



**WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION**

Form #7

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

*March 22, 1996*

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Division of Health TITLE NUMBER: 64

CITE AUTHORITY: W. Va. Code §16-5C-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 65

TITLE OF RULE BEING AMENDED: Residential Board and Care Homes

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached memorandum from Gretchen O. Lewis, Secretary, Department of Health and Human Resources.

Use additional sheets if necessary

\_\_\_\_\_  
Signature



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THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached.

11.70

Use additional sheets if necessary

*Richard J. Lewis*  
Signature

DATE: December 15, 1995

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Kay Howard *KH*  
Director, Regulatory Development  
Department of Health and Human Resources

EMERGENCY RULE TITLE: **Residential Board and Care Home Licensure Rule, 64  
CSR 65**

1. Date of filing: December 15, 1995
2. Statutory authority for promulgating the emergency rule: W. Va. Code § 16-5C-5
3. Date of filing of proposed legislative rule: Public comment period, June 30, 1995 to July 31, 1995, extended to August 21, 1995. Filed with Legislative Rule-Making Review Committee November 27, 1995.
4. Does the emergency rule adopt new language or does it amend or repeal a current legislative rule?  
  
Amends and repeals a current rule (Complete rewrite)
5. Has the same or similar emergency rule previously been filed and expired?  
  
No.
6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the immediate preservation of public peace, health, safety or welfare.  
  
Not Applicable

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not Applicable

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

See Emergency Filing Notice

**Statement of Facts and Circumstances Relating to the Emergency Filing  
of Amendments to Residential Board and Care Home Licensure Rule, 64 CSR 65  
December 15, 1995**

The Division of Health of the Department of Health and Human Resources hereby submits the amended **Residential Board and Care Home Licensure Rule, 64 CSR 65** for emergency filing as authorized under W. Va. Code § 29A-3-15a(f)(3). The present proposed amended rule was the subject of a public comment period which ended August 21, 1995. It was filed with the Legislative Rule-Making Review Committee on November 28, 1995 and the Committee accepted the rule on December 12, 1995 for review at a later date, as yet undetermined.

An earlier version of this rule was intended for review by the 1995 Legislature. However, the scope and substance of the comments received indicated the need for a major rewrite and additional opportunity for public comment. The present rule is, then, the end result of the second round of public comment. Although the Division intends to allow present homes additional time past the effective date of the rule to come into full compliance and intends to conduct training to assist homes, the Division contends that the earlier the rule becomes effective, the earlier the new improved standards will be available for the protection of residents. Additionally, the Division agreed in the West Virginia Comprehensive Long-Term Care Plan filed in response to a Memorandum Order filed under Wolford v. Lewis, 860 F. Supp. 1123 (S.D. W. Va. 1994), to implement amended residential board and care home licensure standards by June, 1995.

Thus, the rule is the subject of a court order, and the court and the Department believe that implementation of the provisions of the revised rule are long overdue, from the point of view of improved and clarified protection of residents, for compliance with State and federal law, and to provide providers with a regulatory situation that is more stable and as responsive to their concerns as possible under current law. The Department believes that implementation of this rule is needed to prevent substantial harm to the public interest, and therefore requests approval to put the rule into effect on an emergency basis.

**PROPOSED RULE  
WEST VIRGINIA DIVISION OF HEALTH  
ADMINISTRATIVE RULES  
RESIDENTIAL BOARD AND CARE HOMES  
64 CSR 65**

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PROPOSED RULE - TITLE 64  
WEST VIRGINIA DIVISION OF HEALTH  
ADMINISTRATIVE RULES  
SERIES 65  
RESIDENTIAL BOARD AND CARE HOMES

FILED

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**§64-65-1. General.**

1.1. **Scope** - This legislative rule prescribes specific standards and procedures to provide for the health, safety, and protection of the rights and dignity of residents of residential board and care homes. This rule must be read in conjunction with W. Va. Code § 16-5C-1 et seq. and § 16-5H-1 et seq. to determine the complete requirements for licensing, regulation, and complaint investigations of residential board and care homes.

1.2. **Authority** - W. Va. Code § 16-5C-5. Related W. Va. Code § 16-5C-1 et seq. and § 16-5H-1 et seq.

1.3. **Filing Date** -

1.4. **Effective Date** -

1.5. **Repeal of Former Rule** - This legislative rule repeals West Virginia Administrative Rules, WV 64 CSR 65, Residential Board and Care Homes, 1993.

**§64-65-2. Application and Enforcement.**

2.1. **Application** - This rule applies to any person, and every form of organization, whether incorporated or unincorporated, including any partnership, corporation, trust, association or political subdivision of this State establishing, maintaining or operating a residential board and care home as defined in W. Va. Code § 16-5C-2 and § 16-5H-1 and this rule: Provided, That participation by a home in the adult family care home program of the department of health and human resources shall be accepted as a residential board and care home license; and Provided further, That this rule does not apply to homes or asylums operated by fraternal orders pursuant to W. Va. Code § 35-3-1 et seq.

2.2. **Enforcement** - This rule is enforced by the secretary of the West Virginia department of health and human resources.

**§64-65-3. Definitions.**

3.1. **Abuse** - Mistreatment of residents, including physical bodily harm, misuse of physical or chemical restraints, verbal abuse, and infliction of emotional suffering.

3.2. **Activities of Daily Living** - The activities that individuals generally perform regularly in the course of maintaining their physical selves, such as eating, dressing, oral hygiene, toileting, personal grooming, and moving themselves from one location to another, as for example, in

moving from a bed to a chair, or from one (1) room to another.

3.3. **Administrator** - The owner or individual selected by the licensee to be responsible for the day-to-day operation of the residential board and care home.

3.4. **Bed Capacity** - The number of residents for which a residential board and care home is licensed to provide care.

3.5. **Bedfast** - The condition of individuals who are confined or restricted to a bed or chair for a prolonged or indefinite period of time with limited mobility and ability to turn themselves while in bed or remove themselves from a chair, making them susceptible to physiological, physical and psychological complications of immobilization and incapable of self-preservation. An individual for whom a physician has prescribed bed rest because of a short term illness (i.g. cold, flu, virus, etc.) is not considered bedfast.

3.6. **Behavioral Health Services** - Those services intended to help individuals with emotional or mental disorders, alcohol or drug abuse problems, or mental retardation or other developmental disabilities to gain or regain the capacity to function adaptively in their environment, to care for themselves and their families, and to be accepted by society.

3.7. **Chemical Restraint** - a psychoactive drug that is used for discipline or convenience and is not required to treat medical symptoms.

3.8. **Certified Long Term Care Nursing Assistant** - Any individual who has met the requirements for entry in the long term care nursing assistant registry.

3.9. **Communicable Disease** - An illness due to an infectious agent or its toxic products which is transmitted, directly or indirectly, to a susceptible host from an infected person, animal, or arthropod, or through the agency of an intermediate host or a vector or through the inanimate environment.

3.10. **Developmental Disorder** - A group of disorders in which the predominant disturbance is in the acquisition of cognitive, language, motor, or social skills. The disturbance may involve a general delay, as in mental retardation, or a delay or failure to progress in a specific area of skill acquisition or multiple areas in which there are qualitative distortions of normal development. The course of developmental disorders tends to be chronic, with some of the signs of the disorder persisting in a stable form (without periods of remission or exacerbation) into adult life.

3.11. **Exploitation** - Illegal or improper use of a resident or a resident's property.

3.12. **Extensive Nursing Care** - The nursing care required when there is a major deviation from normal in a body system or multiple body systems of such magnitude that the deviations are life threatening.

3.13. **Functional Needs Assessment** - Any assessment tool that identifies for the resident

and the home those services that the home will need to obtain or provide for the resident in order to promote the resident's health, wellness, comfort, dignity and independence.

An assessment may include but need not be limited to questions such as the following:

Does the proposed resident have an alternative decision-maker or living will?; Does the proposed resident have the ability to self-manage funds or property?; Does the proposed resident require assistance in bathing, dressing, eating, toileting, or ambulating?;

Does the proposed resident take any prescribed medication?; Does the proposed resident have a regular physician, if so who?; Does the proposed resident require a special diet or monitoring of a special diet?;

Does the proposed resident regularly attend activities in the community, if so, what and where?;

Does the proposed resident require special assistive devices to maintain his or her independence?.

3.14. **Household Member** - A member of a family operating a residential board and care home who lives in the home and who is not receiving services as a resident of the residential board and care home.

3.15. **Immediate and Serious Threat** - A situation which may present a high probability of serious harm or injury to one or more residents. An immediate or serious threat need not result in actual harm to any resident. The threat of probable harm is perceived as being as serious or significant.

3.16. **Imminent Danger** - As applied to a violation of this rule, a danger which could reasonably be expected to immediately cause or contribute to death, serious physical harm or illness to residents, household members or staff before the threat can be eliminated through the plan of correction process of this rule.

3.17. **Legal Representative<sup>1</sup>** -

3.17.1. A conservator, temporary conservator or limited conservator appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W. Va. Code, §44-1-1-et seq., within the limits set by the order;

3.17.2. A guardian, temporary guardian or limited guardian appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W. Va. Code, §44-1-1-et seq., within the

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<sup>1</sup> Owners and administrators should note that the various types of legal representatives do not necessarily have the lawful authority to act on behalf of the resident in all matters which may require action by a legal representative. For example, a conservator may have responsibility for financial affairs, but not personal affairs, such as medical care.

limits set by the order;

3.17.3. An individual appointed as committee or guardian prior to June 9, 1994, within the limits set by the appointing order and W. Va. Code 44A-1-2(d);

3.17.4. A person having a medical power of attorney pursuant to the West Virginia Medical Power of Attorney Act, W. Va. Code §§16-30A-1 et seq., within the limits set by the law and the appointment;

3.17.5. A representative payee under the U.S. Social Security Act, Title 42 US Code §301 et seq., within the limits of the payee's legal authority;

3.17.6. A surrogate decision-maker appointed pursuant to the West Virginia Health Care Surrogate Act, W. Va. Code §§16-30B-1 et seq., or the West Virginia Do Not Resuscitate Act, §§16-30C-1 et seq., within the limits set by the appointment;

3.17.7. An individual having a durable power of attorney pursuant to W. Va. Code §39-4-1, or a power of attorney under common law, within the limits of the appointment; or

3.17.8. An individual lawfully appointed in a similar or like relationship of responsibility for a resident under the laws of this State, or another State or legal jurisdiction, within the limits of the applicable statute and appointing authority.

3.18. **Licensed Health Care Professional** - Any health care professional currently licensed in West Virginia such as, but not limited to a: social worker, dentist, practical nurse, occupational therapist, pharmacist, physical therapist, physician, physician assistant, psychologist, registered professional nurse, or speech-language pathologist.

3.19. **Life Care Contract** - A contract between the residential board and care home and an individual in which the residential board and care home agrees to provide long-term residential care for the individual, for the remainder of the individual's life, regardless of the level of care needed by the individual.

3.20. **Limited and Intermittent Nursing Care** - Direct hands-on nursing care of individuals who need no more than two (2) hours of nursing care per day for a period of time no longer than ninety (90) consecutive days per episode, with a period of at least thirty (30) days between episodes.

3.21. **Major Incident** - An event or occurrence, the outcome of which places one (1) or more residents' health and well-being in jeopardy or imminent danger, as for example: a fall, accident or other event which seriously injures or threatens the life of the resident; a resident death occurring from other than natural causes; a missing resident who is likely to injure him or herself or who needs medication or treatment on a regular basis and who is likely to have difficulty returning to the home on his or her own; assaults on a resident resulting in injury; or events which cause the disruption of normal residential board and care home activity, such as threats or occurrences of extreme violence, explosions, fire or natural disasters.

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3.22. **Neglect** - Failure to provide for the necessities of daily living or the lack of care for significant medical problems.

3.23. **Nursing Care (Services)** - Those procedures commonly employed in providing for the physical, emotional and rehabilitation needs of the ill or otherwise incapacitated which require technical skills and knowledge beyond that which the untrained person possesses, including, but not limited to, such procedures as: irrigations, decubitus care, catheterizations, special procedures contributing to rehabilitation and administration of medication by any method which involves a level of complexity and skill in administration not possessed by the untrained person.

3.24. **Nursing Support Staff** - Registered professional nurses, practical nurses, and nursing assistants employed by the residential board and care home to provide direct hands-on nursing services to residents.

3.25. **On-going Nursing Care** - The nursing care required when a deviation in health is expected to continue over a lengthy period of time (i.e. in excess of ninety (90) days) with minimal or no improvement.

3.26. **Personal Assistance** - Personal services, including, but not limited to the following: help in walking, bathing, dressing, feeding, or getting in or out of bed, or supervision required because of the age or mental impairment of the resident.

3.27. **Physical Restraint** - A device which physically limits, restricts, or deprives an individual of movement or mobility.

3.28. **Resident** - An individual living in a residential board and care home for the purpose of receiving residential board and care services from the home.

3.29. **Residential Board and Care Home** - Any residence or any part or unit thereof, however named, in this State which is advertised, offered, maintained, or operated by the owners or management, whether for consideration or not, for the express or implied purpose of providing accommodations, personal assistance and supervision, for a period of more than twenty-four (24) hours, to four (4) to ten (10) persons who are not related to the owner or manager by blood or marriage within the degree of consanguinity of second cousin and are dependent upon the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care but are capable of self-preservation and are not bedfast, including those individuals who qualify for and are receiving services coordinated by a licensed hospice.

3.30. **Restorative Care** - Care directed toward assisting a resident to achieve and maintain an optimal level of self-care and independence and providing assistance to residents in learning or relearning skills needed in everyday activities.

3.31. **Secretary** - The secretary of the State department of health and human resources or his or her lawful designee.

3.32. **Self-preservation** - The capability of, at least, removing one's physical self from

situations involving imminent danger, such as fire.

3.33. **Service Plan** - A written description of the services being provided to the resident to meet all of the needs identified in his or her functional needs assessment.

3.34. **Supervision** - The assumption of varying degrees of responsibility for the safety and well-being of residents including, but not limited to: being aware of the resident's location to the extent identified as a need by the resident functional needs assessment; monitoring through observation the activities of the resident while on the premises of the home to ensure his or her health, safety and well-being; reminding the resident of any important activities of daily living and prescribed medication; purchasing of food and other supplies; meeting nutritional needs; arranging for or providing transportation as necessary; and other similar activities.

#### §64-65-4. State Administrative Procedures.

##### 4.1. General Licensing Provisions.

4.1.1. No person may establish, maintain, offer, operate or advertise a residential board and care home without first obtaining from the secretary a license authorizing the operation: Provided, however, That any person who filed an application for a residential board and care home license with the secretary prior to October 1, 1993 may continue to operate the residential board and care home without a license until the secretary grants or denies the license.

4.1.2. A license is valid only for the licensee and for the structure named in the application and identified on the license. Separate buildings on the same premises operated as residential board and care homes require separate licenses. The license is not transferable or assignable, and shall be surrendered to the secretary upon written demand, or immediately, when the residential board and care home ceases provision of services.

4.1.3. The words "clinic", "hospital", "nursing home", "personal care home" or any other words which suggest a type of facility other than a residential board and care home shall not be used in the name of the home or in any of the home's advertising. If the licensee owns more than one (1) residential board and care home, each home shall have a separate identification. The licensee shall notify the secretary of any change in the name of the home.

4.1.4. Residential board and care homes which have residents who need limited and intermittent nursing care shall comply with all requirements of this rule.

4.1.5. Residential board and care homes which do not have residents who need limited or intermittent nursing care are not required to comply with Section 12 of this rule.

4.1.6. The licensee is responsible for compliance with: this rule; the terms of the home's license; W. Va. Code § 16-5C-1 et seq., titled Nursing and Personal Care Homes and Residential Board and Care Homes; other relevant federal, State or local laws and regulations; and with the home's policies.

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4.1.7. A residential board and care home is prohibited from renting, leasing or using its premises for any purpose that disrupts the activities of the residents.

4.1.8. Residence in a residential board and care home is restricted to residents, owners, household members, the administrator, and employees, unless otherwise approved in writing by the secretary.

4.1.9. A residential board and care home is prohibited from advertising, asserting, representing or otherwise implying in any manner that it may render care or services other than those specifically identified within the scope of its license.

4.1.10. The secretary may issue an initial or a renewal license for a period not to exceed one (1) year: **Provided**, That if an applicant timely submits, in conformance with this rule and W. Va. Code § 16-5C-1 *et seq.*, an application for renewal of a license currently in effect, together with payment of the proper fee, the license shall continue in effect until: (a) one (1) year following the expiration date of the license; (b) the date of the revocation or suspension of the license pursuant to this rule and W. Va. Code § 16-5C-1 *et seq.*, or (c) the date of issuance of a new license, whichever date occurs first.

### 4.2. Initial License.

4.2.1. Applications for initial licensure as a residential board and care home shall be submitted to the West Virginia office of health facility licensure and certification of the department of health and human resources, and shall include:

4.2.1.a. The following information, (see W. Va. Code § 16-5C-6(a)):

4.2.1.a.A. The name and address of the applicant;

4.2.1.a.B. The name, address and principal occupation:

4.2.1.a.B.(a) Of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent (10%) or more in the applicant;

4.2.1.a.B.(b) Of each officer and director of a corporate applicant;

4.2.1.a.B.(c) Of each trustee and beneficiary of an applicant which is a trust: and where a corporation has a proprietary interest of fifty percent (50%) or more in an applicant, the name, address and principal occupation of each officer and director of the corporation:

4.2.1.a.C. The name and address of the owner of the premises of the residential board and care home or proposed residential board and care home, if he or she is a different person from the applicant, and in such case, the name and address:

4.2.1.a.C.(a) Of each person who, as a stockholder or otherwise, has a

proprietary interest of ten percent (10%) or more in the owner of the premises of the residential board and care home or proposed residential board and care home;

4.2.1.a.C.(b) Of each officer and director of a corporate applicant;

4.2.1.a.C.(c) Of each trustee and beneficiary of the owner of the premises of the residential board and care home or proposed residential board and care home if he or she is a trust; and, where a corporation has a proprietary interest of fifty percent (50%) or more in the owner of the premises of the residential board and care home or proposed residential board and care home, the name and address of each officer and director of the corporation;

4.2.1.a.D. Where the applicant is the lessee or the assignee of the residential board and care home or the premises of the proposed residential board and care home, a signed copy of the lease and any assignment thereof;

4.2.1.a.E. The name and address of the residential board and care home or the premises of the proposed residential board and care home;

4.2.1.a.F. The proposed bed quota of the residential board and care home and the proposed bed quota of each unit thereof;

4.2.1.a.G. A list of the residential board and care home's employee positions and the duties of each position;

4.2.1.a.H. The name and address of the individual who is to serve as administrator;

4.2.1.a.I. Evidence of compliance with applicable laws and regulations governing zoning, buildings, safety, fire prevention and sanitation as required by this rule;

4.2.1.a.J. Documentation that the home has made provisions to ensure the continuing care of all residents for the thirty (30) day period after notification of pending closure. The provisions may be in the form of a bond, a property lien, or other form of guaranty acceptable to the secretary. The guaranty shall be in the amount of three hundred dollars (\$300) per resident or ten thousand dollars (\$10,000), whichever is greater; and

4.2.1.a.K. Such additional information as the secretary may require.

4.2.2. The application shall be on forms provided by the secretary, and shall bear the notarized signature of the applicant. The signature on the application and accompanying forms serves as a release for obtaining references, credit and other background information. The application shall be accompanied by a non-refundable license fee in the amount shown on the form as established pursuant to W. Va. Code § 16-5C-6(e), titled "License required: application; fees; duration; renewal," in the form of a check or money order payable to the West Virginia office of health facility licensure and certification. The secretary will not review incomplete forms and will return them to the applicant. The applicant shall provide to the secretary a

balance sheet showing all expenses and all income on forms provided by the secretary, including but not limited to, reimbursement of the owners, lease payment, number of residents, number of SSI recipients, monthly rates charged and resident census form. As mandated by W. Va. Code § 16-5C-6(e), the cost of the initial licensure inspections or inspections for changes in licensed bed capacity shall be borne by the applicant and must be received by the department prior to the issuance of an initial or amended license.

