

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #3

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SECRETARY OF STATE  
ADMINISTRATIVE LAW DIVISION

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Department of Health and Human Resources TITLE NUMBER: 69

CITE AUTHORITY: W. Va. Code §§ 9-6-2, 16-5B-8, 16-5C-5

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Nurse Aide Abuse and Neglect Registry

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

  
Authorized Signature



**3. Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

[Empty box for explanation of above estimates]

**Memorandum**

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

[Empty box for memorandum]

Date

6/27/14

Agency

Department of Health and Human Resources

Authorized Representative

Karen Bowling  
Karen L. Bowling  
Cabinet Secretary

**Legislative Rule, Title 69, Series 6, Nurse Aide Abuse Registry  
Department of Health and Human Resources  
Office of Inspector General  
Office of Health Facilities Licensure and Certification**

**BRIEF SUMMARY**

**The provisions of W. Va. Code §§ 9-6-2, 16-1-4 and 16-5C-5 require the Secretary of the Department of Health and Human Resources to maintain and administer the Nurse Aide Abuse Registry.**

**It is the purpose of this rule is to establish the specific standards and procedures for maintenance of the Nurse Aide Abuse Registry to protect certain rights of nursing home residents and nurse aides.**

**This rule establishes definitions; responsibilities of the nurse aide; reporting; investigations; determination; notice of determination; hearing; court determination; facility notice and record keeping; and nurse aide registry placement.**

**STATEMENT OF CIRCUMSTANCES**

**The rule is being amended to update current best practices and procedures to ensure the Nurse Aide Abuse Registry protects the rights of nursing home residents and nurse aides.**

**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: July 30, 2014

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Department of Health and Human Resources  
Office of Health Facility Licensure and Certification  
408 Leon Sullivan Way  
Charleston, WV 25301-1713  
(304) 558-0050

LEGISLATIVE RULE TITLE: Nurse Aide Abuse and Neglect Registry

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

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 27, 2014

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

c. Date of Public Hearing(s) *or* Public Comment Period ended:  
July 28, 2014

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached     X                          No comments received

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

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

Jolynn Marra, Director  
Office of Health Facility Licensure and Certification  
408 Leon Sullivan Way  
Charleston, WV 25301-1713  
phone (304) 558-0050  
fax (304) 558-2515  
email Jolynn.Marra@wv.gov

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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)

n/a

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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 of a hearing for the taking of evidence and a general description of the issues to be decided.

n/a

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b. Date of hearing or comment period:

June 27, 2014 - July 28, 2014

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

n/a

d. Attach findings and determinations and reasons:

Attached

Ms. Tina Maher  
Nursing Home Program  
OHFLAC  
408 Leon Sullivan Way  
Charleston, WV 25301-1713

July 24, 2014

RE: SLTCO Comments to Proposed Nurse Aide Abuse Registry Rule (69 CSR 6)

Dear Ms. Maher

Please consider these comments to the Proposed Nurse Aide Abuse Registry Rule (69 CSR 6) on behalf of the West Virginia Long-term Care Ombudsman Program. These comments are made with goal of protecting West Virginia's nursing home residents and promoting the integrity and transparency of the registry process.

#### **Definitions**

Generally, we support the expansion and addition of definitions related to specific types of abuse and neglect. This additional language will provide nurse aides with clearer information about the types of conduct and actions that may be considered abuse and/or neglect.

Suggest adding the phrase "with or without roommates" at the end of the second sentence in proposed rule 2.5. A resident may be secluded even if there are other people present if she is not free to leave of her own choice.

Suggest adding "paid feeding assistants" to the list of persons who are not considered nurse aides in proposed rule 2.8. This makes the definition clearer and is consistent with 42 C.F.R. 483.75(e)(1). Also suggest including some reference to "CNAs" or "certified nurse aides." Nurse aides are commonly referred to as CNAs yet the proposed rule does not acknowledge or recognize this term.

#### **Responsibilities of the Nurse Aide**

Suggest adding the phrase "that pertain to this rule" after "Nurse Aide responsibilities" in Rule 3.1. Alternatively, suggest adding language related to a nurse aide's direct care responsibilities as an additional item in Rule 3.1. As currently drafted, this section is ambiguous in that it does not provide a complete listing of nurse aide responsibilities nor does it provide a reason for the incompleteness.

#### **Reporting**

As currently organized, this section of the proposed rule is confusing. Suggest adding an introductory statement to the effect that "Allegations of abuse, neglect, and or misappropriation of residents' property must be reported to OHFLAC, APS, and the facility administrator."

Also suggest moving and renumbering proposed rule 4.2.c. Suggest “4.3. Additional requirements for allegations involving rape or sexual assault.” The facility actions required by proposed rule 4.3 apply to *all* allegations involving rape or sexual assault not just those allegedly perpetrated by a nurse aide. Suggest either defining, or providing a statutory reference for a definition for, the terms “rape” and “sexual assault” or replacing these terms with the already defined “sexual abuse” in order to promote clarity and consistency.

