All information about the nature and extent of the allegations;

3.3.f. Circumstances under which the reporting person became aware of the alleged abuse, neglect or misappropriation;

3.3.g. The nature and extent of the reporting person's contact with the resident;

3.3.h. When available, information regarding prior incidents of abuse, neglect or misappropriation involving either the resident or the alleged perpetrator or both;

3.3.i. Information regarding treatment provided to the resident in question;

3.3.j. The condition and functional status of the resident;

3.3.k. The date and time of the incident as well as the name, home address and home telephone number of any witnesses;

3.3.l. Legible witnesses' statements that are typed or printed in black ink that contain as much specific information as is obtainable; and

3.3.m. Any physical evidence including pictures of injuries, videotape and documentation of a similar nature.

§ 69-06-4. Investigations.

4.1. The program manager of the NAP or his or her designee, shall review the facilities' Immediate and Follow-up Reports of abuse, neglect or misappropriation of property, prioritizing these reports, and assigning an OHFLAC surveyor to investigate when warranted.

4.2. The investigation process shall include one or more of the following elements:

4.2.a. A visit to the facility;

4.2.b. A private interview with the resident, if possible;

4.2.c. Observation of the resident within the facility environment, if possible;

4.2.d. Examination of the resident's medical and other records, and any other relevant documents;

4.2.e. Assessment of the resident's physical and mental functioning level;

4.2.f. Examination of any documents prepared by the facility that relate to the alleged incident or the facility's investigation thereof;

4.2.g. Evaluation of the nature, extent, and cause or causes of the injury or harm suffered by the resident;

4.2.h. Interviews with any potential witnesses who may possess information related to the issues.

4.2.i. An interview with the alleged perpetrator whenever his or her identity has been determined; and

4.2.j. An evaluation of the environment within the facility and the risks of physical or emotional injury or harm to other residents.

4.3. After completion of the on-sight investigation, the OHFLAC surveyor shall complete a report and submit it to the NAP.

4.4. The NAP shall review the surveyor's investigation report and decide the disposition of the allegations as follows:

4.4.a. Additional information or continuation of the investigative process is warranted; or

4.4.b. Credible evidence exists to sustain the allegation and to start proceedings for placement of the perpetrator's name on the Nurse Aide Abuse Registry; or

4.4.c. Evidence is insufficient to warrant further action.

§ 69-06-5. Notification.

5.1. Once the NAP decides to place the name of an NA on the Nurse Aide Abuse Registry, the NAP shall notify the NA of the following in writing within ten (10) days of the determination:

5.1.a. The nature of the offense(s);

5.1.b. The date and time of the occurrence(s);

5.1.c. The right to request a hearing and the procedure;

5.1.d. The right to be represented by an attorney at the NA's expense;

5.1.e. The NAP's intent to place the NA's name on the Nurse Aide Abuse Registry in thirty (30) days if the NA waives his or her right to a hearing or fails to request a hearing;

5.1.e. The NAP's intent to place the NA's name on the Nurse Aide Abuse Registry in thirty (30) days if the NA waives his or her right to a hearing or fails to request a hearing;

5.1.f. The consequences to the NA if the NAP places the NA's name on the Nurse Aide Abuse Registry.

5.1.g. The right to petition the NAP in writing for removal of his or her name from the Nurse Aide Abuse Registry after one (1) year for placement due to neglect and the right to a response within ten (10) days of receipt of the petition.

5.2. The NAP shall send notification of the information in Section 5.1. to the NA by certified mail, return receipt requested, to the NA's last known address.

5.2.a. If the postal service returns the notice letter to the NAP as unclaimed or undeliverable, the NAP shall send it immediately to the NA by regular mail.

5.2.b. If the postal service returns the letter a second time, OHFLAC shall utilize personal service for delivery.

5.3. The NA shall have thirty (30) days from the date of receipt of the notice to send a waiver or to request a hearing.

5.3.a. If the NA fails to send a waiver or to request a hearing within thirty (30) days:

5.3.a.1. The NAP shall place the NA's name on the Nurse Aide Abuse Registry, and

5.3.a.2. The NAP shall classify the case as uncontested and within ten (10) business days notify the NA of placement on the Nurse Aide Abuse Registry.