4.2.3. Homes applying for licensure that have not previously served individuals in a legally unlicensed location shall provide to the secretary a preliminary operating plan which shall include a proposed budget that projects monthly income, lease payment and reimbursement of the owners.

4.2.4. The applicant shall submit the application and fee at least ninety (90) days prior to the date proposed for commencement of operations.

4.2.5. Except as specified in § 4.13 of this rule, the secretary shall, after inspection, issue an initial license, if the applicant complies with this rule.

4.2.6. If any residents of a residential board and care home are to be moved to another location owned or operated by the same licensee, the licensee shall apply for a license for the new location at least ninety (90) days in advance of the move.

#### 4.3. Waivers.

4.3.1. The secretary may waive the requirements of this rule if after a thorough investigation, the secretary determines that the request for waiver will not adversely affect the health, safety, welfare or rights of the residents.

4.3.2. In order to request a waiver, the licensee or resident shall submit a written request for the waiver at least thirty (30) days in advance of the date on which the waiver is requested to begin. The request shall:

4.3.2.a. Specify the specific requirement in this rule for which the waiver is requested;

4.3.2.b. Specify the time period for which the waiver is requested;

4.3.2.c. Include specific and detailed reasons for the request;

4.3.2.d. Explain why the specific requirement cannot be complied with; and

4.3.2.e. Document that there will be no adverse effect on resident health, safety, welfare, or rights if the waiver is granted.

4.3.3. The individual making the request shall send a copy of the request to the residents of the home, the ombudsman representing the residents of the home, and the legal representative

or next of kin for each of the residents, and shall send a list of the names and addresses of these persons to the secretary within fifteen (15) days of making the request. The person receiving a copy of the request or any other person shall have the right to oppose the request by stating the reasons therefor within twenty (20) days of the receipt of notice of the request. If there is opposition to the request, a hearing shall be afforded all parties. All of the provisions of W. Va. Administrative Rules, Department of Health and Human Resources, Rules of Procedure for Contested Case Hearings, 64 CSR 1, apply.

**4.4. License Renewal.**

4.4.1. Applications for renewal of a license shall be postmarked or hand delivered to the secretary a minimum of ninety (90) days prior to the expiration date appearing on the currently held license.

4.4.2. Except as specified in § 4.13 of this rule, the secretary shall issue a renewal license when the following conditions are met:

4.4.2.a. The home is found to be in compliance with this rule;

4.4.2.b. The applicant has submitted a complete application and all requested documentation regarding financial capability and management of the home; and

4.4.2.c. The home has met all Class I standards and has attained at least a "C" rating according to this rule.

**4.5. Provisional License.**

4.5.1. The secretary may issue a provisional license when:

4.5.1.a. The home has received an "F" rating; or

4.5.1.b. All requirements for renewal of a license are not met prior to the expiration of the previously issued license.

4.5.2. The secretary shall not issue a provisional license when the home:

4.5.2.a. Is in violation of any Class I standard;

4.5.2.b. Is assigned a rating of "F" in three (3) or more licensure categories;

4.5.2.c. Has a record of noncompliance with this rule; or

4.5.2.d. Does not demonstrate potential for at least an overall "C" rating within the expiration date of the currently issued license.

4.5.3. The secretary shall not renew a provisional license.

4.5.4. The secretary shall determine the period of time for which a provisional license is issued. However, in no instance shall this period exceed one (1) year.

4.5.5. If the owner of a home is denied a provisional license or a provisional license expires, the secretary shall treat a subsequent application for a license as an initial license and the owner shall meet the requirements for an initial license including the cost of an initial application fee and inspections as determined by the secretary.

**4.6. Inspections.**

4.6.1. The secretary shall make or cause to be made inspections by duly authorized representatives necessary to carry out the intent of W. Va. Code §§ 16-5C-1 et seq., 16-5H-1 et seq., and this rule.

4.6.2. The secretary has the right to enter upon the premises of a residential board and care home without prior notice to conduct inspections. If the owner or person in charge of the home refuses entry, the secretary may apply to the circuit court in which the home is located or the circuit court of Kanawha County for a warrant authorizing an inspection.

4.6.3. The secretary has the right to enter upon the premises of any building for which probable cause exists that it is being operated or maintained as a residential board and care home without a license. If the owner or person in charge of the home refuses entry, the secretary may apply to the circuit court in which the building is located or the circuit court of Kanawha County for a warrant authorizing an inspection.

4.6.4. The secretary shall conduct at least one (1) unannounced inspection of a residential board and care home in order to assign a rating for all categories of standards prior to issuance of an initial license. Inspections shall be conducted after:

4.6.4.a. The application and fee have been received and been determined to be complete;

4.6.4.b. All requested documentation verifies the readiness of the home for an inspection;

4.6.4.c. Fees for the cost of inspections have been received by the secretary; and

4.6.4.d. Necessary inspections can be scheduled.

4.6.5. Periodic unannounced inspections shall be conducted to determine the residential board and care home's continued compliance with applicable statutes and regulations.

4.6.6. The secretary shall prepare a written report of any inspection made pursuant to this rule within fifteen (15) days of the completion of the inspection and shall mail a copy to the licensee or administrator, as applicable, specifically listing any violation of this rule.

#### 4.7. Complaint Investigation.

4.7.1. Any person may register a complaint with the secretary alleging a violation or violations of this rule by a residential board and care home or a facility alleged to be operating unlawfully as a residential board and care home. The complainant shall state the substance of the complaint and identify the home or building by name or address.

4.7.2. The secretary has the authority to conduct investigations as necessary to determine the validity of the complaint and shall notify the residential board and care home or a facility alleged to be operating unlawfully as a residential board and care home of the substance of the complaint at the time of the completion of any investigation.

4.7.3. The secretary shall send a description of any corrective action that a home will be required to take within a specified time frame and any disciplinary action to be taken by the secretary to the complainant, to the licensee, and to the administrator.

4.7.4. The names of a complainant and of any resident named in the complaint shall be kept confidential and shall not be disclosed to the public without written permission of the complainant and the resident or the resident's legal representative.

4.7.5. Any type of discriminatory treatment of a resident by whom, or upon whose behalf, a complaint has been submitted to the secretary, within one hundred twenty (120) days of the filing of the complaint or the institution of such action, shall raise a rebuttable presumption that such action was taken by the residential board and care home in retaliation for such complaint or action.

4.7.6. If, after an investigation, the secretary determines that the complaint has merit, he or she shall advise any injured party of the possibility of a civil remedy. In addition, residents, residents' families or legal representatives or ombudsmen may also pursue independently in court remedies for violations of this rule.

4.7.7. If a residential board and care home which is found to have violated one (1) or more requirements of this rule during a routine inspection, or a complaint or other investigation fails to correct the violations within one hundred twenty (120) days of the completion of the inspection or investigation, the secretary shall give written notice of the uncorrected violations and of the amount of time until the secretary will report<sup>2</sup> the residential board and care home's

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<sup>2</sup> Under the provisions of 42 U.S.C. 1616(e) and 45 CFR, Part 1397--Standard Setting Requirements for Medical and Nonmedical Facilities Where SSI Recipients Reside, all states are required to "establish, maintain, and ensure the enforcement of standards for any **category** [emphasis added] of institutions, foster homes, or group living arrangements, in which, as determined by the State, a significant number of recipients of Supplemental Social Security Income (SSI) benefits resides or is likely to reside. SSI residents who live in relevant facilities which violate any of the standards will be subject to a reduction in their SSI payments ... in an amount equal to any State supplementary benefit or other payment made by the State for any medical or remedial care provided them by the facility." As part of their responsibilities under the federal regulations, States are required to make certain reports to the residents of deficient facilities and to the appropriate regional office of the United States Social Security Administration.

lack of compliance with the rule to the Social Security Administration to all residents, their families and any legal representatives. The secretary shall also provide all residents with a list<sup>3</sup> of approved facilities and agencies to assist them in moving.

4.7.8. If a residential board and care home which is found to have violated one (1) or more requirements of this rule during a routine inspection or a complaint or other investigation fails to correct the violations within two hundred ten (210) days of the completion of the inspection or investigation, the secretary shall report<sup>4</sup> the residential board and care home's lack of compliance with this rule to the Social Security Administration. The secretary shall also provide all residents with a list<sup>5</sup> of approved facilities and agencies to assist them with moving.

**4.8. Plans of Correction.**

4.8.1. The licensee of a home found on the basis of inspection or other investigation to have violations of requirements in this rule shall develop a plan of correction which shall be signed and dated by the licensee and submitted to the secretary within fifteen (15) working days of receipt of the report of the inspection or other investigation.

4.8.2. The secretary may require immediate correction in the case of a violation constituting immediate and serious threats to the health or safety of a resident or employee.

4.8.3. The plan of correction shall specify:

4.8.3.a. The violations to be corrected;

4.8.3.b. Action taken or proposed to correct the violations and procedures to prevent their recurrence; and

4.8.3.c. A calendar date by which the violations will be corrected, which date shall allow the shortest possible time in which the residential board and care home may reasonably be expected to correct the violation. A home shall ordinarily be expected to comply with the rule within sixty (60) days of the inspection; however, the secretary may allow more time for certain types of deficiencies.

4.8.4. The plan of correction shall be approved, modified or rejected in whole or in part by the secretary in writing.

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<sup>3</sup> See also footnote #2. The purpose of the notification is to inform residents that they do not have the protection of the violated requirement; the list is intended to provide assistance to residents in moving if the lack of compliance by the residential board and care home endangers them or causes a reduction in their benefits.

<sup>4</sup> See footnote #2.

<sup>5</sup> See footnote #3.

4.8.5. In modifying or rejecting a proposed plan of correction, the secretary shall state the reasons for the modification or rejection.

4.8.6. When the secretary rejects a plan of correction, the residential board and care home has a reasonable amount of time, but no more than fifteen (15) working days, to submit a revised plan.

4.8.7. The secretary may conduct reasonable and necessary procedures, including a follow-up on-site inspection, to verify the correction of any violations identified during an inspection or any other investigation.

#### 4.9. Release of Reports and Records.

4.9.1. The secretary, from the time of receipt, shall make available for public inspection, and upon request, provide copies of the following at a reasonable cost:

4.9.1.a. Information concerning and actual applications and exhibits;

4.9.1.b. Inspection reports;

4.9.1.c. Reports of investigations conducted in response to complaints;

4.9.1.d. A current list of the names and addresses of residential board and care homes found to be in violation of this rule, including the detail of each violations; and

4.9.1.e. Any other reports filed with or issued by the secretary pertaining to the compliance of a residential board and care home with applicable laws and rules.

4.9.2. The names of residents shall be kept confidential and shall not be disclosed without the resident's written permission or by order of court of record. Nothing contained in this rule shall be construed to require or permit the public disclosure of confidential medical, social, personal or financial records of any resident. Before releasing a report or record judged public information, the secretary shall delete any confidential information regarding a resident which would reasonably permit identification of the resident.

#### 4.10. Classification of Standards.

In accordance with W. Va. Code § 16-5C-5(c), a classification for each standard in this rule is established according to the following:

4.10.1. Class I standards are those the violation of which would present either an imminent danger to the health, safety or welfare of any resident or substantial probability that death or serious physical harm would result;

4.10.2. Class II standards are those the violation of which would have a direct or immediate relationship to the health, safety or welfare of any resident but which would not create

imminent danger; and

4.10.3. Class III standards are those the violation of which would have an indirect or potential impact on the health, safety or welfare of any resident.

#### 4.11. Point System.

4.11.1. The secretary shall assign a Class I standard a value of ten (10) points if the home fully complies with the standard. If the home fails to comply fully with the Class I standard and the secretary determines that the lack of compliance presents either an imminent danger to any resident or a substantial probability that death or serious harm to any resident may result, the score assigned to the Class I standard shall be zero (0). If the home fails to comply fully with the standard but does demonstrate substantial compliance a score of seven (7) points may be assigned to the standard. If the home fails to demonstrate full or substantial compliance with the standard but partial compliance is in evidence, a score of five (5) points may be assigned to the standard. If the home fails to demonstrate partial compliance or if the violation is a repeat of a deficiency cited during the previous licensure inspection, a partial score shall not be assigned and the standard shall be scored as zero (0).

4.11.2. The secretary shall assign a Class II standard a value of nine (9) points if the home fully complies with the standard. If the home fails to comply fully with the Class II standard and the secretary determines that the lack of compliance may result in substantial probability that serious harm to the health, safety, or welfare of any resident may result, the score assigned to the Class II standard shall be zero (0). If the home fails to comply fully with the standard but does demonstrate substantial compliance a score of six (6) points may be assigned to the standard. If the home fails to demonstrate full or substantial compliance with the standard but partial compliance is in evidence a score of four (4) points may be assigned to the standard. If the home fails to demonstrate partial compliance or if the violation is a repeat of a deficiency cited during the previous licensure inspection, a partial score shall not be assigned and the standard shall be scored as a zero (0).

4.11.3. The secretary shall assign a Class III standard a value of eight (8) points if the home fully complies with the standard. If the home fails to comply fully with the standard but does demonstrate substantial compliance a score of five (5) points may be assigned to the standard. If the home fails to demonstrate full or substantial compliance with the standard but partial compliance is in evidence, a score of four (4) points may be assigned to the standard. If the home fails to demonstrate partial compliance or if the violation is a repeat of a deficiency cited during the previous licensure inspection, a partial score shall not be assigned and the standard shall be scored as a zero (0).

4.11.4. The secretary shall determine substantial, partial, or lack of compliance with a standard based on the severity or scope, or both, of the noncompliance rather than the quantity of components out of compliance under a specific standard.

4.11.5. If a standard is not applicable for a particular residential board and care home, a full compliance value shall be assigned for that item for scoring and rating purposes.

**4.12. Residential Board and Care Home Rating.**

4.12.1. The secretary shall assign a rating to each residential board and care home based on the result of the licensure inspection.

4.12.2. The rating shall be assigned and included on the license issued to the residential board and care home based on the results of the licensure inspection.

4.12.3. Scores and ratings for individual categories are shown in Table 64-3A found at the end of this rule.

4.12.4. The secretary shall not permit points scored in any individual category to offset deficiencies within another category. Therefore, the secretary will not compute a total of value points. An overall rating for the residential board and care home cannot be determined solely on the basis of total points earned.

4.12.5. For purposes of assigning an overall rating, a category rating of "A" shall be assigned a score of four (4); a category of "B" shall be assigned a score of three (3); a category rating of "C" shall be assigned a score two (2); and a category rating of "F" shall be assigned a score of zero. Category rating scores shall be totaled and an average category rating score shall be computed. An overall residential board and care home rating shall be assigned based on considerations of both the average category rating score and the number of categories rated "F" as follows:

4.12.5.a. If a home is given a rating of "F" on one (1) category or has an average category rating score of less than 2.0, an overall rating of "F" shall be assigned;

4.12.5.b. For an average score of 2.0 through 2.59, an overall rating of "C" shall be assigned;

4.12.5.c. For an average score of 2.6 through 3.59, an overall rating of "B" shall be assigned; and

4.12.5.d. For an average score of 3.6 through 4.0, an overall rating of "A" shall be assigned.

4.12.6. The secretary may issue a provisional license to a home with an overall rating of "F" as described in Section 4.5 of this rule. However, any home demonstrating an "F" in three (3) or more licensure categories shall not be issued a license and shall be ordered to close or be subject to other actions by the secretary as described in W. Va. Code § 16-5C-11, License limitation, suspension, revocation; continuation of disciplinary proceedings; closure, transfer of patients, appointment of temporary management; assessment of interest; collection of assessments; promulgation of regulations to conform with federal requirements; hearings; in W. Va. Code § 16-5C-15, Unlawful acts; penalties; injunctions; private right of action, and in W. Va. Code § 16-5H-3, Enforcement; criminal penalties; injunction.

4.12.7. Any residential board and care home which has been determined by the secretary to be noncompliant with any Class I standard shall not be assigned a rating and shall not be issued a provisional license as specified in Section 4.5.2 of this rule.

4.12.8. The secretary shall assign a rating no greater than a "B" to a home which has been denied a provisional license based on violation of a Class I standard and is subsequently reapplying for an initial license as specified in Section 4.5.5 of this rule.

**4.13. Non-Issuance of Initial or Renewal License.**

4.13.1. The secretary may refuse to issue either an initial or a renewal license if he or she finds evidence of the following:

4.13.1.a. Lack of financial stability to operate, such as insufficient capital, delinquent accounts, checks returned because of insufficient funds, and nonpayment of taxes, utility expenses and other essential services;

4.13.1.b. Either the applicant or the administrator has been arrested for, adjudicated, and convicted of any felony or of a misdemeanor relevant for the provision of care in a health care facility or for operating a health care facility;

4.13.1.c. The applicant has been denied or has had a license to operate a health care facility revoked in West Virginia or any other jurisdiction during the previous five (5) years;

4.13.1.d. The applicant has a record of noncompliance with lawful orders of the department or other licensing or certification agency for any jurisdiction in which the applicant has operated, directed or participated in the operation of a health care facility;

4.13.1.e. The owner or person in charge of the home has refused entry to the secretary's duly authorized representative for an inspection or survey;

4.13.1.f. The home has inappropriately converted for its own use the property of a resident;

4.13.1.g. The home has secured property, or a bequest of property, from a resident by undue influence;

4.13.1.h. The home has submitted false information either on the licensure or renewal application forms or during the course of an inspection or survey of the home; or

4.13.1.i. In the instance of an application for a renewal license, the home has received an F rating in one (1) or more of Sections five (§ 64-65-5) through twelve (§ 64-65-12), as applicable, of this rule.

4.13.2. The secretary shall consider all available evidence at the time of the determination, including the history of the residential board and care home and the applicant in

complying with this rule, notices of violations which have been issued to the home and the applicant, findings of surveys and inspections, and any evidence provided by the home, residents, law enforcement officials, and other interested individuals.

**§64-65-5. Administration of the Residential Board and Care Home.**

**5.1. General Administrative Requirements. (Class III)**

5.1.1. The residential board and care home shall adopt policies and procedures governing the care and safety of residents, the protection of residents' personal property (i.e. periodic inventories of each resident's personal possessions) and rights, the operation of the home, the services provided by the home, emergency procedures and disaster plan, admission, discharge and transfer of residents, complaint procedures, infection control and all other policies and procedures required by this rule.

5.1.2. Policies and procedures shall be in writing and kept current with changes indicated by a dated signature of the administrator.

5.1.3. A copy of each policy and procedure shall be available for inspection on request by employees, residents, and resident's representatives.

5.1.4. The residential board and care home shall have written house rules governing resident behavior and responsibilities including: smoking; alcohol consumption; visitation; recreational activities (including television); personal laundry; and the use and storage of personal belongings such as furnishings and clothing. House rules may not be inconsistent with this rule.

5.1.5. The residential board and care home shall comply with any applicable State and local laws and regulations.

**5.2. The Licensee. (Class II)**

5.2.1. The licensee is responsible for compliance with this rule; the terms of the home's license; W. Va. Code §§ 16-5C-1 et seq.; other relevant federal, State or local laws and regulations; and with the home's policies.

5.2.2. The licensee shall:

5.2.2.a. Give evidence of financial responsibility;

5.2.2.b. Protect the physical and mental well-being of the residents;

5.2.2.c. Keep the records and make the reports required by this rule; and

5.2.2.d. Meet the qualifications of the administrator if he or she assumes those duties.

5.2.3. The licensee is responsible for maintaining fiscal records which accurately identify, summarize, and classify funds received and disbursed for the operation of the home. A recognized system of accounting shall be used to accurately reflect details of the business, including residents' trust funds and other property. The home shall be administered on a sound financial basis consistent with good business practices. Evidence of issuance of bad checks or accumulation of delinquent bills shall constitute prima facie evidence that the ownership lacks satisfactory proof of financial ability to operate the home in accordance with the requirements of W. Va. Code § 16-5C-6.