#### **Investigations**

Proposed Rule 5.1 currently states that reports of abuse will be assigned to an OHFLAC surveyor “when warranted.” Suggest including the criteria that will be used to determine when an investigation is warranted to promote a transparent process and avoid accusations of targeting or inconsistency.

#### **Determination**

Proposed Rule 6.1 currently states that the Nurse Aide Program will review and dispose of the report “by “committee.” Suggest including a description of the potential membership of the committee to promote a transparent process.

#### **Hearing**

Proposed Rule 8.3 describes a possibility of three locations for the hearing. Suggest adding the criteria for “who decides” and “what the decision is based on” to promote a transparent process. Request by the nurse aide? Location of most witnesses? Availability of state resources?

Thank you for considering these comments to the Proposed Nurse Aide Abuse Registry Rule (69 CSR 6). Please feel free to contact me if you have any questions or require clarifying information.

Respectfully submitted,

Suzanne E. Messenger, Esq.  
State Long-term Care Ombudsman

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WV DHEHR-CTPLA

July 28, 2014

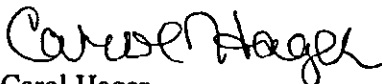
Ms. Jolynn Marra, Director  
Office of Health Facility Licensure  
and Certification  
408 Leon Sullivan Way  
Charleston, WV 25301-1713

**Re: Written Comments to Proposed Rule**  
**Title of Rule Being Amended: Nurse Aide Abuse Registry**

Ms. Marra:

Enclosed please find my written comments relative to the proposed rule.  
Should you have any further questions relative to this matter, please do not hesitate to  
contact me.

Sincerely,

  
Carol Hager

## Comments to Proposed Rule

**Rule Title: Nurse Aid Registry, Title 69, Series 6**

**Title of Rule Being Amended: Nurse Aide Abuse Registry**

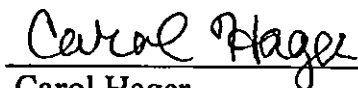
Rule 8.1 of the proposed Rule provides the following language:

Hearings shall be held by the Board of Review in accordance with West Virginia Code Section 29A-5-1, et seq. and except as provided in this section, with the Department of Health and Human Resources rule, Rules for Hearings under the Administrative Procedures Act, 69CSR1.

COMMENT: (1) There is absolutely no statutory authority for the WVDHHR/Board of Review to hear CNA abuse and neglect cases. The WVDHHR/Board of Review is authorized under state law and functions to provide a hearings process to **DHHR customers and providers** who feel themselves aggrieved by agency action. The very specific categories of hearings includes appeals by applicants or recipients of public assistance programs, appeals medical service denials, and grievances by providers of Foster Care, Child Care and Adult Family Care services.

(2) By attempting to have CNA abuse and neglect hearings held before the DHHR/Board of Review, this proposed rule also eliminates the previous provision which required that the DHHR Secretary shall appoint a neutral hearing examiner to preside over the hearing. Previously, the DHHR Secretary utilized the services of contract Administrative Law Judges to preside over the CNA abuse and neglect hearings which guaranteed to all parties involved in the hearing process an absolute degree of neutrality and independence with respect to the decision rendered. In the event CNA abuse and neglect hearings are held before the WVDHHR/Board of Review and decided by an Administrative Law Judge, employed by the WVDHHR, any and all appearances of neutrality and fairness would be lost.

Respectfully Submitted



Carol Hager  
2512 Monroe Avenue  
St. Albans, WV 25177

Title 69 Series 6  
Nurse Aide Abuse and Neglect Registry  
Legislative Rule  
West Virginia Department of Health and Human Resources

**Summary of Public Comments:**

**Comment: #1**

Generally, we support the expansion and addition of definitions related to specific types of abuse and neglect. This additional language will provide nurse aides with clearer information about the types of conduct and actions that may be considered abuse and/or neglect.

Comment by WV State Long Term Care Ombudsman

**Response: #1**

No changes were required in response to this comment.

**Comment: #2**

Suggest adding the phrase "with or without roommates" at the end of the second sentence in proposed rule 2.5. A resident may be secluded even if there are other people present if she is not free to leave of her own choice.

Comment by WV State Long Term Care Ombudsman

**Response: #2**

The Department finds clarification is needed, and changes were made as requested.

**Comment: #3**

Suggest adding "paid feeding assistants" to the list of persons who are not considered nurse aides in proposed rule 2.8. This makes the definition clearer and is consistent with 42 C.F.R. 483.75(e)(1). Also suggest including some reference to "CNAs" or "certified nurse aides." Nurse aides are commonly referred to as CNAs yet the proposed rule does not acknowledge or recognize this term.

