

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

Do Not Mark In This Box

FILED

2015 APR -1 P 3:11

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

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

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

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

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

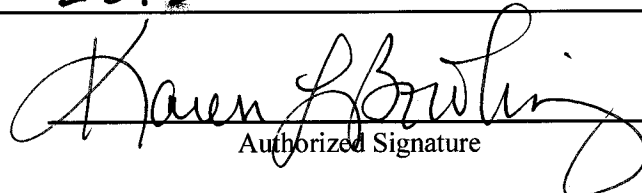
THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) SB 175

SECTION 64-5-1(e), PASSED ON February 28, 2015

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: ~~April~~ 29, 2015

June


Authorized Signature

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

**SERIES 6
NURSE AIDE ABUSE AND NEGLECT REGISTRY**

FILED

2015 APR -1 P 3:12

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§ 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.; 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>.

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

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 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 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. Means the board of review organized in the Department pursuant to W.Va. Code §§ 9-2-6(12).

2.3. Department. West Virginia Department of Health and Human Resources.

2.4. 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.

2.5. 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.

2.6. 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.

2.7. Misappropriation of Property. The deliberate misplacement, exploitation or wrongful use of a resident's belongings or money.

2.8. 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 control. Failure to report an incident or failure to appear in response to a subpoena, or both shall be considered neglect.

2.9. 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 and nursing assistant are considered interchangeable and have the same meaning.

2.10. Nurse Aide Abuse and Neglect Registry. A list of names of nurse aides who have 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.

2.11. Nurse Aide Program. The program within the Office of Health Facility Licensure and Certification (OHFLAC) responsible for oversight of the 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.

2.12. Office of Health Facility Licensure and Certification (OHFLAC). The agency within the West Virginia Department of Health and Human Resources, responsible for oversight of the Nurse Aide Program.

2.13. Physical Abuse. Abuse resulting from 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 knowing, intentional, reckless 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; acts of retaliation; and even in response to a physical attack. Physical abuse also includes controlling behavior through corporal punishment.

2.14. Secretary. The Secretary of the Department of Health and Human Resources, or his or her designee.

2.15. 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.

2.16. Test-eligible Nurse Aide. 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 months, unless the individual has passed the state-approved competency test.

2.17. 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. The nurse aide is responsible for all direct care duties assigned by the facility and for safeguarding residents' rights to a dignified existence, self-determination, and communication. Additional responsibilities that pertain to this rule include, but are not limited to:

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

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

3.3. 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.

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

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

3.6. Maintaining a copy of this rule.

3.7. 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.

§ 69-6-4. Reporting.

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

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 § 9-6-1 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.

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.

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

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.

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

4.2.c. 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.

4.3. 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.

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

4.4.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.

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

§ 69-6-5. Investigations.

5.1. The Nurse Aide Program shall review the facilities' immediate and follow-up reports of abuse, neglect or misappropriation of property and assign an OHFLAC surveyor to investigate when applicable.

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

5.2.a. A visit to the facility;

5.2.b. A private interview with the resident;

5.2.c. Observation of the resident within the facility environment;

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

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

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;

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

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

5.2.i. An interview with the alleged perpetrator; and

5.2.j. An evaluation of the environment and the risks of physical or emotional injury or harm.

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

§ 69-6-6. Determination. The Nurse Aide Program shall review the investigation report and determine the disposition as follows:

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

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

6.2.a. Place the nurse aide on the Nurse Aide Abuse and Neglect Registry; or

6.2.a. Offer an alternative sanction.

§ 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.

7.2. If the Nurse Aide Program 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:

7.2.a. The nature of the offense;

7.2.b. The date of the occurrence;

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

7.2.d. The right to be represented by an attorney at his or her expense;

7.2.e. The intent to place the individual's name on the Nurse Aide Abuse and Neglect Registry in 30 days if the individual fails to request a hearing or fails to agree to alternative sanctions, if applicable;

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

7.2.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 year for placement due to neglect.

7.3. The nurse aide has 30 days from the date of receipt of the notice to request a hearing, or agree to alternative sanctions, if applicable.

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

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

7.4.b. The Nurse Aide Program shall notify the nurse aide of placement of his or her name on the Nurse Aide Abuse and Neglect Registry.

7.5. Upon notification that 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 individual's name on the West Virginia Nurse Aide Abuse and Neglect Registry and notify the individual according to the provisions of this section.

7.6. When the Nurse Aide Program places 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 individual's application as places of employment or residency, as well as the registries of states adjacent to West Virginia of the placement.

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.

§ 69-6-8. Hearing.

8.1. Hearings shall be held by the Board of Review in accordance with W. Va. Code § 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.

8.2. When the Board of Review receives a nurse aide's written request for a hearing, a hearing shall be scheduled within 120 days of the request.

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.

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.

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.

8.7. During the hearing, each party may:

8.7.a. Present evidence;

8.7.b. Cross-examine witnesses;

8.7.c. Submit rebuttal evidence; and

8.7.d. Have representation.

8.8. OHFLAC bears the burden of proof by a preponderance of the evidence.

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.

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

8.12.a. The parties;

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

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

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.

8.14. The nurse aide has the right to file an appeal of the decision, within 30 days in the county in which the incident occurred or the Circuit Court of Kanawha County.

§ 69-6-9. Court Determination. A determination in any court of law of any abuse, neglect or misappropriation of property by a nurse aide in any case involving a minor or an incapacitated adult shall result in placement of the nurse aide's name on the Nurse Aide Abuse and Neglect Registry.

§ 69-6-10. Facility Notice and Record Keeping. Facilities shall provide a copy of this rule to each nurse aide on their staff and to each nurse aide at the time of hiring and keep signed proof that each nurse aide has received a copy of the rule.

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

11.1. Placement on the Nurse Aide Registry for any type of abuse is permanent.

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

11.2.a. The nurse aide 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 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 calendar year is served on the Nurse Aide Abuse and Neglect Registry.

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