5.2.4. The licensee shall maintain a liability insurance policy in an amount that will cover all injuries to any residents.

### 5.3. Administrator. (Class II)

5.3.1. A residential board and care home shall have an administrator who is at least twenty-one (21) years of age and has completed high school or a general education development (GED) certificate: Provided, That individuals who are home administrators at the time this rule becomes effective may complete this requirement within twenty-four (24) months following the effective date of this rule.

5.3.2. The administrator of a residential board and care home shall have a personal history which is free of: evidence of abuse, fraud, or substantial and repeated violations of applicable laws and rules in the operation of any health or social care facility or service organization, or in the care of dependent persons; and conviction of crimes relevant for the provision of care to a dependent population as evidenced by a criminal investigative background check.

5.3.3. The administrator shall participate in ten (10) hours of training related to the administration and operation of a residential board and care home annually. Attendance records shall be maintained on file at the home.

5.3.4. The administrator is responsible and accountable for the development and execution of all policies and procedures required by this rule and shall be able to conform to applicable statutes, rules and regulations; know the requirements of the rule for residential board and care homes; and ensure the adequacy and appropriateness of services delivered to the residents.

5.3.5. The administrator shall ensure that resident care is carried out by appropriately licensed health care professionals when required by State law and rules, and that medications and treatments given to residents are prescribed and administered as required by State and federal law, rules and regulations.

5.3.6. Beginning two (2) years after the effective date of this rule, the administrator shall develop and implement a quality assurance plan.

5.3.7. The administrator or a responsible employee, designated in writing, shall be

available and in charge of the home at all times. Residents may not be designated as the person in charge of the home.

5.3.8. The licensee shall notify the secretary in writing within ten (10) days of any permanent change in the administrator of a residential board and care home. A licensee shall not operate a home more than thirty (30) days without a qualified administrator unless the secretary grants an extension, based on a determination that a reasonable attempt has been made to find a suitable replacement.

**5.4. Admission Procedures. (Class III)**

5.4.1. The residential board and care home shall not deny admission to a prospective resident on the grounds of race, national origin, religion, age, sex or disability.

5.4.2. The relationship of a resident to the residential board and care home shall be covered by a contract entered into at the time of or prior to the individual's admission which provides written assurance of the services that the home will provide to meet the individual's needs. Current residents shall be provided with new or updated contracts within fourteen (14) days of the effective date of this rule, if the existing contract does not meet the requirements of this rule. The contract shall specify: the home's admission, retention and discharge criteria; services to be offered with a full disclosure of fees for services, including the home's policy regarding annual contract price and refunds; an explanation of how personal finances will be managed, how health care will be provided or arranged for, how activities are accessed; and the process of lodging complaints. Each party to the contract shall have a copy of the contract.

5.4.3. The home shall provide the individual with the following information separately at the time of the agreement:

5.4.3.a. Information and referral services to be provided by the home with respect to assisting the resident's utilization of social, recreational, and vocational activities within the community;

5.4.3.b. How the home will protect the resident's personal property from loss and theft;

5.4.3.c. How the home will assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident and how the home will arrange for transportation to and from these services;

5.4.3.d. How the home will address and prepare for emergency situations that affect the well-being of residents, including, but not limited to: life-threatening medical emergencies (including whether the home will provide CPR), fires, natural disasters, severely inclement weather, industrial accidents, major incidents, a missing resident and immediate or serious threats;

5.4.3.e. The resident's and home's responsibility for the procurement and payment for prescribed medications, and for the storage, administration and disposition of medications;

5.4.3.f. The responsibility of the resident's physician for required medical examinations and treatment orders:

5.4.3.g. The home's policy regarding room changes, retention during temporary illness or a significant change in resident status, transfers and discharges and the resident's and the home's transfer and discharge notification responsibilities.

5.4.3.h. The house rules governing resident behavior and responsibilities: and

5.4.3.i. A resident's bill of rights which is consistent with this rule.

5.4.4. Individuals admitted shall be capable of self-preservation. The resident record shall include documented certification by a physician or psychologist that the resident is capable of self-preservation by virtue of his or her ability to follow directions and, with prompting if necessary, to take appropriate action for self-preservation under emergency conditions, except as provided in this section. The certification shall be updated as indicated by changes in the resident's physical or mental condition.

5.4.5. Individuals admitted may be in need of personal assistance in activities of daily living, in need of supervision because of mental or physical impairment, or have limited and intermittent nursing care needs.

5.4.6. Individuals with identified mental or developmental disabilities may be admitted if the home can provide evidence of continued professional follow-up to address the individual's mental health needs or the individual is a client of a licensed behavioral health agency.

5.4.7. Individuals who qualify for and are receiving services coordinated by a licensed hospice may receive these services in a residential board and care home, except that services utilizing equipment which requires auxiliary electrical power in the event of a power failure, such as ventilators, suction apparatus, and intravenous or tube feeding pumps, shall not be used unless the residential board and care home has a backup power generator. In the event that a resident is receiving limited or intermittent nursing care or hospice services, the residential board and care home shall assure that the resident has privacy in care and the ability to evacuate in an emergency. The provision of services to the resident receiving limited or intermittent nursing care or hospice care shall not interfere with the provision of services to other residents.

#### **5.5. Restricted Admissions to Residential Board and Care Homes. (Class II)**

5.5.1. Individuals admitted shall not require the use of routine physical or chemical restraints.

5.5.2. Individuals admitted shall not require ongoing or extensive nursing services.

5.5.3. Individuals admitted shall not require a level of service for which the home is not licensed or does not provide.

**5.6. Retention of Residents whose Condition and Functional Ability Declines after Admission. (Class II)**

5.6.1. If a resident exhibits symptoms of a mental or developmental disorder, and the resident is not receiving services to meet his or her current needs, is not a client of a behavioral health center, or does not have a case manager, the home shall advise the individual or his or her legal representative of his or her behavioral health service options within the community. The resident shall have thirty (30) days to obtain necessary services. If the resident or his or her legal representative fails to meet the resident's needs in this area in a timely manner, then the residential board and care home shall refer the individual to a licensed behavioral health agency: Provided, however, That the home shall seek immediate treatment for a resident or refuse to admit a prospective resident if the home has reason to believe that the individual may suffer serious harm or is likely to cause serious harm to himself or herself or to others if appropriate interventions are not provided in a timely manner.

5.6.2. Individuals who become bedfast subsequent to admission may remain in the home for ninety (90) days during a temporary illness or recovery from surgery if the resident's care does not require nursing care in excess of limited and intermittent nursing care and the resident is not bedfast for more than ninety (90) days, and the following criteria are substantiated through resident interview:

5.6.2.a. The resident requests to remain in the home;

5.6.2.b. The resident is advised of the availability of other specialized health care facilities to treat his or her condition;

5.6.2.c. The need for such care is the result of a medical pathology or a result of the normal aging process;

5.6.2.d. The home can maintain the resident's safety and continue to meet the resident's needs.

**5.7. Discharge Procedures. (Class II)**

5.7.1. Homes with individuals in residence who need more than limited and intermittent nursing care shall inform the resident or his or her legal representative of the need to move the resident to a health care facility with the capability of providing the needed level of nursing care, except that residents receiving services from a licensed hospice program may remain in the home.

5.7.1.a. The home shall assist the resident and his or her legal representative to attempt on a monthly basis to secure an alternative care facility.

5.7.1.b. The home shall thoroughly document in the resident's record efforts made by the home and the resident or his or her legal representative to obtain placement in an alternative care facility and refusals from the facilities in the event that the resident is unable to secure alternative placement and remains in the home.

5.7.2. The residential board and care home shall notify the resident and the resident's legal representative or interested family member within seventy-two (72) hours whenever there is a change in room or roommate assignment or when discharge is considered.

5.7.3. The residential board and care home shall give a thirty-day notice of discharge unless an emergency situation which requires transfer to a hospital or other higher level of care exists or if the resident is a danger to his or herself or others. A copy of the written discharge notice shall be filed in the resident's record.

**5.8. Records. (Class III)**

5.8.1. All records which contain the information required by this rule for residents shall be retained at the home in a secure area and shall be made available for inspection by the secretary's duly authorized representative.

5.8.2. The licensee shall ensure that all records are treated confidentially by staff and shall establish a policy and procedure for release of information from resident records.

5.8.3. The residential board and care home shall begin at admission, maintain, and keep current, a record for each resident. The record shall include:

5.8.3.a. Resident's name; social security number; birth date; sex; marital status; religious preference and affiliation, if any;

5.8.3.b. Names, addresses and telephone numbers for the following relevant persons: physician; dentist; legal representative, if applicable; person, organization or agency responsible for payments for support of the resident, if applicable; next of kin or other interested relatives; persons to be notified in case of an emergency or death; any case management agency or organization; and any day care or other programs in which the resident regularly participates;

5.8.3.c. All agreements or contracts entered into between the resident and the home; initial health assessment and social history; admission, transfer and discharge data;

5.8.3.d. Physician's orders, a list of medications, and/or medication administration records (if appropriate); resident admission weight; the dates of physician, dentist and other health and behavioral health care providers and other professional appointments and visits (including those for accidents and illness requiring medical attention, coordinated by the home); all contact with the resident's physician by the home staff; observations by personnel, licensed nurses, physician, or others authorized to care for the resident;

5.8.3.e. Documentation of incidents and accidents involving the resident, including, at a minimum, the time, place, the action taken in response to the incident and the notification of the resident's physician (if applicable), family or legal representative;

5.8.3.f. The resident's functional needs assessment, service plan, and updates as appropriate;

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5.8.3.g. A list of clothing and personal possessions of the resident;

5.8.3.h. Documentation of resident account activities if the home is managing funds at the resident's request;

5.8.3.i. Documentation of death, including cause and disposition of the resident's personal effects and money or valuables deposited with the home;

5.8.3.j. Other information required by this rule.

5.8.4. The home shall keep resident records in safe storage for at least five (5) years from the date of the discharge or transfer of the resident. If the home ceases to operate, the licensee shall procure a holding area for the resident records that will ensure the confidentiality and safety of the records from loss, destruction or unauthorized use.

### 5.9. Management and Control of Resident Funds. (Class III)

5.9.1. If the licensee agrees to manage a resident's funds, it shall be by written request, in the manner directed by the depositor and in accordance with this rule, utilizing generally acceptable accounting principles to manage the funds in the resident's best interests.

5.9.2. The system shall not commingle resident funds with the home's funds or with the funds of any person other than another resident.

5.9.3. A resident's personal funds exceeding two-hundred dollars (\$200) shall be deposited in an interest bearing account at a local bank.

5.9.4. The home shall, if it handles resident monies in excess of twenty-five dollars (\$25) per resident and in excess of five-hundred dollars (\$500) for all residents in any month, give a bond in an amount and with such surety as the secretary shall approve sufficient to cover all resident accounts at all times. The licensee shall file a bond in the sum to be fixed by the secretary based upon the magnitude of the operations of the applicant but which sum may not be less than two-thousand five-hundred dollars (\$2,500) as shown in Table 64-65.2 found at the end of this rule. Whenever the amount of any bond which is filed pursuant to this subsection is insufficient to adequately protect the money of residents being handled, or whenever the amount of such bond is impaired, the licensee shall file an additional bond in such amount as necessary to adequately protect the money of residents being handled.

5.9.5. The resident account record shall show in detail with supporting documentation all monies received on behalf of the resident and the disposition of all funds received. Persons shopping for residents shall provide a list showing a description and price of items purchased if the purchase exceeds ten (\$10) dollars, along with payment receipts for these items.

5.9.6. The home shall render a true and complete accounting of the management and disposition of resident funds upon request to the depositor and the secretary and at least quarterly to the resident. Information shall be given to the resident upon request.

5.9.7. Upon termination of the deposit, the home shall account to the depositor for all funds received, expended and held on hand.

**5.10. Resident Death (Class II)**

5.10.1. The death of a resident shall be reported immediately to the attending physician and to the resident's family or legal representative, as applicable.

5.10.2. Upon the death of a resident, the following information shall be entered in the resident's record:

5.10.2.a. A record of the notification of the resident's physician, the designated individual for emergencies, and legal representative, if any;

5.10.2.b. The date, time and circumstance of death, including the name of person to whom the body was released and any other details specific to the death;

5.10.2.c. A record of the disposition of the resident's personal belongings that were released, including funds. The resident's legal representative or next of kin shall sign a detailed receipt for these items.

5.10.3. In the event of the death of a resident, a licensee shall return all funds, and property held in trust to the resident's legal representative. In the event the resident has no spouse or adult next of kin or other legal representative or the spouse or adult next of kin or other legal representative can not be located, funds due the resident shall be placed in a separate interest bearing account, and all property held in trust by the licensee shall be safeguarded until such time as the funds and property are required for distribution under state laws governing the administration of estates and trusts.

**§64-65-6. Residential Board and Care Personnel.**

**6.1. Employment Standards. (Class III)**

6.1.1. The residential board and care home shall have written personnel policies and procedures which appropriately meet the needs of the home.

6.1.2. The administrator shall assure that all staff are at least eighteen (18) years of age; licensed (as applicable) in accordance with State law; caring for residents with needs that are within the scope of his or her practice and training; and free from communicable disease in an infectious stage.

**6.2. Staffing Requirements. (Class II)**

6.2.1. Each residential board and care home shall maintain a minimum of one (1) residential staff twenty-four (24) hours per day (i.e. one per eight (8) hour shift) and shall have a sufficient number of employees on duty to provide the residents with all of the services

identified in their individualized service plans.

6.2.2. Awake staff shall be present in the home during normal resident sleeping hours when residents require supervision during sleeping hours or are in need of limited and intermittent nursing services. Awake staff are optional if all residents are certified by a physician or psychologist as not being in need of sleep time supervision and they are not in need of limited and intermittent nursing services.

6.2.3. A multi-story home shall maintain at least one (1) awake staff per story while residents are sleeping, except that the secretary shall permit one (1) awake staff in a multi-story home if:

6.2.3.a. The residents of the home are certified by a physician or psychologist as not being in need of supervision during sleeping hours;

6.2.3.b. The home has no residents who are in need of limited and intermittent nursing services; and

6.2.3.c. The home has an immediate emergency call system from the residents to the awake staff person.

6.2.4. The home shall have the staff needed to meet the laundry, food service, housekeeping, and maintenance requirements of this rule.

6.2.5. When regular staff and supervisory staff are absent due to illness and vacations, there shall be coverage by substitute personnel with comparable qualifications.

6.2.6. Each residential board and care home shall maintain and furnish to the secretary upon request information from personnel records setting forth the number (in full-time equivalents) and types of employees on duty in the home at any given time.

### **6.3. Employee Orientation and Training. (Class III)**

6.3.1. All employees and household members shall be made aware of the purpose of the facility; the services provided; the daily routines and the requirements established by the State rules for licensure of a residential board and care home.

6.3.2. Training shall be provided to new employees and new admissions within the first twenty-four (24) hours of association with the home in emergency procedures and disaster plans, including: evacuation of the home, procedures to report a missing resident, medical emergencies, accidents, fire, natural disasters or other emergencies.

6.3.3. The home shall maintain a written plan of orientation and training for employees. Such training will be provided within the first fifteen (15) days of employment inclusive of the following:

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6.3.3.a. Policies and procedures of the home;

6.3.3.b. The rights and responsibilities of residents including protection of resident privacy and confidentiality;

6.3.3.c. Complaint procedures of the home;

6.3.3.d. Procedures and agencies available in instances of abuse, neglect, and mistreatment: the State adult protective services agency, including its toll-free hot line number; the State licensure and certification agency, including its telephone number; the State commission on aging, including its telephone number; and various other concerned advocacy and protection organizations;

6.3.3.e. The care of aged, infirm or disabled adults with consideration for individual capabilities and needs;

6.3.3.f. Personal assistance procedures as needed for resident care, including at a minimum, personal grooming care, personal hygiene care, nutritional services, and signs and symptoms of alteration in skin integrity;

6.3.3.g. Specific duties and responsibilities of the residential staff for assisting current residents of the home (i.e. a review of individualized service plans, the activities program and/or professionally-designed intervention strategies to help a resident with behavioral health needs to manage his or her behavior);

6.3.3.h. Cardiopulmonary resuscitation (CPR), as applicable, and first aid; and

6.3.3.i. Infection control.

6.3.4. The home may modify the initial orientation and training for individual employees if the individual is certified as a nursing assistant and maintained as such on the nursing assistant registry maintained by the secretary. Completion of such a course satisfies the requirement for training in the areas of personal grooming, hygiene, assistance in feeding and activities of daily living. All other topics required by this rule shall be addressed in the employee's initial orientation and training program. This provision does not exclude individuals certified as nursing assistants from participation in annual on-going in-service training.

6.3.5. The residential board and care home shall provide ongoing in-service training annually in the areas of:

6.3.5.a. Resident rights and confidentiality;

6.3.5.b. Abuse, neglect, mistreatment, and procedures to prevent the occurrence of such incidents;

6.3.5.c. Emergency care of residents (first aid and as applicable, CPR); emergency

plans for the home, including fire safety and evacuation plans;

6.3.5.d. The responsibilities of the residential staff for assisting residents (i.e., individualized service plans, activity programs, etc.) and;

6.3.5.e. Infection control.

**6.4. Volunteers. (Class III)**

Volunteers rendering services in the home shall adhere to the laws and regulations governing confidential treatment of residents' personal information and provide evidence of freedom from communicable disease in an infectious stage.

**6.5. Personnel Records. (Class III)**

6.5.1. The residential board and care home shall maintain a confidential personnel record on each employee, including the administrator, and household members who provide services to residents. Each record shall contain at least the following:

6.5.1.a. An employment application which includes at least the individual's current home address and telephone number, emergency contacts, and social security number; and

6.5.1.b. Documentation of the results of a criminal record investigation regarding previous convictions involving abuse, mistreatment or neglect of dependent populations or theft of the property of such populations and the documented verification of past employment or personal references, or upon employment, a check of any abuse registry established by the State.

6.5.1.c. A record of orientation, annual and/or additional training, education and credentials;

6.5.1.d. The date of employment and a position title and description;

6.5.1.e. A health record containing the results of a pre-employment physical examination, annual screenings for tuberculosis (tine test not acceptable) and other communicable diseases as indicated by exposure, prevalence or currently accepted medical practice in congregate living situations as indicated by the commissioner of the bureau of public health of the State department of health and human resources. The employment physical and tuberculosis screening shall be obtained in the first week of employment.

6.5.2. Personnel records shall be maintained on file at the residential board and care home for at least three (3) years following termination of employment. The record shall have documentation of the date and reason for termination of employment.

**§64-65-7. Resident Rights.**

**7.1. Posting of Information and General Rights. (Class III)**

7.1.1. The residential board and care home shall post in a conspicuous place the following:

7.1.1.a. Residents' rights;

7.1.1.b. Phone numbers of the abuse hotline; the office of the licensing agency; the state ombudsman; and the regional ombudsman; and

7.1.1.c. Information about the ombudsman program including: (1) the name, address and telephone number of the designated long-term care ombudsman program serving the region in which the residential board and care home is located; (2) a brief description of the services provided by the long-term care ombudsman program; and (3) a statement as to the penalties for willful interference and retaliation.

7.1.2. The home shall promptly notify the resident's legal representative or interested family member whenever there is a change in resident's rights.

7.1.3. If a legal representative has been appointed for or designated by any resident as having the authority to exercise on behalf of the resident one (1) or more of the resident's rights under this rule, the home shall afford the legal representative full opportunity to exercise the authority. If a legal representative so appointed or designated exercises this authority, he or she shall exercise his or her authority in a manner consistent with all applicable state and federal laws and regulations.