Comment by WV State Long Term Care Ombudsman

**Response: #3**

Comments were considered, but no changes will be made. The language in the rule is clear that a Nurse Aide must "successfully complete a state-approved training and competency evaluation." This definition is not relevant to "paid feeding assistants," so the changes will not be made based on the comments provided.

In addition, the term certified nursing assistant or CNA is not used in West Virginia. Nurse aides are not certified in West Virginia. Therefore, no changes will be made based on the comments provided.

**Comment: #4**

Suggest adding the phrase "that pertain to this rule" after "Nurse Aide responsibilities" in Rule 3.1. Alternatively, suggest adding language related to a nurse aide's direct care responsibilities as an additional item in Rule 3.1. As currently drafted, this section is ambiguous in that it does not provide a complete listing of nurse aide responsibilities nor does it provide a reason for the incompleteness.

Comment by WV State Long Term Care Ombudsman

**Response: #4**

The Department finds clarification is needed, and changes were made as requested.

**Comment: #5**

As currently organized, this section (3.1) of the proposed rule is confusing. Suggest adding an introductory statement to the effect that "Allegations of abuse, neglect, and or misappropriation of residents' property must be reported to OHFLAC, APS, and the facility administrator."

Comment by WV State Long Term Care Ombudsman

**Response: #5**

The Department gave consideration to this comment, and determined that the reporting requirements are specified in detail in section § 69-6-4 of this rule. Therefore, the Department did not make changes based on the comment provided.

**Comment: #6**

Also suggest moving and renumbering proposed rule 4.2.c. Suggest "4.3. Additional requirements for allegations involving rape or sexual assault." The facility actions required by proposed rule 4.3 apply to *all* allegations involving rape or sexual assault not just those allegedly perpetrated by a nurse aide. Suggest either defining, or providing a statutory reference for a definition for, the terms "rape" and "sexual assault" or replacing these terms with the already defined "sexual abuse" in order to promote clarity and consistency.

Comment by WV State Long Term Care Ombudsman

**Response: #6**

The Department finds clarification is needed, and changes were made as requested.

**Comment: #7**

Proposed Rule 5.1 currently states that reports of abuse will be assigned to an OHFLAC surveyor “when warranted.” Suggest including the criteria that will be used to determine when an investigation is warranted to promote a transparent process and avoid accusations of targeting or inconsistency.

Comment by WV State Long Term Care Ombudsman

**Response: #7**

The comment was considered and the state and federal requirements were reviewed. Changes were not made based on this comment.

**Comment: #8**

Proposed Rule 6.1 currently states that the Nurse Aide Program will review and dispose of the report “by committee.” Suggest including a description of the potential membership of the committee to promote a transparent process.

Comment by WV State Long Term Care Ombudsman

**Response: #8**

The comment was considered and the state and federal requirements were reviewed. Changes were made to the section in response to the comment.

**Comment: #9**

Proposed Rule 8.3 describes a possibility of three locations for the hearing. Suggest adding the criteria for “who decides” and “what the decision is based on” to promote a transparent process. Request by the nurse aide? Location of most witnesses? Availability of state resources?

Comment by WV State Long Term Care Ombudsman

**Response: #9**

The comment was considered and the state and federal requirements were reviewed. The proposed language is more flexible than state and federal requirements. No changes will be made in response to the comments provided.

**Comment: #10**

Rule 8.1 of the proposed Rule provides the following language:

Hearings shall be held by the Board of Review in accordance with W. Va. Code § 29A-5-1, ~~et seq.~~ et seq. and except as provided in this section, with the Department of Health and Human Resources rule, Rules for Hearings under the Administrative Procedures Act, 69CSR1.

(1) There is absolutely no statutory authority for the WVDHHR/Board of Review to hear CAN abuse and neglect cases. The WVDHHR/Board of Review is authorized under state law and functions to

provide a hearing process to DHHR customer and providers who feel themselves aggrieved by agency action. The very specific categories of hearings includes appeals by applicants or recipients of public assistance programs, appeals medical service denials, and grievances by providers of Foster Care, Child Care and Adult Family Care services.

- (2) By attempting to have CAN abuse and neglect hearings held before the DHHR/Board of Review, this proposed rule also eliminates the previous provision which required that the DHHR Secretary shall appoint a neutral hearing examiner to preside over the hearing. Previously, the DHHR Secretary utilized the services of contract Administrative Law Judges to preside over the CAN abuse and neglect hearings which guaranteed to all parties involved in the hearing process an absolute degree of neutrality and independence with respect to the decision rendered. In the event CAN abuse and neglect hearings are held before the WVDHHR/Board of Review and decided by an Administrative Law Judge, employed by the WVDHHR, any and all appearances of neutrality and fairness would be lost.

Comment by Ms. Carol Hager

**Response: #10**

By its express terms, W.Va. Code § 29A-5-1(d) permits an administrative agency to designate any member within the agency to preside as a hearing examiner and requires that such hearing be conducted in an impartial manner. No changes will be made in response to the comment provided.