5.4. If the NAP determines that there is insufficient evidence to substantiate the allegation, the NAP shall notify the NA by certified mail within ten (10) business days.

5.5. Upon notification that an NA's name has been included on the Nurse Aide Abuse Registry of another state, the NAP shall place the NA's name on the Nurse Aide Abuse Registry and notify the NA according to provisions of Section 5 of this rule.

5.6. When the NAP places a NA's name on the Nurse Aide Abuse Registry, it shall notify the Nurse Aide Abuse Registries of other states listed on the NA's application as places of employment or residency and notify the Registries of states adjacent to West Virginia of such placement.

5.7. The NAP shall notify the administrator at the NA's last known facility of employment of the NA's placement on the Nurse Aide Abuse Registry by sending him or her copies of correspondence related to the NA's placement on the Registry.

§ 69-06-6. Hearing.

6.1. Hearings shall be held in accordance with W. Va. Code §§ 29a-5-1, et seq. and, except as provided in this section, with 69CSR1, "Rules for Hearings under the Administrative Procedures Act".

6.2. When OHFLAC receives a NA's written request for a hearing, OHFLAC shall schedule the hearing on the next available date.

6.3. OHFLAC's shall schedule the hearing in proximity to the location where the alleged incident occurred or in the OHFLAC offices on a day and time convenient to the parties.

6.4. OHFLAC shall mail to the NA or his or her attorney notice of the date, place and time of the hearing, certified mail, return receipt requested, within fifteen (15) days of OHFLAC's receipt of the request.

6.5. The secretary shall appoint a neutral hearing examiner to preside over the hearing.

6.6. Costs of the hearing shall be divided as follows:

6.6.a. OHFLAC is responsible for obtaining the services of a court reporter and hearing examiner and bearing those costs; and

6.6.b. The NA shall bear the cost of his or her attorney and of a copy of the transcript if requested.

6.7. During the hearing, each party shall have these opportunities:

6.7.a. To present relevant written or verbal evidence;

6.7.b. To present witnesses and cross-examine witnesses; and

6.7.c. To have an attorney present.

6.8. OHFLAC shall bear the burden of proof, "by a preponderance of the evidence."

6.9. Upon receipt of the hearing examiner's recommendations, the secretary shall issue a written decision with supporting Findings of Fact and Conclusions of Law.

6.10. If the secretary decides:

6.10.a. In favor of the NA, the NAP shall close the case and notify the NA in writing.

6.10.b. Against the accused NA, and affirms placement on the Nurse Aide Abuse Registry, the NAP shall place the NA's name on the Nurse Aide Abuse Registry within ten (10) days, and except in cases of neglect, the name shall remain on the Nurse Aide Abuse Registry until a court of law reverses the decision or the NAP is notified of the NA's death.

6.11. The NAP shall forward copies of the secretary's decision to the following

individuals within ten (10) days of the decision:

6.11.a. The NA;

6.11.b. The current administrator of the facility in which the incident occurred;

6.11 c. The administrator of the facility in which the NA is currently working if applicable; and

6.11.d. The federal inspector general's office.

6.12. The NA has thirty (30) days from the date of receipt of the secretary's decision to correct his or her misstatements and to submit a statement disputing the decision to be included on the Nurse Aide Abuse Registry.

6.13. The NA has the right to appeal the secretary's decision to the Circuit Court of the county in which the hearing was held in accordance with W. Va. Code §29-A-5-4 and the West Virginia Rules of Civil Procedure.

§ 69-06-7. Court Determination.

7.1. A determination in any court of law of any abuse, neglect, or misappropriation of property, by an NA in any case involving a minor or an incapacitated adult shall result in placement of the NA's name on the Nurse Aide Abuse Registry.

§ 69-06-8. Facility Notice and Recordkeeping.

8.1. Facilities shall provide a copy of this rule to each NA on their staff and to each NA at the time of hiring and keep signed proof that each NA has received a copy of the rule.

§ 69-06-8. Enforcement.

9.1. This rule is enforced under W. Va. Code §§ 9-6-14, 16-1-17, 16-1-18, applicable licensure laws in W. Va. Code §§ 16-5B-1 et seq. and 16-5C-1 et seq. and rules promulgated thereunder.