7.1.4. Nothing in this rule shall in any way be construed to diminish or deprive any individual of rights recognized and established under other laws of the State of West Virginia or of the United States.

7.1.5. The home shall encourage and assist a resident throughout the duration of his or her stay to exercise his or her rights as a resident and as a citizen, such as voting in governmental elections.

7.1.6. A resident has the right to be free from restraint, interference, coercion, discrimination, or reprisal from the residential board and care home in exercising his or her rights.

## **7.2. Notice of Rights. (Class III)**

7.2.1. The home shall provide a copy of the residents' rights to the resident with duplicates on request. The date the rights are distributed shall be recorded.

7.2.2. The home shall post resident's rights and its current license in a conspicuous location at eye level in the home. The statement shall be easily readable with at least ten (10) point type.

7.2.3. The resident has the right to inspect all records pertaining to him or her and to

purchase photocopies at a reasonable cost.

7.2.4. Residents have the right, if they so choose, to view the results of inspections and complaint investigations conducted by the licensing agency. Deficiencies cited during the most recent survey and any complaint investigations conducted within the preceding twelve (12) months, and the residential board and care home's plan of correction shall be located in a place accessible to residents.

**7.3. Treatment. (Class I)**

7.3.1. The resident has the right to participate in planning his or her overall care, to utilize the physician or pharmacist of his or her choice, and to be fully informed in advance about care and treatment that may affect him or herself.

7.3.2. No resident shall be abused, neglected, mistreated, or restrained by physical or chemical means. Restraints shall not be used except as allowed under Subsection 8.5 of this rule.

7.3.3. The resident has the right to refuse to participate in experimental research. A resident shall participate in experimental research only on the basis of prior written informed consent. Any informed consent procedures shall be in conformance with applicable state and federal laws, rules and regulations.

**7.4. Protection of Resident Funds. (Class III)**

7.4.1. The resident has the right to manage his or her financial affairs, and the home may not require residents to deposit their personal funds with the home.

7.4.2. If the home manages funds for a resident, it shall be in accordance with this rule.

**7.5. Self Determination. (Class III)**

7.5.1. A resident has the right to meet with and participate in the activities of social, religious, and community groups, at his or her discretion.

7.5.2. Residents have the right to assemble and organize themselves as a group to solicit and recommend improvements in the home's services and to resolve problems that may arise between the residents and the home.

7.5.3. A resident shall not be compelled to retire at night or arise in the morning at the same set time.

7.5.4. Residents have the right to be free to leave the residential board and care home.

**7.6. Privacy and Confidentiality. (Class II)**

7.6.1. The resident has the right to personal privacy and confidentiality of his or her

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personal and permanent resident record. Personal privacy includes accommodations, medical treatment, written and telephone communications, personal assistance, visits and meetings of family and resident groups, but does not require the home to provide a private room.

7.6.2. The resident has the right to associate and communicate privately with persons of his or her choice.

7.6.3. The resident has the right to request that no person shall enter his or her room without identifying him or herself to the resident and receiving the resident's permission to enter.

7.6.4. The resident has the right to privacy and it shall be maintained when personal assistance is being provided. Resident bedrooms shall not be used as passageways.

7.6.5. The resident has the right to share the same bedroom with his or her spouse.

### 7.7. Complaints. (Class II)

7.7.1. The resident has the right to voice grievances with respect to treatment or care furnished without discrimination or reprisal for voicing the grievance.

7.7.2. The resident has the right to prompt action by the home to resolve grievances the residents might have, including those with respect to the behavior of other residents. The home shall assess the validity of all complaints and shall respond to the complainant in writing as to actions to be taken or not taken with reasons therefor, within twenty-four (24) hours of receipt of the complaint.

7.7.3. The resident has the right to express grievances and to communicate to the home staff and outside representatives of the his or her choice the need for changes in the residential board and care home policies or practices.

7.7.4. Nothing in this rule shall be construed to limit in any way the lawful authority of the State department of health and human resources to administer and implement W. Va. Code § 9-6-1 et seq. relating to adult protective services.

### 7.8. Work. (Class III)

7.8.1. The resident has the right to be employed outside of the home.

7.8.2. The resident has the right to refuse to perform services for the home.

7.8.3. The resident has the right to perform services for the home when:

7.8.3.a. The home has documented the resident's need or desire for work in the service plan in the resident's record;

7.8.3.b. The agreement specifies duties, hours of work and compensation;

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7.8.3.c. The agreement is not a condition for admission or continued residence; and

7.8.3.d. The resident enters into the agreement voluntarily.

7.8.4. Any resident who performs any staff duties shall meet the personnel and health requirements for that position.

7.8.5. A residential board and care home shall not permit a resident to perform work which creates conditions or in a manner potentially hazardous for themselves or others.

### 7.9. Mail and Communication. (Class II)

7.9.1. The resident has the right to send and promptly receive unopened mail. A resident may request a staff member to open and read correspondence.

7.9.2. The resident has the right to have access to stationary, postage and writing implements at the resident's own expense.

7.9.3. The resident has the right to have access to regular telephones for local calls at no cost. Coin-operated telephones may be provided for long distance calls. The use of "collect only" telephones as the primary telephones for resident use is prohibited. Appropriate privacy shall be afforded to the resident during telephone use.

### 7.10. Access and Visitation Rights. (Class II)

7.10.1. The resident has the right to receive visitors. Relatives and members of the clergy shall be permitted to visit at any time. Any entity or individual that provides health, social, legal, or other services to a resident, shall be permitted access to the resident subject to the resident's right to deny or withdraw consent at any time.

7.10.2. The resident has the right to collaborate with other residents and the administrator to reach a mutually agreed upon schedule of visiting hours. Visiting hours shall be posted conspicuously in a public place and shall consist of no less than ten (10) hours per day, seven (7) days per week.

7.10.3. The resident has the right to receive information from agencies acting as client advocates such as the State's long term care ombudsman program, and to be afforded the opportunity to contact these agencies.

### 7.11. Personal Property. (Class III)

The resident has the right to retain and use personal possessions including furnishings, and appropriate clothing as space permits, unless to do so would infringe upon the rights, health or safety of other residents.

### 7.12. Civil Rights. (Class II)

7.12.1. Individuals have the right to be free from discriminatory practices related to admission or services on the grounds of race, religion, national origin, age, gender, or disability.

7.12.2. The resident has the right to reside in a home that shall not segregate any resident, give separate treatment, restrict in the enjoyment of any advantage or privilege enjoyed by others in the residential board and care home, or provide with any aid, care services, or other benefits which are different or are provided in a different manner from those provided to others in the residential board and care home on the grounds of race, religion, national origin, age, gender, or disability.

7.12.3. The resident has the right to reside in a smoke-free environment. Homes shall have non-smoking areas and may adopt no-smoking policies. Current residents who smoke (as of the effective date of this rule) shall not have smoking privileges terminated through a no-smoking policy.

**§64-65-8. Health Care and Social Standards.**

**8.1. Operational Standards. (Class I)**

8.1.1. The residential board and care home shall encourage and assist all residents in developing and maintaining independence and self-determination.

8.1.2. The home shall allow the resident to choose his or her own physician and pharmacist in lieu of the homes's physician and pharmacist.

8.1.3. The home shall inform each resident of the names, specialties, and means of contact with the physician responsible for his or her care, if the home utilizes one (1) or more physicians to provide care oversight for all residents of the home.

8.1.4. This rule permits responsibilities of physicians contained within this rule to be implemented by nurse practitioners or physicians' assistants as assigned by the supervising physician and within the parameters of the individual's professional license.

8.1.5. The home shall take reasonable precautions to comply with standard precautions as recommended by the local public health authority should an epidemic occur.

8.1.6. The home shall be acquainted with the local emergency service system should emergency transport and care of residents in a medical emergency be required.

8.1.7. The home shall provide emergency aid for commonly occurring household injuries. A standard American Red Cross first-aid kit, or the equivalent, shall be readily available at all times in the home.

**8.2. Assessment. (Class II)**

8.2.1. The residential board and care home shall evaluate the continued appropriateness

of residence of an individual in the home.

8.2.2. The home shall assure that each resident has a written, signed and dated health assessment by a licensed physician or other licensed health care professional authorized to perform such assessments by applicable State laws and rules not more than sixty (60) days prior to the resident's admission, or no more than five (5) working days following admission, and at least annually thereafter. The admission and annual health assessment shall include screening for tuberculosis and other communicable diseases if indicated by exposure, prevalence or risk according to current medical practice in congregate living situations as indicated by the commissioner of the bureau of public health of the department of health and human resources.

8.2.3. Within thirty (30) days of admission, every resident shall have an individualized functional needs assessment completed in writing by a licensed health care professional. The resident's assessment shall include a review of at a minimum; health status, functional, psychosocial, activity and dietary needs.

8.2.4. Formal reassessment shall be documented in the resident's record at least annually based upon the month of the resident's admission.

### **8.3. Planning. (Class II)**

8.3.1. The home shall encourage residents to actively participate in the planning of their care and supervision.

8.3.2. Each resident shall have a service plan, based upon his or her assessment, developed within forty-five (45) days of admission and updated at least once every six (6) months. The service plan shall be developed and implemented in response to individual resident needs.

8.3.3. The service plan shall support the principles of individuality, personal dignity, freedom of choice and homelike environment.

8.3.4. The home shall review, monitor, implement and make appropriate modifications to each resident's service plan as appropriate. Formal service plan review shall be documented in the resident's record at least annually based upon the month of the resident's admission. If upon completion of the review, a determination has been made that changes in resident status have occurred, a new service plan shall be completed.

8.3.5. The home shall permit a resident to refuse any treatment. The home may inform a resident, however, that failure to follow his or her service plan may result in a behavioral or medical condition which requires services which are not available in a residential board and care home.

### **8.4. Services. (Class I)**

8.4.1. The home shall provide treatment and care in accordance with the functional

needs assessment and service plan to assist each resident to maintain the highest level of functioning possible.

8.4.2. The home shall assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident.

8.4.3. The home shall provide or arrange for appropriate transportation of the resident to receive medical and social services.

8.4.4. The home shall provide assistance to the resident and the resident's family in the adjustment to the residential board and care home setting and in the adjustment to transfer when other levels of care become necessary.

8.4.5. The home shall provide the resident with personal assistance to meet the needs identified on his or her functional needs assessment. Resident needs may include, but are not limited to, assistance from staff: to self-administer medically prescribed drugs and treatment; to follow any planned diet, rest or activity regimen; to utilize functional equipment (i.e. hearing aides, glasses, canes, etc.); and to perform activities of daily living.

8.4.6. The home shall provide supervision by designated staff for daily awareness of the general health, safety, and physical and emotional well-being of the resident.

8.4.7. The home shall provide dietary and general household services essential for the health and comfort of residents such as daily meals and snacks, laundry, floor cleaning, dusting, and bed-making.

8.4.8. The home shall provide a planned and meaningful activity program to meet the needs of the residents. Volunteers may assist but not replace home employees in carrying out the activities program. The home's program shall:

8.4.8.a. Encourage, guide, or assist residents with arrangements to participate in social, recreational, diversional, vocational, religious, or other activities within the home in accordance with individual interests, tolerance and abilities;

8.4.8.b. Provide information and referral services and opportunities for utilization of social, recreational, vocational activities within the community;

8.4.8.c. Provide a monthly calendar of varied events which lists all social and recreational activities for the residents;

8.4.8.d. Provide at least eleven (11) hours of scheduled activities available to the residents each week for no less than one (1) hour each day; and

8.4.8.e. Encourage but not require residents to participate in activities or restrict a resident's participation in an activity except upon a physician's order.

### 8.5. Medications. (Class I)

8.5.1. The residential board and care home shall make provision for the administration or self-administration of medicines and drugs according to physician orders in compliance with applicable State laws. The home shall, in consultation with a licensed health care or licensed registered professional nurse, establish written policies and procedures, which are consistent with this rule, for assisting residents in obtaining individually prescribed medication and for disposing of outdated prescription medications in accordance with applicable State and federal laws.

8.5.2. Prescription drugs shall be obtained, administered or self-administered only on the written order or prescription of an individual authorized by law to prescribe drugs in this State. The home shall ensure notification of the licensed health care professional managing the resident's health care regarding the resident's use of over-the-counter medications and the health care professional shall determine whether or not the resident can self-administer such medications in a safe manner.

8.5.2.a. Copies of the prescriptions or written orders for drugs shall be retained in the resident's record. Verbal orders shall be reviewed and signed by the individual responsible for the order within ten (10) working days from the original order date.

8.5.2.b. The ability of a resident to self-administer medication shall be documented in the resident's record.

8.5.3. The attending physician, or other health care professional, or a consulting pharmacist shall review the medication regimen of each resident as needed, but at least annually. Documentation of this review must be entered into the resident's record.

8.5.4. The home shall keep a record of all drugs given to each resident indicating each dose given. The record shall include: the resident's name; the name, strength, and quantity of the drug; instructions for giving the drug; the date and time drug is administered; and the name or initials of persons giving the drug. If initials are used, a signature equivalent to those initials shall be entered on the record.

8.5.5. Self-administration of insulin or injectables for which the individual has been trained to self-administer is permitted.

8.5.6. The use of PRN (as needed) controlled or prescription drugs such as narcotics, tranquilizers or psychotropic medications requiring judgment capabilities beyond the expertise of unlicensed staff or a fluctuating medication regimen is prohibited unless the self-administering resident is capable of determining when the medication is needed or the medication administration and management is otherwise in accordance with State and federal law, rules and regulations.

8.5.7. When oxygen therapy is provided, it shall only be administered by using oxygen concentrators except that a portable source shall be available for resident use for out-of-room activities and in the event of power failure; the equipment shall be maintained electrically safe and service shall be available as needed; the oxygen tubing shall be stored in a sanitary manner

when not in use and replaced as indicated by accepted infection control measures; and smoking shall be prohibited in any location when oxygen is in use and no smoking signs shall be posted conspicuously and enforced.

8.5.8. The residential board and care home shall store all medications in a way as to be inaccessible to all residents unless residents are determined to be capable of self-medication. In such cases, the home shall provide the self-medicating resident with resources to have the medications stored in a safe manner.

8.5.9. The container label of each prescription drug shall be legible, legally dispensed and labeled for the resident for whom it has been prescribed. When the prescriber's directions change, the container shall be relabeled by a licensed pharmacist or there shall be a written document signed and dated by the physician to verify the change in a medication prescription which is stored in the resident record. All medications shall be kept in their original labeled containers and shall be labeled in accordance with the rules of the West Virginia board of pharmacy and in a manner that the name and strength of medication, manufacturer name, lot number, and expiration date can be readily identified by the home:

8.5.10. Medication shall be centrally stored if the preservation of medicine requires refrigeration; when medication is determined, and documented by the home to be hazardous if kept in the personal possession of the person for whom it was prescribed; if the resident is not capable of self-administering medications as prescribed; or when, because of physical arrangements and conditions or habits of other persons in the home, the medications are determined to be a safety hazard to others.

8.5.11. Centrally stored medications shall be kept in a locked cabinet or other storage receptacle and accessible only to the staff responsible for medications.

8.5.12. If Schedule II drugs of the controlled substances act are administered, a copy of the written prescription signed by the physician shall be in the resident's record and a proof of use record shall be maintained. Schedule II drugs shall be stored in a manner so that they are securely protected by two (2) locks. The key to the separately locked Schedule II drugs shall not be the same key that is used to gain access to non-scheduled drugs. If refrigeration is required, the home shall provide: a refrigerator in a locked room, a locked refrigerator or a locked box within the refrigerator for storage. A thermometer shall be required in a refrigerator storing medications. The temperature within the refrigerator storing medications shall not exceed forty degrees Fahrenheit (40° F).

8.5.13. All medications for deceased residents shall be removed from the medication cart, cabinet, and refrigerator and separated from all other medications.

8.5.14. All controlled drugs shall be disposed of in accordance with state and federally approved practices.

8.5.15. Unit dose medication and medications in sealed original manufacturer's containers which can be credited by the vendor shall be returned to the vendor for credit or

disposed of in the manner directed by the resident.

8.5.16. All medications not returned for credit to the vendor shall be destroyed within the home by two (2) members of the home's staff or the home shall release the medication to the resident's legal representative and maintain a signed receipt in the home as documentation of the release of the medication.

8.5.17. The home shall maintain a record of the destruction of controlled drugs for a period of two (2) years. All medication destruction records shall be signed and dated by the individuals destroying the medications. The medication destruction record shall clearly state the following information: the name of the resident for whom the drug was prescribed; the prescription number; the name of the dispensing pharmacy; the name and dosage of the drug; the amount of the drug destroyed; and the date the drug was destroyed.

#### **8.6. Accident, Illness and Major Incident Procedures. (Class I)**

8.6.1. When a resident experiences an illness or an incident that results in injury or resident complaint, the home shall arrange for an appropriately licensed health care professional to:

8.6.1.a. Assess the severity and cause of the accident or illness;

8.6.1.b. Advise the residential board and care home as to the need to seek emergency assistance related to the accident or illness; and

8.6.1.c. Record actions taken in the resident's record, and, shall recommend to the home in writing actions, if any, to take to avoid similar accidents or illnesses. The home shall keep a written documentation of the recommendations. If the resident has an obvious need for emergency assistance, the person on duty should first obtain emergency assistance, and then call the licensed health care professional.

8.6.2. The residential board and care home shall document monitoring of the resident's condition for a period of twenty-four (24) hours following the accident or the onset of the illness or as specified by the licensed health care professional.

8.6.3. Major incidents shall be reported to the licensing agency by the licensee.

8.6.4. Written policies and procedures shall be established and enforced for contacting a resident's family, legal representative, physician or designated health service professional to communicate any apparent significant deviations from the resident's normal appearance, state of health or well-being. The home shall promptly notify the resident's physician when there is a major incident or any significant change in the resident's condition.

8.6.5. Physical restraints shall not be used except in an emergency under physician's order not to exceed twenty-four (24) hours for the safety of the resident and others in the home until a time that professional help arrives on the premises. Restraints utilized during emergencies

shall be limited to cloth vest or soft belt restraints only and their application shall be by trained staff only. Restraints shall be released every two (2) hours for at least ten (10) minutes. These procedures shall be documented and available for review by the secretary.

8.6.6. Any medical, dental or mental health professional, ordained minister, christian science practitioner, religious healer, social service worker, peace officer, or law enforcement officer is required under the adult protective services law to report (W. Va. Code §9-6-9) any incident in which an incapacitated adult is neglected, abused, or in an emergency situation, subject to conditions likely to result in neglect, abuse or emergency, or has died as a result of abuse or neglect. Reports of neglect, abuse or emergency situations shall be made immediately to the local adult protective services office of the department of health and human resources or by calling the adult protective services hotline number, as required by law and to the home's licensing agency. The secretary may report alleged failures by a licensed health care professional to report alleged incidents of neglect or abuse or emergency situations to the individual's licensing board.

8.6.7. The home shall assure that all alleged violations involving abuse, exploitation or neglect are immediately and thoroughly investigated and documented by the licensee or his or her designee within twenty-four (24<sup>o</sup>) hours of the incident.

8.6.8. If the allegation is substantiated, the home shall assure that appropriate sanctions are invoked or actions are taken to prevent a recurrence of alleged abuse, exploitation or neglect.

8.6.9. The home shall assure that the licensing agency has been notified within seventy-two hours (72<sup>o</sup>) of the date of the occurrence of alleged abuse, exploitation, or neglect. Concurrently, documentation of the investigation, the results of the investigation and the response to the investigation shall be forwarded to the licensing agency.

#### **§64-65-9. Dietetic Services.**

##### **9.1. General. (Class I)**

9.1.1. The residential board and care home shall ensure that each resident is offered at least three (3) meals daily, seven (7) days a week and special diets and snacks which meet resident needs and choices, as identified in his or her needs assessment, which are freshly prepared each day. Meals shall provide nutrients and calories for each resident based upon substantial compliance with current recommended dietary allowances of the Food and Nutrition Board of National Academy of Sciences, National Research Council, or as specified in this rule, except as ordered by a physician.