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COMMISSION OF THE  
STATE OF WEST VIRGINIA

TITLE 69  
LEGISLATIVE RULE  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

SERIES 6  
NURSE AIDE ABUSE AND NEGLECT REGISTRY

§ 69-6-1. General.

1.1. Scope. -- This legislative rule establishes specific standards and procedures for maintenance of the Nurse Aide Abuse and Neglect 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.,~~ W. Va. Code §§ 9-6-1 et seq., 16-5B-1 et seq., 16-5C-1 et seq., and 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>~~ <http://www.gpo.gov>

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

1.3. Filing Date. -- April, 2010.

1.4. Effective Date. -- July 1, 2010.

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 as defined in this rule and W. Va. § 16-5B-1 et seq and 16-5C-1 et seq.

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.

§ 69-6-2. Definitions.

The following definitions are for the purposes of implementing this rule.

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

2.1. Abuse. The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. This presumes that instances of abuse of all residents, even those unaware that harm has occurred or those in a coma, cause physical harm, or pain or mental anguish. Abuse includes emotional abuse, physical abuse, sexual abuse, verbal abuse and involuntary seclusion.

2.2. Board of Review. Organized within the department pursuant to W. Va. Code 9-2-6(12) to have such powers of a review nature and such additional powers as may be granted by the secretary.

~~2.1.a. Involuntary Seclusion. Separation of a resident from other residents or from his or her room or confinement to his or her room (with or without roommates) against the resident's will, or the will of the resident's legal representative. Emergency or short-term monitored separation from other residents will not be considered involuntary seclusion and may be permitted if used for a limited period of time as a therapeutic intervention to reduce agitation until professional staff can develop a plan of care to meet the resident's needs.~~

2.3. Emotional Abuse. Subjecting or exposing a resident to behavior that may result in psychological trauma or injury. Emotional abuse includes: humiliating, harassing, teasing or threatening; unreasonably restricting a resident's contact with family, friends or other residents; unreasonably ignoring a resident's requests; threats of punishment or deprivation; or willfully violating a resident's rights, including confidentiality. Emotional abuse may also be referred to as psychological abuse, mental abuse, or psychosocial abuse.

~~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.~~

2.4. Facility. A nursing home as defined in W. Va. Code § 16-5C-1 et seq. or an extended care facility operated in connection with a hospital as defined in W. Va. Code § 16-5B-1 et seq.

2.5. Involuntary Seclusion. Separation of a resident against the resident's will, or the will of the resident's legal representative. Seclusion includes separation of the resident from other residents, separation of the resident from his or her room, or confinement of a resident to his or her room, with or without roommates.

~~2.3. 2.6. Misappropriation of Property. The deliberate misplacement, exploitation or wrongful use of a resident's belongings or money without the resident's consent.~~

~~2.4. 2.7. Neglect. The failure to provide goods and services necessary to avoid physical harm, or the significant threat of physical harm, mental anguish or mental illness unless such actions are beyond the Nurse Aide's nurse aide's control. Failure to report an incident or failure to appear in response to a subpoena, or both shall be considered neglect.~~

~~2.4.a. Failure to appear in response to a subpoena. Failure by Nurse Aide or Nursing Assistant who received a subpoena to appear at an Administrative Hearing regarding an incident of abuse, neglect or misappropriation. The Nurse Aide or Nursing Assistant may be placed on the Nurse Aide Abuse Registry for neglect, if there is proof of service.~~

~~2.5. 2.8. Nurse Aide or Nursing Assistant. 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 residents in a facility after successfully completing a state-approved training and competency evaluation~~

program. The terms ~~Nurse Aide~~ nurse aide and ~~Nursing Assistant~~ nursing assistant are considered interchangeable and have the same meaning.

~~2.6.~~ 2.9. Nurse Aide Abuse and Neglect Registry. ~~Those~~ A list of names of Nurse Aides nurse aides who have ~~admitted or have been adjudicated~~ been found by the Nurse Aide Program to have abused, neglected, or misappropriated the property of residents of a facility, 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 ~~Nurse Aide~~ nurse aide.

~~2.7.~~ 2.10. Nurse Aide Program. The program within ~~OHFLAC~~ Office of Health Facility Licensure and Certification (OHFLAC) responsible for oversight of the ~~Nurse Aide~~ nurse aide training and competency evaluation programs throughout the state and maintenance of the Nurse Aide registries including the Nurse Aide Abuse and Neglect Registry.

~~2.8.~~ 2.11. 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 Nurse Aide Program.