9.1.2. When therapeutic or modified diet services are provided by the home, a physician's order for each diet and the meal pattern, including types and amounts of food to be served, shall be on file. Therapeutic or modified diets, as recommended by the physician, shall be prepared according to written instructions obtained from the resident's physician or dietitian. At no time shall a resident be offered less than one thousand four hundred (1,400) calories daily, unless specifically ordered by a physician.

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9.1.3. The home shall offer residents a variety of foods at meals as follows:

9.1.3.a. Breakfast: fruit or juice; cereal, whole grain or enriched bread product; and Grade A vitamin D milk.

9.1.3.b. Noon and evening meals: protein sources, such as meat, poultry, fish, eggs, cooked dried legumes, cheese or peanut butter; vegetable or fruit; whole grain or enriched grain food products; and Grade A vitamin D milk.

9.1.4. Each resident shall be weighed upon admission and provided with the amount of food and fluid on a daily basis necessary to maintain his or her appropriate minimum average weight.

9.1.5. The home shall assure that residents are receiving meals that are planned and developed with regard to individual preferences.

9.1.6. The home shall encourage resident participation in menu planning and shall serve meals at times mutually agreed upon by residents in the home with consideration of resident past practice prior to admission to the home.

9.1.7. The home shall accommodate residents who are unable to eat at the planned mealtime and provide for a meal substitution if the resident does not tolerate the foods planned for the meal.

### 9.2. Administrative Requirements. (Class III)

9.2.1. Every resident shall be encouraged to eat in designated dining areas. The home shall not routinely designate private living areas and hallways as dining areas. A supply of appropriate and customary tableware in good condition shall be available for each resident.

9.2.2. The home shall maintain a daily record of actual foods served for each meal. Menu content shall be varied. Grocery receipts and records of actual food served shall be kept on file for at least thirty (30) days.

## §64-65-10. Fire Safety, Disaster and Emergency Preparedness.

### 10.1. Fire Safety. (Class I)

The residential board and care home shall provide evidence of compliance with applicable rules of the State fire commission. Any variation to compliance with the fire code must be coordinated with the department and approved in writing by the state fire marshal.

### 10.2. Disaster and Emergency Preparedness. (Class I)

10.2.1. The home shall have a written disaster and emergency preparedness plan which states procedures to be followed in the event of an internal or external disaster or emergency

which could severely affect the operation of the home.

10.2.2. The disaster and emergency preparedness plan shall have procedures for at least the following situations and shall identify specific tasks and responsibilities for all employees in the event of any of the following events: missing residents; high winds; tornadoes; floods; bomb threats; utility failure; severe winter weather; and an emergency food supply and menu which will provide nutrition for all persons residing in the home for a minimum of seventy-two (72) hours.

10.2.3. There shall be copies of the disaster and emergency preparedness plan at all staff stations or emergency control stations. The disaster and emergency preparedness plan shall be located in an area that allows visual contact at all times. Staff shall know the location at all times.

10.2.4. The disaster and emergency preparedness plan shall be reviewed and updated by the administrator or his or her designee on an annual basis and signed and dated to verify review.

10.2.5. Emergency call information shall be conspicuously posted near each telephone in the home, exclusive of resident telephones. This information shall include at least the following:

10.2.5.a. Telephone numbers of the fire department, the police, an ambulance service and other appropriate emergency services;

10.2.5.b. Key personnel telephone numbers, including at least the following: the administrator; physician (if applicable); or the nurse on call (if applicable); and

10.2.5.c. Names and telephone numbers of all other personnel to be called in case of fire or emergency.

10.2.6. Within seventy-two (72) hours of admission, the disaster and emergency preparedness plan procedures shall be clearly communicated by the staff to the resident.

10.2.7. The disaster and emergency preparedness plan shall be rehearsed by all personnel from all shifts once yearly.

**§64-65-11. Physical Plant and Sanitation Requirements.**

**11.1. Life Safety and Construction. (Class I)**

11.1.1. The residential board and care home shall comply with the State building code

promulgated in **W. Va. Administrative Rules, 87 CSR 4, Building Code.**<sup>o</sup>

11.1.2. All residential board and care homes shall provide for accessibility for individuals with a physical disability. This shall include at least the entirety of the main floor, including the living rooms, kitchen and dining areas and at least a portion of bedroom and bathroom space. The home shall reasonably attempt to ensure that most barriers to daily tasks have been overcome and that all necessary ramps, railings, and curb cuts are in place. Existing facilities have until the first day of January, one thousand nine hundred and ninety-seven (January 1, 1997), to comply with this requirement.

11.1.3. Trailers shall not be licensed as residential board and care homes.

11.1.4. The residential board and care home shall have electric power and have hot and cold running water adequate to meet the needs of the residents and employees.

11.1.5. Residential board and care homes shall be located in residential areas or partially residential areas.

## 11.2. Sanitation. (Class I)

11.2.1. The home shall have a water supply which complies with applicable State and federal rules and regulations.

11.2.2. Sewage disposal shall be in accordance with applicable State rules.

11.2.3. The home shall be kept substantially free of insects, rodents and vermin. Pesticides shall be applied in a manner to prevent contamination of food and hazards to residents.

11.2.4. Pets are permitted, provided that all residents are advised prior to admission that pets are kept on the premises. If pets are added after the admission of residents, all residents shall agree to having pets. However, pets are not permitted in a resident's bedroom without the resident's consent and are not permitted in food preparation areas.

11.2.4.a. Dogs and cats kept in the home or on the grounds of the home shall be properly licensed (if applicable) and vaccinated (for dogs this includes rabies, leptospirosis, distemper, and parvo and for cats this includes rabies). Documentation of the licensing, vaccination and prevention measures shall be available on the premises. Animals and their quarters shall be kept in a clean condition at all times.

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<sup>o</sup> Available from the State Fire Commission or the Secretary of State. Section 4 of the above referenced Building Code rule incorporates by reference the BOCA National Building Code; BOCA National Plumbing Code; BOCA National Mechanical Code; BOCA National Existing Structures Code; BOCA National Energy Conservation and CABO One- and Two-Family Dwelling Code. You may purchase these books, collectively or separately, from Building Officials and Code Administrators International, 4051 West Flossmoor Road, Contra Club Hills, Illinois 60477-5795, 1-312-700-2300 or BOCA International Regional Offices, 3592 Corporate Drive, Suite 107, Columbus, Ohio 43229, 1-614-890-1064 or view a set at the Secretary of State's Office

11.2.5. Solid waste, including garbage and refuse, shall be removed from the building daily and the premises weekly, or more often if necessary in accordance with the applicable provisions of State law and regulations.

11.2.6. The home shall have sufficient supplies and equipment to permit frequent cleaning of floors, walls, woodwork, windows, and screens, and to facilitate all building and ground maintenance.

11.2.7. The home shall ensure that rooms are painted and undamaged; carpets, furniture and linoleum are in minimal need of replacement; the interior of the house is maintained in a clean, safe and sanitary condition and is in good repair overall.

11.2.8. The home shall provide the following facilities if food for resident consumption is prepared by staff within the home:

11.2.8.a. Sufficient space to carry out proper food preparation and serving operations with a system to protect food from contamination during preparation and service;

11.2.8.b. Dish washing facilities and methods to effectively remove food soil and sanitize dishes, utensils and equipment used in food storage, preparation and service. If a dishwasher is not used, dishes, equipment and utensils shall first be washed, next rinsed, and then sanitized by immersion for at least one-half (1/2) minute in clean, hot water of a temperature of at least one hundred seventy degrees Fahrenheit (170° F); or immersion for at least one (1) minute in a clean solution containing at least fifty (50) parts per million of available chlorine as a hypochlorite (household bleach or the equivalent) and having a temperature of at least seventy-five degrees Fahrenheit (75° F); or any other method that will provide the equivalent bactericidal effect;

11.2.8.c. Refrigeration storage equipment to assure the maintenance of potentially hazardous food at or below forty-five degrees Fahrenheit (45° F), medium temperature storage, freezer units and dry food storage areas;

11.2.8.d. A system to store and prevent the contamination of utensils and equipment and ensure that they are kept in good repair;

11.2.8.e. A waste disposal system and can washing facilities;

11.2.8.f. Procedures to handle utensils and equipment used by residents affected with communicable diseases (disposable equipment is acceptable in this situation); and

11.2.8.g. Effective procedures for maintaining the food service environment in a clean, safe and sanitary manner.

11.2.9. The home shall ensure that dietary areas and equipment are designed to accommodate the requirements for sanitary storage, processing and handling of food if food is regularly brought into the facility by an outside food service provider.

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11.2.10. The home shall provide laundry facilities or services for residents' personal laundry. Laundry services may be provided by an outside laundry service.

11.2.11. Homes which do their own laundry shall have a separate area or room designed for use as a laundry, including space for sorting soiled and clean linen and clothing. In addition, the home shall ensure that:

11.2.11.a. Washing machines are installed so that no back-siphonage possibility exists, and electric or gas clothes dryers shall be vented to the outside;

11.2.11.b. Soiled and clean laundry are not stored together at any time; and

11.2.11.c. Table and kitchen linens are laundered separately from other washable goods. Sanitizing agents shall be used when laundering kitchen, bath, and bed linens.

### 11.3. General Living Environment. (Class I)

11.3.1. Traffic paths in the home and yard shall be maintained free of obstacles;

11.3.2. All stairways used by residents shall have sturdy handrails on one (1) side of the corridor to provide for safety with ambulation;

11.3.3. Electrical outlets shall have proper number of plugs and cords are maintained away from walking areas;

11.3.4. Tools and equipment shall be kept on shelves or in closets; sharp knives are kept in drawers or knife holders;

11.3.5. Locked storage facilities shall be provided for all toxic materials separate from any food and drug storage;

11.3.6. Each door to the outside shall have at least one (1) lock that permits keyless egress to residents of the home;

11.3.7. All windows shall have functioning locks for security which can be easily opened for quick escape; and

11.3.8. Hot water temperature shall be minimally maintained at one hundred five degrees Fahrenheit (105° F) at bathing fixtures used by residents. Hot water temperature shall not exceed one hundred ten degrees Fahrenheit (110° F) in tubs and showers and one hundred twenty degrees Fahrenheit (120° F) at hand washing sinks or other non-bathing plumbing fixtures used by residents.

11.3.9. Doors and windows used for ventilation shall be screened.

11.3.10. Outdoor lighting shall be provided at doorways, on decks or patios and near

garages.

**11.4. Interior Comfort. (Class II)**

11.4.1. Temperature shall be maintained at a level comfortable to the residents.

11.4.1.a. The home shall have a central heating system or incremental units capable of maintaining a temperature in rooms used by residents of at least seventy-two degrees Fahrenheit (72° F) during cold weather. Individual room units known as "through the wall heating/cooling units" which are approved by U.L. Inc. may be acceptable. Heat shall be supplied to all rooms used by residents.

11.4.1.b. Cooling devices or systems shall be provided for the use of residents when inside temperatures exceed eighty degrees Fahrenheit (80° F). Acceptable cooling devices include, but are not limited to: air conditioners, heat pumps and electric fans. Portable and mounted electric fans shall be screened, constructed and placed in a manner which maximizes resident safety and minimizes drafts.

11.4.2. There shall be at least fifteen (15) square feet per resident of common living area for social, leisure and recreation activities other than bedrooms, bathrooms, hallways and closets. Common areas shall not be used in ways which infringe on the rights of access of others, and shall not be used as sleeping areas. There shall be enough seating to accommodate all residents.

11.4.3. A minimum of fifteen (15) square feet per resident shall be provided for dining. Activity and dining areas must be separate.

11.4.4. The home shall provide furniture that is well-crafted, reasonably designed and functional for the people who live in the home.

11.4.5. The home shall provide comfortable and adequate lighting throughout the interior environment.

11.4.6. Window coverings (i.e. curtains, drapes, blinds, shades, screens) shall be used to keep rooms comfortable (i.e. screen glare from the sun, keep out insects, and/or reduce heat from the sun).

11.4.7. All home appliances (stove, refrigerator/freezer, washer, dryer, television, stereo) shall be in good working order.

**11.5. Bedrooms. (Class II)**

11.5.1. Bedrooms shall provide no less than eighty (80) square feet of space for single occupancy rooms and no less than sixty (60) square feet for each resident of a multiple occupancy room. This shall not include closet or bathroom space.

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11.5.2. No bedroom shall be occupied by more than three (3) residents. Residents shall not share bedrooms with the administrator, staff or persons residing in the home who are not residents as defined in this rule.

11.5.3. Bedrooms shall have an adequate amount of window area to provide for comfort, ventilation and emergency escape.

11.5.4. Each bedroom shall have at least one (1) light controlled by a switch at the door to the room.

11.5.5. Basements shall not be used as bedrooms for residents and beds shall be placed only in areas commonly used as a bedroom.

11.5.6. Each resident shall be provided with a bed that is at least thirty-six inches (36") in width, equipped with a substantial, clean and comfortable mattress which fits the bed, and a clean, comfortable pillow of at least average size. A resident may use a hospital bed for a specific condition. Side rails are permissible, if used to assist the resident in turning or getting out of bed.

11.5.7. Bed coverings shall be available to keep residents comfortable. This shall include at a minimum a pillowcase, a protective mattress cover, a top and bottom sheet and a quilt, comforter or blanket.

11.5.8. Clean and freshly laundered bed linens shall be provided for each resident at least once each week and more often, if needed.

11.5.9. Windows shall have curtains, shades or blinds which can be operated by the resident and can function to provide privacy for the resident.

11.5.10. Each resident of each bedroom shall be provided with the following bedroom setting type furniture:

11.5.10.a. A bedside table, chest or its equivalent accessible to the bed, with drawers for the storage of personal items;

11.5.10.b. A bed lamp or bedside light suitable for reading and accessible to the bed; and

11.5.10.c. A comfortable chair of sturdy construction suitable for resident use.

11.5.10.d. An adequate personalized dresser for storage of clothing, etc.; and

11.5.10.e. A closet which may be shared by no more than one (1) other person.

11.5.11. A mirror suitable for full-length viewing shall be accessible to all residents.

**11.6. Toilet and Bathing Facilities. (Class II)**

11.6.1. Each resident shall have access to a toilet and washroom without entering another bedroom. No more than six (6) individuals (i.e. any combination of residents, administrator, staff and persons residing in the home who do not meet the definition of resident found in this rule) shall share a single toilet-washroom.

11.6.2. There shall be at least one (1) bathing facility for each ten (10) individuals residing in the home and at least one (1) per floor on which resident rooms are located. No more than ten (10) individuals (i.e. any combination of residents, administrator, staff and persons residing in the home who do not meet the definition of resident found in this rule) shall share a single bathing facility.

11.6.3. Bathing facilities shall have at least one (1) combination shower and bathtub or one (1) bathtub or one (1) shower. Showers or bathtubs shall be equipped with non-slip surfaces or mats and grab-bars for each shower or tub provided.

11.6.4. Each toilet-washroom shall have:

11.6.4.a. At least one (1) hand washing sink;

11.6.4.b. At least one (1) toilet; and

11.6.4.c. Grab-bars for each toilet.

11.6.5. Locks on bath and toilet facility doors and the doors to rooms housing these facilities shall be easily opened or removed from the outside in the event of an emergency.

11.6.6. Toilet-washrooms shall be supplied with soap, toilet tissue, and towels. The shared use of towels is prohibited.

11.6.7. Clean towels and wash cloths shall be provided to the resident at least twice weekly, and more often if needed.

11.6.8. Bathtubs, shower stalls and hand washing facilities shall not be used for storage or for laundering soiled linens.

**§64-65-12. Additional Requirements Related to the Provision of Limited and Intermittent Nursing.**

**12.1. Standard Requirements. (Class I)**

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<sup>7</sup> The provisions of this section apply only to residential board and care homes providing limited and intermittent nursing. See Paragraph 4.1.4 of this rule

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12.1.1. A residential board and care home which provides limited and intermittent nursing care shall arrange for a registered professional nurse to assume responsibility for the oversight of nursing care and services. The home shall enter into a written agreement with the registered professional nurse which specifies the responsibilities of the registered professional nurse and the home. Arrangements for nursing services may be made by contract with an individual or a nursing service with a management entity; or the residential board and care home may employ a registered nurse; or the administrator of the home may act in this capacity, if he or she is a licensed registered professional nurse. Arrangements with a home care agency providing only direct care does not satisfy the requirements for nursing management oversight of all residents.

12.1.2. The home shall provide adequate nursing support staff to ensure appropriate nursing care outcomes. Nursing support staff shall be under the supervision of the registered professional nurse who has assumed the overall responsibility for the oversight and care provided to the residents.

12.1.3. Homes whose administrator or supervisor-in-charge is a registered professional nurse are not required to employ another individual to meet the responsibilities of the registered professional nurse if there are sufficient numbers of nursing support staff to meet the needs of residents.

12.1.4. The home shall implement, within reasonable expectation, the recommendations of the registered nurse regarding care, services and staff training intended to protect the residents.

12.1.5. The home shall provide written notice to each resident regarding the availability of nursing services at the time of admission, or, for current residents, within thirty (30) days of the effective date of this rule.

12.1.6. The home shall not house residents who are unable to recognize danger or walk independently on any floor other than the first floor of a multi-level residential board and care home.

12.1.7. The home shall assure that treatment involving medical management of a resident is carried out only in accordance with an order from a physician or other lawfully authorized licensed health care professional, and that the order with the physician's or other licensed health care professional's signature is placed in the resident's care record.

12.1.7.a. No medication, diet, medical procedure or treatment shall be started, changed or discontinued by the home without an order by a licensed health care professional.

12.1.7.b. All physician orders shall be reviewed every thirty (30) days for accuracy by the registered professional nurse or other lawfully authorized professional, unless there is a medical condition requiring a more frequent review as determined by the resident's physician.

12.1.8. The home shall assure that:

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12.1.8.a. All verbal orders are recorded in the resident's care record, signed by a licensed nurse, and countersigned by the physician or other licensed health care professional who issued the order within ten (10) working days from the original order date;

12.1.8.b. All physician's orders specify the type, frequency, duration, and dosage for each medication, treatment or special feeding;

12.1.8.c. Treatment measures are performed only by qualified staff; and

12.1.8.d. Nursing procedures and treatments are performed only by a licensed registered or practical nurse, in accordance with applicable State law.

12.1.9. The home shall measure and record the resident's height in his or her record upon admission and annually thereafter.

12.1.9.a. The home shall weigh and record each resident's weight in his or her record upon admission and at least monthly or as ordered by the physician.

12.1.9.b. The home shall report undesirable changes in body weight of five percent (5%) or more to the resident's physician within seventy-two (72) hours of the identification of the weight change.

12.1.10. The home shall retain a physician or a consultant pharmacist who shall conduct quarterly pharmacy reviews on all residents receiving limited or intermittent nursing services.

12.1.11. The use of PRN (as needed) medications is prohibited, unless one (1) or more of the following conditions exist:

12.1.11.a. The resident is capable of determining when the medication is needed;

12.1.11.b. Licensed health care professionals are responsible for medication management; or

12.1.11.c. The resident's physician has provided detailed instructions or home staff have telephoned the doctor, explained the symptoms and received a documented oral order to assist the resident in self-administration of the medication. The physician's instructions shall include symptoms that might indicate the use of the medication, the dosage, the route of administration, the frequency with which the medication may be administered, and directions for follow-up care if the symptoms persist in excess of twenty-four (24) hours.

12.1.12. The home shall assure that the registered professional nurse maintains a general record with a complete signature for each entry which shall include at least:

12.1.12.a. The date, time in and time out for each visit (unless the registered professional nurse is employed by the residential board and care home at least thirty-five (35) hours per week);

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12.1.12.b. A list of duties performed by the registered nurse during each visit; and

12.1.12.c. A brief statement regarding identified concerns and recommended actions taken to resolve them.

12.1.13. The home shall develop a system that provides for twenty-four (24) hour accessibility between the home, the registered professional nurse, and/or other emergency personnel.

12.1.14. The home secure an emergency transfer agreement with a local hospital and establish agreements with outside service providers as applicable (i.e. laboratories, physical therapy, occupational therapy, speech therapy, disposal of medical waste, ambulance services, etc.). Copies of all agreements shall be maintained on file in the home and available for review by the secretary.

### 12.2. Nursing Services. (Class I)

12.2.1. A licensed nurse shall document the following in each resident's individual case record using a complete signature or initials with a complete signature on each page of the record:

12.2.2. A monthly progress note in the resident's record as indicated by the needs of the resident to document the status of the resident and any changes in his or her health or welfare;

12.2.3. Any significant temporary or permanent changes in condition including changes resulting from incidents or accidents; and

12.2.4. Any verbal or written orders received from a licensed health care professional.

12.2.5. The registered professional nurse shall:

12.2.5.a. Provide oversight of the care and services through daily contact with the home and visits to the residents at least eight (8) hours a week. Visits shall be of sufficient duration to perform all required duties;

12.2.5.b. Provide overall supervision of the provision of nursing services to residents by ensuring that the services established within the resident's service plan are met and that the resident's physical, mental and social well-being are not compromised;

12.2.5.c. Complete a written nursing assessment for each resident with nursing needs within twenty-four (24) hours following admission, and which shall be rewritten quarterly thereafter, or at the time of any significant temporary or permanent change in the resident's condition. In the absence of a significant temporary or permanent change in condition, the assessment shall be reviewed every thirty (30) days.

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12.2.5.d. On an ongoing basis, the nurse shall evaluate each resident's functional capabilities to assure that each joint is maintained with an optimal range of motion; and evaluate each resident's medication administration in accordance with the physician's orders, and report adverse signs or symptoms related to medications to the physician immediately:

12.2.5.e. Coordinate the development of a component of the service plan to meet any identified nursing and medical needs of the resident with the resident and the attending physician or other licensed health care professional, which shall be signed and dated by the attending physician or other licensed health care professional. This component shall be completed within seven (7) days after admission and shall be reviewed by the registered nurse at least every thirty (30) days or at the time of a significant temporary or permanent change in condition.

12.2.5.f. Review training needs of residential board and care home staff members:

12.2.5.g. Provide needed training or recommend to the residential board and care home appropriate training for staff; and

12.2.5.h. Provide to the residential board and care home a written record of training provided by the registered nurse to individuals or groups with an outline of the items discussed, the date and time of the session, and signatures of individuals involved in the training.

12.2.5.i. Provide overall supervision of medication storage, dispensing systems and disposition:

12.2.5.j. Coordinate admission and discharge planning as it relates to the medical component of resident care; and

12.2.5.k. Serve as the liaison between the resident, the resident's physician, and the administrator (if applicable) on an as needed basis.

### 12.3. Personnel and Staffing. (Class III)

12.3.1. The administrator shall have at least one (1) year of experience in caring for adults with mental or physical impairments.

12.3.2. Any individual designated as the assistant administrator shall meet the requirements established by this rule for administrators.

12.3.3. The administrator shall demonstrate knowledge, skills and abilities in the administration and management of a residential board and care home, including:

12.3.3.a. Knowledge and understanding of mentally impaired or physically impaired individuals; and

12.3.3.b. The ability to plan and implement the overall services needed by residents.

12.3.4. The administrator and assistant administrator shall annually attend at least ten (10) additional hours of training related to management or operation of a residential board and care home specific to the population in care. Documentation of training attendance and content shall be maintained in their personnel files.

12.3.5. Residential care and residential support staff shall attend at least eight (8) additional hours of training annually specific to the population in care at the residential board and care home. Documentation of the training shall be maintained in the employee's personnel file. Acceptable training topics include, but are not limited to: medications and side effects; signs and symptoms of substance abuse; mental illness and developmental disability; crisis intervention; aging processes; behavior management; resident care techniques; interpersonal skills; promoting socialization and independence; death and dying; nutrition and therapeutic diets; restorative care; habilitation and/or rehabilitation; the use of assistive or prosthetic devices; range of motion, transfer and positioning; and emergency interventions when the residents are out of the residential board and care home.

#### **12.4. Resident Care and Related Services. (Class III)**

12.4.1. The residential board and care home shall assure that all of the resident's needs are identified within a service plan. The resident's service plan shall be maintained in one (1) document that clearly identifies the interventions to be provided, the frequency of each intervention, and the level of staff necessary to carry out the intervention.

12.4.2. The residential board and care home shall obtain progress reports from professional outside service providers at least every sixty (60) days until it is stated in a report that services are no longer needed.

12.4.3. The progress reports shall contain at a minimum:

12.4.3.a. A statement that continued services are/are not needed;

12.4.3.b. Recommendations, if any, for continued services;

12.4.3.c. The individual's response to the service being provided.

12.4.4. Copies of the progress reports shall be retained in the resident's record.

#### **§64-65-13. Penalties.**

##### **13.1. Civil Penalties.**

13.1.1. The secretary shall administer penalties for violations of this rule and of W. Va. Code §§16-5C-1 et seq. and 16-5H-1 et seq. as specified in W. Va. Code §§16-5C-1 et seq., 16-5H-1 et seq., and this rule.

13.1.2. Upon completion of a report of inspection, the secretary shall determine what, if any,

## 64 CSR 65

civil penalties are to be imposed pursuant to the West Virginia Code and this rule, and issue citations. Supplemental penalties shall be assessed for a facility's failure to correct continuing violations: Provided, That where supplemental penalties have been assessed for continued failure to correct a violation of a non-life threatening nature, the secretary shall, prior to issuing a written citation, notify the licensee or non-licensed operator by registered or certified mail, return receipt requested, that civil penalties will be imposed on a date to be specified by the secretary unless the corrective actions specified by the secretary are implemented in an acceptable manner.

13.1.3. All citations shall be in writing and shall include at least the following:

13.1.3.a. The penalty;

13.1.3.b. A description of the nature of the violation fully stating the manner in which the licensee or non-licensed operator violated a specific statutory provision or provision of the rule; and

13.1.3.c. The basis upon which the secretary assessed the penalty and selected the amount of civil penalty.

13.1.4. The name of any resident jeopardized by the violation shall not be specified in the citation.

13.1.5. For each violation of a Class I standard, a civil penalty shall be assessed of not less than one hundred dollars (\$100) or more than ten thousand dollars (\$10,000). For each violation of a Class II standard, a civil penalty shall be assessed of not less than fifty dollars (\$50) and not more than one thousand dollars (\$1,000). For each violation of a Class III standard, a civil penalty shall be assessed of not less than twenty-five dollars (\$25) and not more than two hundred fifty dollars (\$250).

13.1.6. Each day a violation continues after the date by which correction was required by an approved plan of correction, or if an approved plan of correction was not submitted, the date on which the plan was due shall constitute a separate violation.

13.1.7. In both determining to assess a civil penalty and in fixing the amount of the civil penalty to be imposed for violations, the secretary shall consider the gravity of the violation, which shall include:

13.1.7.a. The degree of substantial probability that death or serious physical harm will result and, if applicable, did result from the violation;

13.1.7.b. The severity of serious physical harm most likely to result, and if applicable, that did result from the violation; and

13.1.7.c. The extent to which the provisions of the applicable statutes or regulations were violated.

## 64 CSR 65

13.1.8. If a licensee or a non-licensed operator does not plan to contest a citation which imposes a penalty, he or she shall submit to the secretary, within ten (10) business days after the issuance of the citation, the total sum of the penalty assessed.

13.1.9. If a licensee or a non-licensed operator desires to contest a citation which imposes a penalty or the date specified for correction of a violation, he or she shall, within four (4) business days after service of the citation or specification of time in which a violation is to be corrected, serve upon the secretary, either personally or by registered or certified mail, the licensee's or non-licensed operator's written notice pursuant to **West Virginia Department of Health and Human Resources Administrative Rules, Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64 CSR 1.**

13.1.10. The assessments for penalties and for costs of legal action taken under W. Va. Code §16-5C shall have interest assessed at two (2%) percent on the last day of each month in which occurs the thirtieth (30th) day after receipt of notice of such assessment or after the month in which occurs the thirtieth (30th) day after receipt of the secretary's final order following a hearing, whichever is later. All such assessments against a facility that are unpaid shall be added to the facility's licensure fee and may be filed as a lien against the property of the licensee or operator of the facility.

13.1.11. The secretary shall, in a civil judicial proceeding, recover any unpaid assessment which has not been contested under W. Va. Code §16-5C-12 within thirty (30) days of receipt of notice of such assessment, or which has been affirmed under the provisions of that section and not appealed within thirty (30) days of receipt of the secretary's final order, or which has been affirmed on judicial review, as provided in W. Va. Code §16-5C-13. All money collected by assessments of civil penalties or interests shall be paid into a special resident benefit account and shall be applied by the secretary only for the protection of the health or property of residents of facilities operated within the State of West Virginia, including payment for the costs of relocation of residents to other facilities, operation of a home pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost.

### 13.2. Restrictions: Revocation.

13.2.1. The secretary may place restrictions upon or revoke the current license of a home, if he or she finds evidence of one (1) or more of the following:

13.2.1.a. Lack of financial stability to operate, such as insufficient capital, delinquent accounts, checks returned because of insufficient funds, and nonpayment of taxes, utility expenses and other essential services;

13.2.1.b. The licensee or the administrator of the home has been arrested for, adjudicated, and convicted of any felony or of a misdemeanor relevant for the provision of care in a health care facility or for operating a health care facility;

13.2.1.c. The licensee has been denied or has had a license to operate a health care facility revoked in West Virginia or any other jurisdiction during the previous five (5) years;

64 CSR 65

13.2.1.d. The licensee has a record of noncompliance with lawful orders of the department or other licensing or certification agency for any jurisdiction in which the applicant has operated, directed or participated in the operation of a health care facility;

13.2.1.e. The licensee or other person in charge of the home refuses entry to the secretary's duly authorized representative for an inspection or survey;

13.2.1.f. The home has inappropriately converted for its own use the property of a resident;

13.2.1.g. The home has secured property, or a bequest of property, from a resident by undue influence;

13.2.1.h. The home has submitted false information either on the licensure or renewal application forms or during the course of an inspection or survey of the home; or

13.2.2. The secretary shall consider all available evidence at the time of the determination, including the history of the residential board and care home and the applicant in complying with this rule, notices of violations which have been issued to the home and the applicant, findings of surveys and inspections, and any evidence provided by the home, residents, law enforcement officials, and other interested individuals.

13.2.3. In addition to all other actions and penalties specified in this rule, the secretary shall have the authority to ban new admissions by order until further notice by the secretary or reduce the bed capacity of the home or both, when on the basis of inspection he or she determines that:

13.2.3.a. There is an immediate and serious threat to one or more residents; or

13.2.3.b. There are poor care outcomes resulting in an avoidable decline in a resident's condition; or

13.2.3.c. There has been a decline in the functional abilities of one or more residents resulting from neglect or abuse; and

13.2.3.d. An admission ban or reduction in bed capacity or both would place the home in a position to render adequate care.

13.2.4. The secretary shall notify a licensee of an admissions ban or reduction in bed capacity or both, stating the terms of the order, the reasons thereof and the date set for compliance.

13.2.5. In addition to all other actions and penalties specified by law and this rule, the secretary has the authority to revoke a license which has been obtained through the use of fraud or subterfuge.

**§64-65-14. Administrative Due Process.**

Administrative due process and remedies for actions taken under this rule and W. Va. Code §§16-5C-1 et seq. and 16-5H-1 et seq. are as provided in this rule, in said articles of the West Virginia Code, and in **Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64 CSR 1.**

**§64-65-15. Severability.**

The provisions of this rule are severable. If any portion of this rule is held invalid, the remaining provisions remain in effect.

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Table 64-65-1. Scores for A, B, C, And F Ratings in Each Category, Average Rating and Overall Rating

Sec. No.	CATEGORY	POINT VALUE SCORE	RATING	RATING SCORE <sup>2</sup>	RATING			
					F <sup>1</sup>	C	B	A
5	Administration				≤59	60-68	69-76	77-86
6	Resident Care Employees				≤28	29-32	33-36	37-41
7	Resident Rights				≤71	72-81	82-92	93-103
8	General Health and Safety				≤40	41-45	46-51	52-58
9	Resident Services & Recreational Activ.				≤12	13	14-15	16-18
10	Dietetic Service				≤13	14-15	16-17	18-20
11	Physical Requirements				≤39	40-45	46-50	51-57
12	Additional Requirements ...				≤24	25-28	29-31	32-36

Average Rating Score	Rating
3.6 - 4.0	A
2.6 - 3.59	B
2.0 - 2.59	C
1.99 or less in any category	F

Total Rating Score \_\_\_\_\_

Average Rating Score \_\_\_\_\_

Final Rating \_\_\_\_\_

<sup>1</sup> Rating score values are:

- A = 4
- B = 3
- C = 2
- F = 0

<sup>2</sup> = Less than or equal to

## 64 CSR 65

Table 64.65-2. Surety Bond Schedule

AVERAGE RESIDENT FUNDS MONTHLY BALANCE	REQUIRED SURETY BOND AMOUNT
\$ 1 to \$2,000	\$2,500
\$2,001 to \$2,100	\$2,625
\$2,101 to \$2,200	\$2,750
\$2,201 to \$2,300	\$2,875
\$2,301 to \$2,400	\$3,000
\$2,401 to \$2,500	\$3,125
\$2,501 to \$2,600	\$3,250
\$2,601 to \$2,700	\$3,375
\$2,701 to \$2,800	\$3,500
\$2,801 to \$2,900	\$3,625
\$2,901 to \$3,000	\$3,750
\$3,001 to \$3,100	\$3,875
\$3,101 to \$3,200	\$4,000
\$3,201 to \$3,300	\$4,125
\$3,301 to \$3,400	\$4,250
\$3,401 to \$3,500	\$4,375
\$3,501 to \$3,600	\$4,500
\$3,601 to \$3,700	\$4,625
\$3,701 to \$3,800	\$4,750
\$3,801 to \$3,900	\$4,875
\$3,901 to \$4,000	\$5,000
\$4,001 to \$4,100	\$5,125
\$4,101 to \$4,200	\$5,250
\$4,201 to \$4,300	\$5,375
\$4,301 to \$4,400	\$5,500
\$4,401 to \$4,500	\$5,625
\$4,501 to \$4,600	\$5,750
\$4,601 to \$4,700	\$5,875
\$4,701 to \$4,800	\$6,000

## 64 CSR 65

Table 64.65-2. Surety Bond Schedule (Cont'd)

AVERAGE RESIDENT FUNDS MONTHLY BALANCE	REQUIRED SURETY BOND AMOUNT
\$4,801 to \$4,900	\$6,125
\$4,901 to \$5,000	\$6,250
\$5,001 to \$5,100	\$6,375
\$5,101 to \$5,200	\$6,500
\$5,201 to \$5,300	\$6,625
\$5,301 to \$5,400	\$6,750
\$5,401 to \$5,500	\$6,875
\$5,501 to \$5,600	\$7,000
\$5,601 to \$5,700	\$7,125
\$5,701 to \$5,800	\$7,250
\$5,801 to \$5,900	\$7,375
\$5,901 to \$6,000	\$7,500
\$6,001 to \$6,100	\$7,625
\$6,101 to \$6,200	\$7,750
\$6,201 to \$6,300	\$7,875
\$6,301 to \$6,400	\$8,000
\$6,401 to \$6,500	\$8,125
\$6,501 to \$6,600	\$8,250
\$6,601 to \$6,700	\$8,375
\$6,701 to \$6,800	\$8,500
\$6,801 to \$6,900	\$8,625
\$6,901 to \$7,000	\$8,750
\$7,001 to \$7,100	\$8,875
\$7,101 to \$7,200	\$9,000
\$7,201 to \$7,300	\$9,125
\$7,301 to \$7,400	\$9,250
\$7,401 to \$7,500	\$9,375
\$7,501 to \$7,600	\$9,500
\$7,601 to \$7,700	\$9,625

## 64 CSR 65

Table 64.65-2. Surety Bond Schedule (Cont'd)

AVERAGE RESIDENT FUNDS MONTHLY BALANCE	REQUIRED SURETY BOND AMOUNT
\$7,701 to \$7,800	\$9,750
\$7,801 to \$7,900	\$9,875
\$7,901 to \$8,000	\$10,000
\$8,001 to \$8,100	\$10,125
\$8,101 to \$8,200	\$10,250
\$8,201 to \$8,300	\$10,375
\$8,301 to \$8,400	\$10,500
\$8,401 to \$8,500	\$10,625
\$8,501 to \$8,600	\$10,750
\$8,601 to \$8,700	\$10,875
\$8,701 to \$8,800	\$11,000
\$8,801 to \$8,900	\$11,125
\$8,901 to \$9,000	\$11,250
\$9,001 to \$9,100	\$11,375
\$9,101 to \$9,200	\$11,500
\$9,201 to \$9,300	\$11,625
\$9,301 to \$9,400	\$11,750
\$9,401 to \$9,500	\$11,875
\$9,501 to \$9,600	\$12,000
\$9,601 to \$9,700	\$12,125
\$9,701 to \$9,800	\$12,250
\$9,801 to \$9,900	\$12,375
\$9,901 to \$10,000	\$12,500
\$10,001 or more	Calculate <sup>10</sup>

<sup>10</sup> 1.25 times the prior year's average monthly balance of client's funds

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

STEPHEN N. REED  
Deputy Secretary of State

CATHERINE FREROTTE  
Executive Assistant

Telephone: (304) 558-6000  
Corporations: (304) 558-8000  
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WILLIAM H. HARRINGTON  
Chief of Staff

JUDY COOPER  
Director, Administrative Law

PENNEY BARKER  
Supervisor, Corporations

**STATE OF WEST VIRGINIA**

**SECRETARY OF STATE**

Building 1, Suite 157-K  
1900 Kanawha Blvd., East  
Charleston, WV 25305-0770

(Plus all the volunteer  
help we can get)

March 21, 1996

**NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE**

AGENCY: Division of Health

RULE: Amendments, Series 65, Residential Board and Care Homes

DATE FILED AS AN EMERGENCY RULE: December 15, 1996

DECISION NO. 2-96.Revision

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

MAR 22 10 40 AM '96

FILED

Given the extremely rare and narrow circumstances of this individual and singular case, and upon the March 21, 1996 filing of Order in Civil Action No. : 2:92-1151 by the U.S. District Court for the Southern District of West Virginia at Charleston which had inadvertently been omitted in the original materials provided and the issuance of the attached Attorney General's opinion, I am reversing my original decision of January 26, 1996 and it is now the decision of the Secretary of State that the above emergency rule be **approved**. A copy of the complete decision with required findings is available from this office.

KEN HECHLER  
Secretary of State

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

ENTERED

OCT - 4 1991

PAUL WOLFORD, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. : 2:92-1151

GRETCHEN O. LEWIS, et al.,

Defendants.

ORDER BC  
NO. \_\_\_\_\_ PAGE \_\_\_\_\_

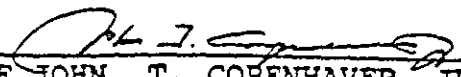
O R D E R


This day came the parties in the above-styled action, pursuant to the Court's directive that the parties confer and develop a remedial plan for correcting and implementing proposed changes, regulatory and enforcement procedures, incorporating the Court's orders and findings, together with a timetable for implementing the changes, and submitted their comprehensive plan for long-term care. The Court has reviewed the plan and to the extent of those portions required by the Court's Order hereby approves it, and thereupon

It is hereby ORDERED and DECREED that the following portions of the attached Plan are required by this Court's Order or necessarily flow therefrom: Sections 1.02.01; 1.02.04; 1.02.05; 2.01.01; 2.01.02; 2.02.01; 2.02.02; 2.04 (all); 2.05.05; all of 2.07 except 2.07.02(b), 2.07.08(a) (first sentence) and 2.07.09 (first sentence); and all of 2.08 except 2.08.01(c) and 2.08.02(d), and are hereby approved and shall be implemented, except to the extent that modifications are submitted to and approved by this Court.