~~2.9.~~ 2.12. Physical Abuse. Abuse resulting from ~~Nurse Aide to resident~~ nurse aide-to-resident contact including but not limited to striking the resident with a part of the body or with an object; shoving, pushing, pulling, pinching, tugging or twisting any part of the resident's body with fingers or nails; burning or sticking the resident with an object; engaging in physical contact that is knowingly, intentionally, recklessly or careless 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; and even in response to a physical attack.~~ Physical abuse also includes controlling behavior through corporal punishment.

~~2.11.~~ 2.13. Sexual Abuse. Sexual harassment, sexual coercion, sexual exploitation, or sexual assault, sexual contact, or graphic images of a resident's body, including but not limited to, private areas, of a resident; sexual interaction between a Nurse Aide and a resident; or inciting any of this type of activity.

~~2.11.a.~~ Sexual abuse also includes graphic images of a resident's body including, but not limited to, private areas.

~~2.12.~~ 2.14. Test-eligible Nurse Aide ~~or Nursing Assistant~~. 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 residents in a nursing home after successfully completing a state-approved nurse aide training program, but who has not yet successfully completed the state-approved competency test. An individual may not work as a nurse aide or nursing assistant on a full-time basis for more than four ~~(4)~~ months, unless the individual has passed the state-approved competency test.

~~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.~~

2.15. Verbal Abuse. The use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance, regardless of their age, ability to comprehend, or disability. Examples of verbal abuse include, but are not limited to, threats of harm; saying things to frighten a resident, such as telling a resident that he or she will never be able to see his or her family again; intimidation; humiliation; threats of hostility, or vulgarity.

**§ 69-6-3. Responsibilities of the Nurse Aide.**

3.1. The nurse aide is responsible for all direct care duties assigned by the facility. Additional responsibilities that pertain to this rule include, but are not limited to:

3.1.a. Safeguarding residents' rights to a dignified existence, self-determination, and communication.

3.1.b. Ensuring that residents are free from abuse, neglect, corporal punishment, involuntary seclusion and misappropriation of property.

3.1.c. Immediately report to facility administration all incidents of abuse, neglect, or misappropriation of property.

3.1.d. Maintaining current and accurate information with the Nurse Aide Program including name, address, phone number and all other information required by the Nurse Aide Program.

3.1.e. Maintaining current and accurate employment information with the Nurse Aide Program.

3.1.f. Reporting any changes in their criminal history to the Nurse Aide Program.

3.1.g. Maintaining a copy of this rule.

3.1.h. Appearing as a witness, if subpoenaed, at the Administrative Hearing regarding an incident of abuse, neglect or misappropriation. If the nurse aide fails to appear, the Nurse Aide Program may place the name of the nurse aide on the Nurse Aide Abuse and Neglect Registry for neglect.

**§ 69-6-3. § 69-6-4. Reporting.**

~~3.1.~~ 4.1. Reporting Allegations of Suspected Abuse, Neglect or Misappropriation of Property to Facility Administration.

~~3.1.a.~~ 4.1.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 abused or neglected or that the resident's property has been misappropriated shall immediately report the

incident to the facility administration and Adult Protective Services as required by W. Va. Code ~~§9-6-9. §~~ 9-6-1 et seq.

4.1.b. Failure of a nurse aide to report any incident of suspected abuse, neglect, or misappropriation of property will result in his or her placement on the Nurse Aide Abuse and Neglect Registry for neglect for one year.

~~3.1.b. This rule does not preclude other persons from reporting suspected abuse, neglect or misappropriation of residents' property.~~

~~3.1.c.~~ 4.1.c. A facility shall not discharge, 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 reported himself or herself.

~~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 the Nurse Aide Program, the Secretary, or a court determines otherwise.~~

~~3.2.~~ 4.2. Reporting Allegations of Suspected Abuse, Neglect, or Misappropriation of Property to the Nurse Aide Program.

~~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 a Nurse Aide Registry Immediate Fax Reporting of Allegations to the Nurse Aide Program within twenty-four (24) hours.~~

4.2.a. When allegations of abuse, neglect, or misappropriation of property of a resident have been reported to the facility, the facility shall submit an immediate report form in a format provided by OHFLAC and completed in its entirety within 24 hours.

~~3.2.b.~~ 4.2.b. The facility shall also report the allegations to Adult Protective Services in accordance with W. Va. Code ~~§9-6-9 §~~ 9-6-1 et seq. and to a state or regional long-term care ombudsman operating under the authority of W. Va. Code ~~§§16-5L-1, et seq. §~~ 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 accompany the resident to the nearest emergency room for examination.~~

~~3.2.c.2. — If rape or sexual assault is suspected, 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 Nurse Aide Registry Five Day Follow-up Report to the Nurse Aide Program.~~

4.2.d. Within five working days after the immediate report, the facility shall submit the five-day follow-up report in the format provided by OHFLAC and completed in its entirety to the Nurse Aide Program.