44

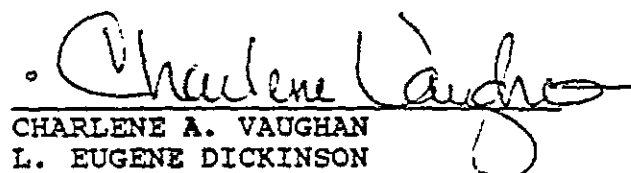
ENTERED this 4<sup>th</sup> day of October, 1994.

  
JUDGE JOHN T. COPENHAVER, JR.

  
DANIEL F. HEDGES  
1116-B Kanawha Boulevard, East  
Charleston, WV 25301

JANE PERKINS  
National Health Law Program  
313 Ironwoods Drive  
Chapel Hill, NC 27516

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Department of Health and Human Resources  
State Capitol Complex  
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Charleston, WV 25305

COUNSEL FOR DEFENDANTS



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CHARLESTON 25305

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

(304) 558-2021  
FAX (304) 558-0140

March 21, 1996

Ms. Judith Cooper  
Office of the Secretary of State  
Building 1, Suite 157-K  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

MAR 21 12 55 PM '96

FILED

Dear Ms. Cooper:

Following my review of the pleadings filed in the Wofford case and discussions with the Secretary of State, Kay Howard, Jeff Matherly and you, I reviewed the applicable statutes.

Given the extremely rare and narrow circumstances of this individual and singular case, and upon consideration of a memorandum order which had inadvertently been omitted in the original materials provided to your office, it is my opinion that it is entirely legal for the Secretary of State to reconsider the original decision and to proceed with filing the applicable rules on an emergency basis.

My opinion is limited in this case to the very narrow and strict facts before us and in no way is to be interpreted by anyone as a departure from past practice in this area.

Sincerely,

William S. Steele  
Managing Deputy Attorney General

WSS/jy



**WEST VIRGINIA  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION**

Form #7

Do not mark in this box  
Filing Date

**FILED**

MAR 21 4 00 PM '96

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

*March 22, 1996*

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Division of Health TITLE NUMBER: 64

CITE AUTHORITY: W. Va. Code §16-5C-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 65

TITLE OF RULE BEING AMENDED: Residential Board and Care Homes

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 35TH DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached memorandum from Gretchen O. Lewis, Secretary, Department of Health and Human Resources.

Use additional sheets if necessary

Signature



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Gaston Caperton  
Governor

Gretchen O. Lewis  
Secretary

Date: March 21, 1996  
To: The Honorable Ken Hechler  
Secretary of State  
From: Gretchen O. Lewis *Gretchen*  
Secretary  
Re: Proposed Amended Residential Board and Care Licensure Rule -  
Emergency Rule Decision 2-96

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

MAR 21 12 55 PM '96

FILED

It has recently come to my attention that in filing the proposed amended Residential Board and Care Licensure Rule with your Office on December 15, 1995 and in responding to your subsequent request for additional supportive documentation related to the justification for the emergency filing, the Department inadvertently failed to submit a relevant item of documentation. (A copy of the Filing Notice is attached.) The Department submitted to you the Memorandum Order filed under Wolford v. Lewis, 860 F. Supp. 1123 (S.D. W. Va. 1994), and the Comprehensive Long Term Care Plan issued thereunder in which the Department agreed to implement amended residential board and care home licensure standards by June 1995, but did not submit the intervening Court Order (copy attached) which specifically approved and ordered the implementation of specific relevant portions of the Long Term Care Plan (#2.07.09).

I am therefore requesting that, based on this submission of the attached Court Order, you reconsider your denial of the Department's request to place the proposed amended Residential Board and Care Licensure Rule into effect on an emergency basis, as issued in Emergency Rule Decision No. 2-96, and approve the Department's request for emergency filing.

I regret the inconvenience to you and your staff, and will appreciate your efforts in this matter.



WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #7

Do not mark in this box  
Filing Date

FILED

DEC 15 2 22 PM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: Division of Health TITLE NUMBER: 64

CITE AUTHORITY: W. Va. Code §16-5C-5

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 65

TITLE OF RULE BEING AMENDED: Residential Board and Care Homes

IF NO, SERIES NUMBER OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

TITLE OF RULE BEING FILED AS AN EMERGENCY: \_\_\_\_\_

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR ~~42~~ 21 DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

See attached.

RECEIVED

DEC 15 1995

Legislative Rule Making  
Review Committee

Signature

Use additional sheets if necessary

**Statement of Facts and Circumstances Relating to the Emergency Filing  
of Amendments to Residential Board and Care Home Licensure Rule, 64 CSR 65  
December 15, 1995**

The Division of Health of the Department of Health and Human Resources hereby submits the amended **Residential Board and Care Home Licensure Rule, 64 CSR 65** for emergency filing as authorized under W. Va. Code § 29A-3-15a(f)(3). The present proposed amended rule was the subject of a public comment period which ended August 21, 1995. It was filed with the Legislative Rule-Making Review Committee on November 28, 1995 and the Committee accepted the rule on December 12, 1995 for review at a later date, as yet undetermined.

An earlier version of this rule was intended for review by the 1995 Legislature. However, the scope and substance of the comments received indicated the need for a major rewrite and additional opportunity for public comment. The present rule is, then, the end result of the second round of public comment. Although the Division intends to allow present homes additional time past the effective date of the rule to come into full compliance and intends to conduct training to assist homes, the Division contends that the earlier the rule becomes effective, the earlier the new improved standards will be available for the protection of residents. Additionally, the Division agreed in the West Virginia Comprehensive Long-Term Care Plan filed in response to a Memorandum Order filed under Wolford v. Lewis, 860 F. Supp. 1123 (S.D. W. Va. 1994), to implement amended residential board and care home licensure standards by June, 1995.

Thus, the rule is the subject of a court order, and the court and the Department believe that implementation of the provisions of the revised rule are long overdue, from the point of view of improved and clarified protection of residents, for compliance with State and federal law, and to provide providers with a regulatory situation that is more stable and as responsive to their concerns as possible under current law. The Department believes that implementation of this rule is needed to prevent substantial harm to the public interest, and therefore requests approval to put the rule into effect on an emergency basis.

**FILED**  
MAR 21 12 56 PM '95  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

# United States District Court

FOR THE SOUTHERN

DISTRICT OF

WEST VIRGINIA AT CHARLESTON

PAUL WOLFORD, et al.

v.

## SUBPOENA IN A CIVIL CASE

GRETCHEN O. LEWIS, et al.

CASE NUMBER: 2:92-1151

TO: JUDITH COOPER, Assistant to the Secretary of State  
State Capitol, Building 1, Room 157-K  
Charleston, West Virginia

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY UNITED STATES DISTRICT COURT 500 Quarrier Street Charleston, West Virginia	COURTROOM before the Hon. John T. Copenhaver, Jr. DATE AND TIME 4:00 P.M. Thursday, MARCH 21, 1996
--------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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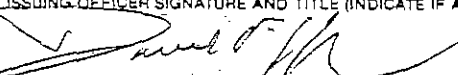
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b) (6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) 	DATE March 15, 1996
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER  
DANIEL F. HEDGES, Counsel for Plaintiff Class  
8 Hale Street, Charleston WV 25301 (304) 346-1054

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

PAUL WOLFORD, et al.,

Plaintiffs,

v.

CIVIL ACTION NO.: 2:92-1151

GRETCHEN O. LEWIS, et al.,

Defendants.

NOTICE

To: Charlene A. Vaughan  
L. Eugene Dickinson  
Senior Assistant Attorneys General  
Office of Health Facilities-Licensure & Certification  
State Capitol Complex, Building 3, Room 550  
Charleston WV 25305

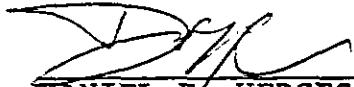
Ken Hechler  
Secretary of State  
State Capitol, Building 1, Room 157-K  
Charleston, West Virginia

Judith Cooper  
Office of the Secretary of State  
State Capitol, Building 1, Room 157-K  
Charleston, West Virginia

Kay Howard  
Director, Office of Regulatory Development  
Department of Health and Human Resources  
State Capitol Complex, Building 3, Room 265  
Charleston, West Virginia

Please take notice that the undersigned counsel for the plaintiffs will bring on for hearing the Motion for An Order for Compliance or for Contempt at 4:00 P.M. on the 21st day of March, 1996 before the Hon. John T. Copenhaver, Jr. in the United States District Court at 500 Quarrier Street, Charleston, West Virginia.

PAUL WOLFORD, et al.,  
Plaintiffs,  
By Counsel.



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DANIEL F. HEDGES  
8 Hale Street  
Charleston WV 25301

JANE PERKINS  
National Health Law Program  
211 North Columbia Street, 2nd Floor  
Chapel Hill NC 27514

COUNSEL FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

PAUL WOLFORD, et al.,

Plaintiffs,

v.

CIVIL ACTION NO.: 2:92-1151

GRETCHEN O. LEWIS, et al.,

Defendants.

**MOTION FOR AN ORDER FOR COMPLIANCE  
OR FOR CONTEMPT**

Comes now the counsel for the plaintiff class and respectfully moves that the Court issue an Order for compliance or for contempt, and that the defendant Secretary of Health and Human Resources and/or Secretary of State Ken Hechler be ordered to take such action as is necessary to implement the Residential Board and Care Home Regulations, and in support of said motion shows to the Court the following facts:

1. That the Court-ordered West Virginia Comprehensive Long-Term Care Plan, § 2.07.09 provides that the standards required by the Court Order for Residential Board and Care Homes shall be implemented by June 1, 1995. The defendants and the Secretary of State have knowledge of the requirements of this Court-ordered Plan, though the Secretary of State denies knowledge of the two-page Court Order ordering the implementation of the Plan.

2. That in accord with the Court's directive in the above-styled matter, the implementing plan was approved and adopted by this Court on October 4, 1994, including all the regulations that were necessary to implement the Court's prior decree.

3. That the Department of Health filed the amendments required by law and Court Order to the Residential Board and Care Home Regulations on December 15, 1995.

4. That the Assistant to the Secretary of State, Judith Cooper, informed the undersigned counsel on or about the 5th day of March, 1996 that though the Court Order with the time deadline in and of itself constitutes grounds for the emergency under the statute, she wrote the opinion disapproving the said rule for the Secretary of State Ken Hechler to sign was because she had never been furnished a copy of the Court's October 4, 1994 Order, and that had she been furnished a copy, the opinion would have been written approving the Residential Board and Care Home Regulations as an Emergency Rule.

5. That on or about the 6th day of March, 1996, counsel for the plaintiff class contacted the Secretary of State to determine whether or not this error in fact could be corrected and the opinion denying the filing of the Emergency Rule could be modified to assure the filing of the rule, and he declined.

6. That the Secretary of State, Ken Hechler, and his assistant, Judith Cooper, having knowledge of the Court's Order, and the defendant Secretary of Health and Human Resources, are

in contempt of this Court's Order by their failure to take such action as to assure the effectuation of the Residential Board and Care Home Regulations as an Emergency Rule.

WHEREFORE, the plaintiffs respectfully pray that the defendant Gretchen O. Lewis, Secretary of State Ken Hechler, and Judith Cooper be found in contempt of Court and that appropriate sanctions be levied, and that this Court order the immediate implementation of said Regulations.

PAUL WOLFORD, by his next friend,  
LIDA MACKEY; HENRY BIAS, by his  
next friend, LIDA MACKEY; and  
CODY BURDETTE, individually and  
on behalf of all others similarly  
situated,  
Plaintiffs,  
By Counsel.



DANIEL F. HEDGES  
8 Hale Street  
Charleston WV 25301

JANE PERKINS  
National Health Law Program  
211 North Columbia Street, 2nd Floor  
Chapel Hill NC 27514

COUNSEL FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

PAUL WOLFORD, et al.,

Plaintiffs,

v.

CIVIL ACTION NO.: 2:92-1151

GRETCHEN O. LEWIS, et al.,

Defendants.

CERTIFICATE OF SERVICE

I, Daniel F. Hedges, counsel for the plaintiffs in the above-styled matter, do hereby certify that I have served a true and exact copy of the foregoing Motion for An Order for Compliance or for Contempt with accompanying Notice upon counsel for the defendants by personal service on this 15th day of March, 1995, addressed as follows:

Charlene A. Vaughan  
L. Eugene Dickinson  
Senior Assistant Attorneys General  
OHFLAC, State Capitol Complex  
Building 3, Room 550  
Charleston WV 25305

Ken Hechler  
Secretary of State  
State Capitol, Building 1, Room 157-K  
Charleston, West Virginia

Judith Cooper  
Assistant to the Secretary of State  
State Capitol, Building 1, Room 157-K  
Charleston, West Virginia

Kay Howard  
Director, Office of Regulatory Development  
Department of Health and Human Resources  
State Capitol Complex, Building 3, Room 265  
Charleston, West Virginia

  
Daniel F. Hedges

cc: Dr. Wallace  
NT Tolliver  
LK (3)

LK  
3/24/94

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

<b>ENTERED</b>	
21 1994	
ORDER BOOK	
NO. _____	PAGE _____

PAUL WOLFORD, by his next friend, Lida Mackey; HENRY BIAS, by his next friend, Lida Mackey; and COY BURDETTE, individually and on behalf of all others similarly situated,

Plaintiffs

v.

Civil Action No. 2:92-1151

GRETCHEN LEWIS, in her official capacity as Secretary, West Virginia Department of Health and Human Resources; ANN STOTTLEMYER, in her official capacity as Director, Medical Services, West Virginia Department of Health and Human Resources; LYNDA G. KRAMER, in her official capacity as Director, Office of Health Facilities-Licensure and Certification, Bureau of Administration and Finance, West Virginia Department of Health and Human Resources; SANDRA L. DAUBMAN, in her official capacity as Program Administrator, Office of Health Facilities-Licensure and Certification, Bureau of Administration and Finance, West Virginia Department of Health and Human Resources; and GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia,

Defendants

MEMORANDUM ORDER

This matter is before the court on the plaintiffs' motion for summary judgment on the first, second, third and

eighth claims set forth in their amended complaint.<sup>1</sup> The materials before the court consist of the parties' pleadings, stipulation of facts, stipulated exhibits, memoranda of law, supporting appendices and order of class action certification.

#### I. Keys Amendment

The class of plaintiffs affected by the first claim is "all present or future residents of residential board and care, personal care, and nursing homes in the State of West Virginia."<sup>2</sup> The class contends in general that with respect to residential board and care homes, personal care homes and nursing homes in which a substantial number of Supplemental Security Income recipients reside, the defendants have failed to establish and/or ensure the enforcement of standards required by the Keys

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<sup>1</sup>By agreed order entered on February 16, 1994, plaintiffs voluntarily dismissed their fourth, sixth and seventh claims. The fifth claim is not addressed in the pending motion.

<sup>2</sup>"Residential board and care homes" are designed for three to eight persons who by reasons of physical or mental impairment are dependent on the services of others but "who are capable of self-preservation and do not require nursing care. W. Va. Code § 16-5c-2(e). "Personal care homes" are devised for three or more physically or mentally impaired persons needing the services of others but not requiring "extensive, on-going nursing care." § 16-5C-2(d). "Nursing homes" provide care for "three or more persons who are ill or otherwise incapacitated and in need of extensive, on-going nursing care due to physical or mental impairment" or provide rehabilitation services for "persons who are convalescing from illness or incapacitation." § 16-5C-2(c).

Amendment to the Supplemental Security Income Program, 42 U.S.C. § 1382e, and regulations promulgated thereunder by the Office of Human Development Services, Department of Health and Human Services, entitled "Standard Setting Requirements for Medical and Nonmedical Facilities Where SSI Recipients Reside," 45 C.F.R. §§ 1397.1 through 1397.20 (hereinafter, HDS regulations). (Compl. at ¶ 85.)

The Keys Amendment, made effective October 1, 1977, is designed to insure that Supplemental Security Income benefits are not used to pay for substandard living arrangements. To achieve that goal, Supplemental Security Income benefits to recipients living in substandard arrangements are at a reduced rate. The Keys Amendment requires, inter alia, that:

(1) Each State shall establish or designate one or more State or local authorities which shall establish, maintain, and insure the enforcement of standards for any category of institutions, foster homes, or group living arrangements in which (as determined by the State) a significant number of recipients of supplemental security income benefits is residing or is likely to reside. Such standards shall be appropriate to the needs of such recipients and the character of the facilities involved, and shall govern such matters as admission policies, safety, sanitation, and protection of civil rights.

(2) Each State shall annually make available for public review a summary of the standards established pursuant to paragraph (1), and shall make available to any interested individual a copy of such standards, along with the procedures available in the State to

insure the enforcement of such standards and a list of any waivers of such standards and any violations of such standards which have come to the attention of the authority responsible for their enforcement.

42 U.S.C. § 1382e(1) & (2).

HDS regulations promulgated under the Keys Amendment require that each state designate an authority "to establish, maintain and ensure the enforcement of standards" set forth in the regulations and "assure" compliance with section 1397.20 of the regulations. 45 C.F.R. § 1397.10(b) & (d). Under section 1397.20, the designated state authority must establish standards "appropriate to the needs of the SSI recipients residing in the facilities and to the character of the facilities involved." § 1397.20(a)(1). The standards must also govern such matters as:

(i) Admission policies (including a continuous needs assessment and referral to appropriate resources);

(ii) Safety;

(iii) Sanitation (cleanliness and hygienic procedures); and

(iv) Protection of civil rights (under the United States Constitution, the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of Federal and State laws).

§ 1397.20(a)(1)(i)- (iv).

In addition to establishing standards for the living arrangements covered by the Keys Amendment, the designated state authority must establish procedures for enforcing the standards. § 1397.20(b). The enforcement procedures must include periodic inspections, the provision of technical assistance, and use of a warning system providing a deficient facility with the opportunity to comply with required standards and residents with the opportunity to move out if the facility fails to correct its deficiencies. § 1397.20(b)(1).

The state must further establish specific time periods for: (1) a deficient facility to carry out an approved plan for correcting violations, § 1397.20(b)(2)(i); and (2) if the facility fails to comply, for informing residents and/or families and guardians in writing of standards not being met by the facility and "of the time period during which residents may relocate if they wish before the authority reports the deficient facility to the Social Security Administration." § 1397.20(b)(2)(ii). "[A] list of approved facilities and agencies which will help them move," must also be provided. Id. If the facility continues to be in violation of the required standards after expiration of the time given for correcting deficiencies and allowing residents the opportunity to move, the responsible state authority must report the noncompliance to the Regional Office of the Social Security

Administration so that the appropriate reduction in Supplemental Security Income benefits can be made. § 1397.20(c)(1).

HDS regulations also require the state authority to maintain records detailing each violation of a standard by a facility, § 1397.20(d)(1)(i), and to make records available to the public showing the complete set of standards for each type of covered facility, the procedures used to ensure enforcement of the standards, and the list of facilities found in violation of a standard, § 1397.20(d)(2)(i), (ii) and (iv).

A. Establishment of Standards and Procedures

The parties have stipulated that the Office of Health Facility-Licensure and Certification (hereinafter, "OHFLAC") is the authority designated by the state to establish and enforce standards for the regulation of nursing, residential board and care and personal care homes, (Stip. 7(a)), and that a significant number of Social Security Income recipients reside in those settings, (Stip. 5(a)). It is also agreed that West Virginia enacted legislation in 1988 requiring the promulgation of rules and regulations setting forth minimum numbers and qualifications of personnel; safety and sanitation requirements; categorization of the standards into classes depending on their effect on the health, safety and welfare of the residents; assignment of numerical values based on the standard's classification to

represent levels of compliance; and a system for rating facilities as part of the licensing procedure, which rating system was to be established no later than March 1, 1989. (Stip. 6 and W. Va. Code § 16-5C-5.) Nonetheless, regulations governing personal care homes have not changed significantly in over twenty years, (Stips. 7(b) & 16(a)-(b)), and regulations for residential board and care homes were not made effective until October 1, 1993, (Stip. 14(b)),<sup>3</sup> several months after the filing of this lawsuit on December 21, 1992.