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

~~3.3. The contents of a Report shall include the following:~~

~~3.3.a. The name, gender and age of the resident who is the alleged victim;~~

~~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 Nurse Aide 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.i. Information regarding treatment provided to the resident in question;~~

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

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

~~3.4. The Nurse Aide Program shall keep, pending investigation, legible witnesses' statements that are typed or printed in black ink that contain as much specific information as is obtainable and any physical evidence including pictures of injuries, videotape and documentation of a similar nature.~~

~~3.4.a. Witnesses' signatures shall be in blue ink.~~

4.2. The reporting facility shall keep investigative information, including but not limited to, witness statements, physical evidence (including pictures of injuries), videotape evidence, and documentation of a similar nature until final resolution.

4.3. Reports involving rape or sexual assault require the additional actions:

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

4.3.b. If rape or sexual assault is suspected, facility staff shall assure that the matter is reported to local law enforcement.

~~§69-6-4,~~ § 69-6-5. Investigations.

~~4.1. 5.1.~~ The program manager of the Nurse Aide Program or his or her designee, shall review the facilities' ~~Immediate and Follow-up Reports~~ immediate and follow-up reports of abuse, neglect or misappropriation of property, ~~prioritizing these reports,~~ and ~~assigning~~ assign an OHFLAC surveyor to investigate when ~~warranted~~ applicable.

~~4.2. 5.2.~~ The investigation process shall may include one or more of the following elements:

~~4.2.a. 5.2.a.~~ A visit to the facility;

~~4.2.b. 5.2.b.~~ A private interview with the resident, ~~if possible;~~

~~4.2.c. 5.2.c.~~ Observation of the resident within the facility environment, ~~if possible;~~

~~4.2.d. 5.2.d.~~ Examination of the resident's medical and other records, and any other relevant documents, including incident reports;

~~4.2.e. 5.2.e.~~ Assessment of the resident's physical and mental functioning level;

~~4.2.f. 5.2.f.~~ Examination of any documents prepared by the facility that relate to the alleged incident or the facility's investigation of the incident;

~~4.2.g. 5.2.g.~~ Evaluation of the nature, extent, and cause or causes of the injury or harm suffered by the resident;

~~4.2.h. 5.2.h.~~ Interviews with any potential witnesses who may possess information related to the issues;

~~4.2.i. 5.2.i.~~ An interview with the alleged perpetrator ~~whenever his or her identity has been determined;~~ and

~~4.2.j. 5.2.j.~~ An evaluation of the environment ~~within the facility~~ and the risks of physical or emotional injury or harm ~~to other residents.~~

~~4.3. 5.3.~~ After completion of the ~~on-site~~ investigation, the OHFLAC surveyor shall complete a report and submit it to the Nurse Aide Program.

~~4.4. The Nurse Aide Program 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;~~

~~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;~~

~~4.4.c. The evidence is insufficient to warrant further action.~~

**§ 69-6-6. Determination.**

6.1. The Nurse Aide Program shall review the investigation report and decide the disposition as follows:

6.1.a. The evidence is insufficient to warrant further action; or.

6.1.b. Make a finding of abuse, neglect, misappropriation of property, or a combination thereof and:

6.1.b.1. Place the nurse aide on the Nurse Aide Abuse and Neglect Registry; or

6.1.b.2. Offer an alternative sanction.

~~§ 69-6-5. Notification.~~ **§ 69-6-7. Notice of Determination.**

7.1. If the Nurse Aide Program determines that there is insufficient evidence to substantiate the allegation, the Nurse Aide Program shall notify the nurse aide by regular mail.

~~5.1. 7.2. Once if the Nurse Aide Program decides to place the name of a Nurse Aide on the Nurse Aide Abuse Registry, the Nurse Aide Program shall notify the Nurse Aide of the following in writing within ten (10) days of the determination:~~ makes a finding of abuse, neglect, misappropriation of property, or a combination thereof, the Nurse Aide Program shall notify the nurse aide by certified mail of the determination. The determination notice shall include:

~~5.1.a. 7.2.a.~~ The nature of the offense;

~~5.1.b. 7.2.b.~~ The date of the occurrence;

~~5.1.c. 7.2.c.~~ The nurse aide's right to request a hearing and the procedure for a request;

~~5.1.d. 7.2.d.~~ The nurse aide's right to be represented by an attorney at his or her expense;

~~5.1.e. 7.2.e.~~ The Nurse Aide Program's intent to place the Nurse Aide's individual's name on the Nurse Aide Abuse and Neglect Registry in thirty (30) days if the Nurse Aide individual waives his

~~or her right to a hearing or~~ fails to request a hearing or fails to agree to alternative sanctions, if applicable;

~~5.1.f. 7.2.f.~~ The consequences ~~to the Nurse Aide~~ if the Nurse Aide Program places the Nurse Aide's individual's name on the Nurse Aide Abuse and Neglect Registry; and

~~5.1.g. 7.1.g.~~ The Nurse Aide's right to petition the Nurse Aide Program in writing for removal of his or her name from the Nurse Aide Abuse and Neglect 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 Nurse Aide Program shall send notification of the information in Subsection 5.1 of this Section to the Nurse Aide by certified mail, return receipt requested, to his or her last known address.

~~5.2.a.~~ If the postal service returns the notice letter to the Nurse Aide Program as unclaimed or undeliverable, the Nurse Aide Program shall send it immediately to the Nurse Aide by regular mail.

~~5.3. 7.3.~~ The Nurse Aides nurse aide has ~~thirty (30)~~ days from the date of receipt of the notice to request a hearing, or agree to alternative sanctions, if applicable.

~~5.3.a.~~ If the Nurse Aide fails to request a hearing within ~~thirty (30) days:~~

7.4. If the Nurse Aide fails to request a hearing, or if applicable, agrees to alternative sanctions within 30 days:

~~5.3.a.1. 7.4.a.~~ The Nurse Aide Program shall place the Nurse Aide's individual's name on the Nurse Aide Abuse and Neglect Registry; and

~~5.3.a.2. 7.4.b.~~ The Nurse Aide Program shall ~~classify the case as uncontested and within ten (10) business days~~ notify the Nurse Aide nurse aide of placement of his or her name on the Nurse Aide Abuse and Neglect Registry.

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

~~5.5. 7.5.~~ Upon notification that a Nurse Aide's an individual's name has been included on the Nurse Aide Abuse and Neglect Registry of another state, the Nurse Aide Program shall place the Nurse Aide's individual's name on the West Virginia Nurse Aide Abuse and Neglect Registry and notify the Nurse Aide's individual according to the provisions of this section.

~~5.6. 7.6.~~ When the Nurse Aide Program places a Nurse Aide's an individual's name on the Nurse Aide Abuse and Neglect Registry, it shall notify the Nurse Aide Abuse and Neglect Registries of other states listed on the Nurse Aide's individual's application as places of employment or residency ~~and notify, as well as the Registries registries~~ of states adjacent to West Virginia of the placement.

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

7.7. The Nurse Aide Program shall notify, in writing, the administrator at the individual's last known place of employment of the individual's placement on the Nurse Aide Abuse and Neglect Registry.

~~§69-6-6.~~ § 69-6-8. Hearing.

~~6.1.~~ 8.1. Hearings shall be held by the Board of Review in accordance with W. Va. Code § 29A-5-1, ~~et seq.~~ et seq. and except as provided in this section, with the Department of Health and Human Resources rule, Rules for Hearings under the Administrative Procedures Act, 69CSR1.

~~6.2.~~ 8.2. When ~~OHFLAC~~ the Board of Review receives a Nurse Aide's ~~nurse aide's~~ written request for a hearing, ~~OHFLAC shall schedule the hearing on the next available date~~ a hearing shall be scheduled within 120 days of the request.

~~6.3. OHFLAC 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.~~

8.3. The hearing shall be scheduled in proximity to the location where the alleged incident occurred, in OHFLAC offices, or a location agreed to by the parties.

~~6.4. OHFLAC shall mail to the Nurse Aide or his or her attorney, notice of the date, place and time of the hearing, by certified mail, return receipt requested.~~

8.4. Written notice of the date, time, place of the hearing, and brief statement of the matter asserted shall be given as prescribed by W.Va. Code § 29A-7-2, or by electronic mail at least 10 days prior to the hearing.

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

~~6.6. Costs of the hearing shall be distributed as follows:~~

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

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

8.5. The nurse aide shall bear the cost of his or her attorney and a copy of the transcript, if requested.

8.6. Due to the confidential nature of these proceedings, the hearing is not open to the public. The Hearing Examiner shall have the authority to determine who may attend the hearing.

~~6.7.~~ 8.7. During the hearing, each party may:

~~6.7.a.~~ 8.7.a. Present relevant written or verbal evidence;

~~6.7.b.~~ 8.7.b. Present witnesses and cross-examine Cross-examine witnesses; and

~~6.7.c.~~ 8.7.c. Have an attorney present. Submit rebuttal evidence; and

~~6.7.d.~~ 8.7.d. Have representation.

~~6.8.~~ 8.8. OHFLAC bears 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.

8.9. The Board of Review shall issue a written decision with supporting findings of fact and conclusions of law.

8.10. The Hearing Examiner may dismiss the request for a hearing if the nurse aide fails to appear at the scheduled hearing without good cause. The Hearing Examiner shall reschedule the hearing if the nurse aide establishes in writing good cause for failing to appear within 10 days of receipt of the notice of the failure to appear.

8.11. A nurse aide who fails to appear as a witness at an administrative hearing, after receiving a subpoena to appear, may be placed on the Nurse Aide Abuse and Neglect registry for neglect.

~~6.10.~~ If the Secretary decides:

~~6.10.a.~~ In favor of the accused Nurse Aide, the Secretary shall notify the Nurse Aide must be notified in writing; or

~~6.10.b.~~ Against the accused Nurse Aide, and affirms placement on the Nurse Aide Abuse Registry, the Nurse Aide Program shall place the Nurse Aide's name on the Nurse Aide Abuse Registry within thirty (30) days. The Nurse Aide's name shall remain on the Nurse Aide Abuse Registry until a court of law reverses the decision, or the Nurse Aide petitions for removal of his or her name from the Nurse Aide Abuse Registry at the expiration of his or her placement period.

~~6.11.~~ The Secretary shall forward copies of the Secretary's decision to the following individuals within ten (10) days of the decision:

8.12. The Board of Review shall send copies of the final order to the following:

~~6.11.a.~~ The Nurse Aide;

8.12.a. The parties;

~~6.11.b.~~ 8.12.b. The current administrator of the facility in which the incident occurred;  
and

~~6.11.c.~~ 8.12.c. The administrator of the facility in which the ~~Nurse Aide~~ nurse aide is currently working, if applicable.

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

~~6.12.~~—The Nurse Aide 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.

8.13. If the Board of Review affirms placement on the Nurse Aide Abuse and Neglect Registry, the Nurse Aide Program shall place the nurse aide's name on the Nurse Aide Abuse and Neglect Registry within 30 days. The nurse aide's name shall remain on the Nurse Aide Abuse and Neglect Registry until a court of law reverses the decision, or the nurse aide petitions for removal of his or her name from the Nurse Aide Abuse and Neglect Registry at the expiration of his or her placement period.

~~6.13.~~ 8.14. ~~In the alternative, the~~ The Nurse Aide nurse aide has the right to file an appeal of the Secretary's decision, within thirty (30) days ~~to the Circuit Court of~~ in the county in which the hearing was held in accordance with W. Va. Code §29A-5-4 and the West Virginia Rules of Civil Procedure the incident occurred or the Circuit Court of Kanawha County.

~~§69-6-7.~~ § 69-6-9. Court Determination.

~~7.1.~~ 9.1. A determination in any court of law of any abuse, neglect or misappropriation of property by a ~~Nurse Aide~~ nurse aide in any case involving a minor or an incapacitated adult shall result in placement of the ~~Nurse Aide's~~ nurse aide's name on the Nurse Aide Abuse and Neglect Registry.

~~§69-6-8.~~ § 69-6-10. Facility Notice and Record Keeping.

~~8.1.~~ 10.1. Facilities shall provide a copy of this rule to each ~~Nurse Aide~~ nurse aide on their staff and to each ~~Nurse Aide~~ nurse aide at the time of hiring and keep signed proof that each ~~Nurse Aide~~ nurse aide has received a copy of the rule.

~~§69-6-9.~~ 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 under those Code sections.

~~§69-6-10.~~ §69-6-11. Nurse Aide Registry Placement.

~~10.1.~~ 11.1. Placement on the Nurse Aide Registry for any type of abuse is permanent ~~unless~~ there are mitigating circumstances.

~~10.1.a. In the event of mitigating circumstances, the hearing examiner has the option of placing the Nurse Aide or Nursing Assistant on the Registry for abuse for a period of one (1) to (5) five years.~~

~~10.1.b. Mitigating circumstances include:~~

~~10.1.b.1. psychological diagnoses as documented by a certified medical professional,~~

~~10.1.b.2. a recent catastrophic event such as:~~

~~10.1.b.2.a. loss of home,~~

~~10.1.b.2.b. death of a spouse, child or parent or~~

~~10.1.b.2.c. diagnosis of a terminal illness.~~

~~10.1.b.3. if a Nurse Aide or Nursing Assistant is a new graduate and has been working for no more than one (1) year since his or her test date.~~

~~10.2. 11.2. Placement on the Nurse Aide Registry for neglect is for one (1) calendar year after which the Nurse Aide nurse aide or Nursing Assistant may send a written request to the Registry to have his or her name removed, unless:~~

~~10.2.a. 11.2.a. the The Nurse Aide nurse aide or Nursing Assistant has continued to work in long term care, assisted living, behavioral health or hospice after he or she has been notified of his or her placement on the Nurse Aide Abuse and Neglect Registry for neglect. The Nurse Aide nurse aide or Nursing Assistant shall have the time that he or she worked after his or her notification added to the placement time so that a total of one (1) calendar year is served on the Nurse Aide Abuse and Neglect Registry.~~

~~11.2.b. The nurse aide becomes ineligible for other reasons.~~

~~10.3. As an alternative to placement on the Nurse Aide Registry, and as warranted by the facts of the case the Secretary may require the Nurse Aide or Nursing Assistant to receive re-education regarding specific tasks or topics which were offered during the Nurse Aide's initial training.~~