Other portions of West Virginia's statutory scheme governing nursing, personal care and residential board and care homes impose a duty on OHFLAC to offer and sponsor education and training programs, § 16-5C-3(i), and by regulation, to establish procedures for prompt investigation of complaints of alleged violations of applicable standards, § 16-5C-8. If it is determined after investigation that the complaint has merit, OHFLAC must take appropriate disciplinary action and advise any injured party of the possibility of civil remedies. § 16-5C-8. The statute also requires homes to disclose to prospective residents in writing a list of costs which may be incurred, § 16-5C-7(a). In addition, those facilities handling money for residents must obtain a bond unless they handle "less than twenty-five dollars

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<sup>3</sup>Plaintiffs do not claim that standards governing nursing homes are nonexistent or that they are inadequate.

per patient and less than five hundred dollars for all patients in any month." § 16-5C-7(b). As part of its licensing authority,<sup>4</sup> OHFLAC is responsible for insuring that administrators of facilities are "qualified by training and experience," § 16-5C-6.

OHFLAC is also charged with the general duty of establishing and implementing procedures to enforce compliance with the statute and regulations issued thereunder. § 16-5C-3(n). In that respect, it has the right to inspect facilities and assess civil penalties for violation of facility standards. § 16-5C-3(k) & (m). In particular, the statute provides for at least one inspection prior to the issuance of a license and thereafter for "periodic unannounced inspections." § 16-5C-10. Reports of inspections are to be in writing, filed with OHFLAC, and list deficiencies in the facility's compliance with applicable standards. § 16-5C-10(a). A copy of the report is to be sent to the facility, together with a specified time for submitting a plan for correction of the deficiencies. Id. If a correction plan is not timely submitted or if the deficiencies are not corrected within the time allowed by an approved correction plan, civil penalties may be assessed or other disciplinary action taken. § 16-5C-10(b). Other disciplinary actions available include admission bans, license terminations, appointments of temporary

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<sup>4</sup>OHFLAC has the responsibility for licensing nursing, personal care and residential board and care homes. (Stips. 14(c), 16(a) & 18(a).)

management, and civil actions. § 16-5C-11. Copies of all inspections and other reports of facilities filed or issued by OHFLAC are to be made available for public inspection. § 16-5C-16.

1. Residential Board and Care Homes

With respect to the regulations established for residential board and care homes, which took effect October 1, 1993, and their conformance with the Keys Amendment and HDS regulations, it is agreed that the standards do not require individual needs assessments, (Stip. 26);<sup>5</sup> do not ensure referrals to appropriate services, (Stip. 28); do not contain a written procedure for informing residents and/or families and guardians of deficiencies in the facilities' standards or of time periods in which residents may relocate, (Stip. 30); and do not assure accessibility for the handicapped (Stip. 45).

It is further agreed that with respect to state-law requirements, they provide for a rating system, (Stip. 22); but do not adequately spell out qualifications for administrators, (Stip. 29); and do not contain minimum numbers and qualifications

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<sup>5</sup>Defendants assert, however, that since July 13, 1993, resident assessment forms have been used when conducting complaint investigations and initial surveys and resurveys of unlicensed residential board and care homes, which assessments will identify inappropriate placements and evaluate "self-preservation" abilities. (Aff. Sandra L. Daubman, Defs.' App. 7.)

of personnel, (Stips. 6 & 54). In addition, the parties stipulate that prior to the institution of this action, OHFLAC did not advise injured parties of the possibility of seeking civil remedies, (Stip. 24), and that the regulations do not implement that requirement, (Stip. 36). There is no provision for technical assistance built into the regulations, although OHFLAC will respond to telephone inquires. (Stip. 46(a).) Similarly, the offering and sponsoring of educational and training programs is not addressed, (see Stip. Ex. 1), but it is agreed that a teleconference was held in August 1993 covering the new regulations and procedures, (Stip. 46(b)).

In other respects, defendants contend and support with reference to the new regulations, which contentions are not disputed by plaintiffs, that the residential board and care regulations now in effect comply with the federal requirement of establishing an admission policy by defining the type of resident that residential board and care homes are authorized to admit, (Stip. Ex. 1 at § 5.3.2), and with the state-law requirement of disclosure of costs, (Stip. Ex. 1 at 5.3.3.2). It is also undisputed that the new regulations contain sections dealing with safety, sanitation and hygienic procedures and a system for classifying standards and assigning numerical values for assessing violations, (Stip. Ex. 1 at 4.10 & 4.11), although plaintiffs

maintain, without specific references, that the regulations are inadequate in those areas.

Aside from contending that the defendants are in violation of federal and state law with respect to those matters which are subject to stipulation, plaintiffs claim that defendants are in violation of the federal mandate to establish standards governing the protection of civil rights because the regulations do not protect residents' privacy rights by requiring private bedrooms or, for those preferring a roommate, restricting bedroom occupancy to two persons. On that point, it is noted that the regulations limit bedroom occupancy to three residents. (Stip. Ex. 1 at 11.5.2.). Plaintiffs also claim, and a review of the new regulations discloses, that they do not mention West Virginia's statutory requirement of a bond for those facilities handling residents' monies.

It is further seen from a review of the current regulations, that after a facility is initially licensed, OHFLAC is required to conduct periodic unannounced inspections and prepare and send to the facility a written report listing any violations. (Stip. Ex. 1 at 4.6.5. and 4.6.6.) If a violation is found, the facility must submit a plan of correction within fifteen working days of receipt of the report, which plan must contain a calendar date by which time the violation will be corrected. (Stip. Ex. 1 at 4.8.1. and 4.8.3.3.) Provision is made for the assessment of

civil penalties as required by statute. (Stip. Ex. 1 at 12.1.) No time period for investigating complaints is specified. There is no requirement that residents be provided with a list of facilities to which they might move if violations of standards are not corrected and there is no requirement that deficient facilities be reported to the Social Security Administration. Information concerning inspections, investigations and other reports are to be made available to the public, (Stip. Ex. 1 at 4.9.1.), but nothing requires a change in the practice, (Stip. 47), of releasing records of inspections or "deficiency statements" to the public only after an approved plan of correction is completed, which could be up to a year after a complaint is filed.

Defendants have raised no legal defense to their failure to address all federal and state requirements in the current regulations governing residential board and care homes. The court accordingly finds on the basis of the parties' stipulations and its review of the current regulations that the West Virginia Department of Health and Human Services Administrative Rules for Residential Board and Care Homes, 64 C.S.R. 65, effective October 1, 1993, are in violation of the Keys Amendment, 42 U.S.C. § 1382e, and HDS regulations governing Standard Setting Requirements for Medical and Nonmedical Facilities where Supple-

mental Security Income Recipients Reside, 45 C.F.R. §§ 1397.1 through 1397.20, by their failure to:

1. Establish standards governing:

a. admission policies which include continuous needs assessments and referral to appropriate resources as required by section 1397.20(a)(1)(i); and

b. protection of residents' civil rights by providing accessibility for handicapped residents as required by section 1397.20(a)(1)(iv) and its incorporation of current federal law respecting accessibility for individuals with a physical disability.

2. Establish procedures for enforcing the standards which

a. include provision of technical assistance as required by section 1397.20(b)(1)(ii); and

b. as required by section 1397.20(b)(2)(ii), specify time periods, after a deficient facility fails to correct violations, for (1) informing residents and/or families and guardians of residents of standards which the facility does not meet, and the time period during which residents may relocate, if they wish, before the deficient facility is reported to the Social Security Administration; and (2) provide residents with a list of approved facilities and agencies which will help them move.

3. Require the reporting of deficient facilities to the Social Security Administration as required by section 1397.20(c).

4. Make available to the public the list of facilities found in violation of a standard, as required by section 1397.20(d)(2)(iv), in a timely manner.

Inasmuch as plaintiffs have cited no specific deficiencies in the sections dealing with safety, sanitation and hygienic procedures the court finds no violation in those areas. In addition, on the basis of the materials presented, the court is unable to conclude that the Keys Amendment requires the recognition of a constitutional right to privacy which would be violated by allowing three residents to share a bedroom.

The court further finds on the basis of the parties' stipulations and facts which are not in dispute that the West Virginia Department of Health and Human Services Administrative Rules for Residential Board and Care Homes, 64 C.S.R. 65, effective October 1, 1993, are in violation of West Virginia's statutory mandates in that they do not address the following matters:

1. Minimum numbers and qualifications of personnel as required by section 16-5C-5(b)(2);

2. Adequate minimum qualifications for administrators by training and experience as required by section 16-5C-6(b)(2);

3. Informing parties injured by a facility's violation of required standards of the possibility of seeking civil remedies as required by section 16-5C-8;

4. Bonding requirements for facilities handling residents' monies in excess of twenty-five dollars per resident and five hundred dollars for all residents in any month, as required by section 16-5C-7(b); and

5. Offering and sponsoring of educational and training programs as required by section 16-5C-3(i).

2. Personal Care Homes

As to personal care homes and their conformance with federal law, the parties stipulate that existing regulations do not require individual needs assessments, (Stips. 15(f) & 26); do not ensure referrals to appropriate services, (Stip. 28); do not assure accessibility for the handicapped, (Stip. 45); do not address the provision of technical assistance, (Stip. 46(a)); do not provide a written procedure for informing residents and/or their families and guardians of deficiencies in the facilities or of time periods for relocation, (Stip. 30); and do not require that deficient facilities be reported to the Social Security

Administration, (Stip. 31). It is also stipulated that it is the practice not to release records of inspections of "deficiency statements" to the public until an approved plan of correction is done, which could be up to a year after a complaint is filed, (Stip. 47).

In addition, it is stipulated that personal care home regulations do not comport with West Virginia's statutory provisions for proper placement in an appropriate level of care, (Stip. 23), and do not define the meaning of "extensive, on-going nursing care," (Stip. 25), resulting in a great number of residents in personal care homes who have significant medical and nursing care needs and degrees of mental illness or retardation requiring specially-tailored care that is not available in those homes, (Stip. 53). It is also agreed that existing regulations do not included a rating system, (Stip. 22); do not require cost disclosures or bonds, (Stips. 23 & 34); do not inform injured residents of the possibility of seeking civil remedies, (Stip. 36); do not adequately spell out qualifications for administrators, (Stip. 29); do not contain procedures for the assessment of civil penalties, (Stip. 38 and Defs.' App. 6); do not include minimum numbers and qualifications of personnel, (Stip. 6); and do not address the obligation to offer and sponsor educational and training programs, (Stip. 46(b) & (c)).

In other respects, plaintiffs contend, and defendants do not dispute, that existing personal care home regulations do not contain admission policies as required by federal law and do not address privacy rights by limiting the number of residents who may share a bedroom. With respect to privacy concerns, it is stipulated that there are no regulatory limits on the number of persons a facility may house, (Stip. 15.(c)), and that eight or more residents often share a bedroom in personal care homes, (Stip. 44). Plaintiffs further contend, without contradiction from defendants, that personal care home regulations do not provide for the classification of standards and assignment of numerical values to represent levels of compliance and do not provide for furnishing residents with a list of approved facilities and agencies that will help them relocate if a deficient facility fails to correct violations. A review of current regulations also reveals that they do not require periodic inspections.

Defendants nonetheless resist summary judgment with regard to the issues raised by plaintiffs on the general assertion that they are in compliance with federal and state law; that since 1983, the state has had regulations governing minimal standards for personal care homes; and that they are in the process of revising the regulations applicable to personal care homes with the expectation that they will be passed during the

1995 legislative session. (Aff. Sandra L. Daubman, Defs.' App. 7.) They also maintain that since July 13, 1993, resident assessment forms have been used when conducting complaint investigations and initial surveys and resurveys of unlicensed personal care homes, which assessments will identify inappropriate placements.<sup>6</sup> (Id. at Attach. 3.) On the bond requirement, they assert that a review of documents maintained by a past director shows that the majority of personal care homes did not handle residents' monies in an amount that required bonding.

Defendants' arguments indicate that efforts are being made to bring the state into compliance with federal and state requirements for personal care homes. Indeed, a comparison of the rules now in effect for personal care homes, (Defs.' App. 6), and the draft regulations dated February 24, 1993, (Defs.' App. 9), reveals that some deficiencies in the existing rules are addressed in the draft rules. For example, draft rule 6.1

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<sup>6</sup>The parties' stipulation No. 15(f) contains the statement that "[t]he parties disagree as to the existence of a federal mandate" requiring "individual care assessments of persons going into personal care homes." The statement is not supported by reference to anything and cannot form the basis for defeating summary judgment. Moreover, personal care homes come within the meaning of the Keys Amendment application to "group living arrangements," as that category is defined by HDS regulations to mean a "residential facility" which provides "both room and board and continuous protective oversight" and is either a medical or non-medical facility of any size "publicly or privately operated on a non-profit or for-profit basis." § 1397.5(a). As such, they must establish admission policies, including a continuous needs assessment. § 1397.20(a)(1).

contains more expansive guidelines for admission policies, (compare draft 6.1 and 6.4 with existing 7.1.3.(a)), and undertakes to describe "extensive, on-going nursing care" by giving examples of medical conditions or needs which disqualify a person from being accepted as a resident in a personal care home, (see draft 6.4.1). The draft rules also provide for admission assessments, (draft 7.2) and continuing needs assessments after admission, e.g., draft 6.5., 7.2 and 7.3). However, other deficiencies in the existing rules are not addressed in the draft rules and the defendants' efforts to correct inadequacies cannot overcome the conclusion that violations now exist and will continue if the draft regulations are enacted in their current form.

There being no dispute but that the existing regulations fail to comply with the federal and state law requirements made the subject of plaintiffs' motion, and in order to ensure that any ultimate revision to the rules addresses the inadequacies apparent in the existing rules and the draft presented, the court makes the following findings with respect to the sufficiency of the current rules governing personal care homes.

The West Virginia Board of Health Legislative Rules governing Personal Care Home Licensure, Chapter 16-5C, Series II (1983), are in violation of the requirements of the Keys Amendment, 42 U.S.C. § 1382e, and section 1397.20 of the HDS

regulations governing Standard Setting Requirements for Medical and Nonmedical Facilities where Supplemental Security Income Recipients Reside, by their failure to:

1. Establish standards governing:

a. admissions policies, including individual needs assessments and referrals to appropriate resources as required by 45 C.F.R. § 1397.20(a)(1)(i), and

b. protection of residents' civil rights by providing accessibility for handicapped residents as required by 45 C.F.R. § 1397.20(a)(1)(iv) and its incorporation of current federal law respecting accessibility for individuals with a physical disability.

2. Establish procedures for enforcing the standards which

a. include periodic inspection of facilities as required by section 1397.20(b)(1)(i);

b. include provision of technical assistance as required by section 1397.20(b)(1)(ii); and

c. as required by section 1397.20(b)(2)(ii), specify time periods within which a deficient facility must correct violations of standards, and after a deficient facility fails to correct violations, for (1) informing residents and/or families and guardians of residents of standards which the facility does not meet, and the time period during which

residents may relocate, if they wish, before the deficient facility is reported to the Social Security Administration; and (2) provide residents with a list of approved facilities and agencies which will help them move.

3. Require the reporting of deficient facilities to the Social Security Administration as required by section 1397.20(c).

4. Make available to the public the list of facilities found in violation of a standard, as required by section 1397.20(d)(2)(iv), in a timely manner.

The court declines on the current record to find that the Keys Amendments requires recognition of a constitutional right to privacy that is violated by allowing as many as eight persons to share a bedroom. In the absence of more specific reference to how existing regulations in those areas are inadequate, the court similarly is unable to find a violation of the requirement of section 1397.20(a)(ii) and (iii) that standards be established on matters such as safety, sanitation and hygienic procedures.

The court further finds that the West Virginia Board of Health Legislative Rules governing Personal Care Home Licensure, Chapter 16-5C, Series II (1983), are in violation of state law in that they do not address the following statutory requirements:

1. Minimum numbers and qualifications of personnel as required by section 16-5C-5(b)(2);
2. Adequate minimum qualifications for administrators by training and experience as required by section 16-5C-6(b)(2);
3. Informing parties injured by a facility's violation of required standards of the possibility of seeking civil remedies as required by section 16-5C-8;
4. Bonding requirements for facilities handling residents' monies in excess of twenty-five dollars per resident and five hundred dollars for all residents in any month as required by section 16-5C-7(b);
5. Offering and sponsoring of educational and training programs as required by section 16-5C-3(i);
6. Written disclosure of costs which may be incurred as required by section 16-5C-7(a);
7. Classification of standards and assignment of a numerical value for evaluating levels of compliance as required by section 16-5C-5(c) and (d);
8. A rating system as required by section 16-5C-5(e);
9. Periodic unannounced inspections as required by section 16-5C-9;

10. Proper placement in an appropriate level of care by giving meaning to that portion of section 16-5C-2(e) which states that personal care homes may not house persons requiring "extensive, on-going nursing care;" and

11. Procedures for the assessment of civil penalties as required by section 16-5C-10(d).

B. Enforcement of Standards and Procedures

With respect to the defendants' conformance with their federal and state law obligation to enforce standards and enforcement procedures for nursing, personal care and residential board and care homes, see 42 U.S.C. 1382e, 45 C.F.R. 1397.1 and W. Va. Code § 16-5C-3(a), the parties stipulate that investigations of complaints of alleged violations in personal care and residential board and care homes may take up to thirty days or even six months, (Stip. 32 & 41); that prior to the institution of this suit, the state failed to effectively enforce existing standards in personal care homes, (Stip. 37); that between January 1990 and the institution of this suit on December 21, 1992, civil penalties were not used as an enforcement mechanism in nursing, residential board and care or personal care homes, and that prior to January 1990, civil penalties were used in nursing homes but not in residential board and care or personal care homes, (Corrected Stip. 39); that between January 1990 and the

institution of this suit, other enforcement procedures, such as admission bans, license terminations, temporary management, administrative appeals, and civil action, were rarely used,<sup>7</sup> (Stip. 40); and that after the filing of this suit, the defendants retained legal counsel<sup>8</sup> and a paralegal/investigator to represent OHFLAC and assist in enforcement activities, (Stip. 56).

Based on the above stipulations and the affidavit of Gail Falk (Pls.' App. 1), which is accepted as true for purposes of the pending motion, (Stip. 16(c)), plaintiffs contend that defendants do not conduct a "prompt investigation of all complaints and alleged violations" as required by West Virginia Code, section 16-5C-8, and that enforcement actions have been nonexistent or totally ineffective in that the only enforcement technique used is one based on inspection, citation of a deficiency in standards, and request for a plan of correction, which

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<sup>7</sup>During that time period, no civil actions were commenced against nursing homes, (Stip. 42(a)); no bans on admission were used against personal care homes, but were used a few times against nursing homes, (Stip. 42(b)); temporary management was used once against a nursing home but no temporary management was imposed on any residential board and care home or personal care home, (Stip. 42(d)); and between January 1990 and September 30, 1993, no termination activities were instituted against any personal care home and only one was used against a nursing home, (Stip. 42(c)).

<sup>8</sup>A senior assistant to the attorney general was assigned to work full time with OHFLAC as of May 16, 1993. (Kramer Aff. at ¶ 75, Defs.'s App. 4.)

is in virtually all instances accepted without verification that corrections have been made (Falk Aff. at ¶ 73). No system exists for flagging emergency situations, for addressing overall managerial failings, for using enforcement procedures to compel corrective action, (Falk Aff. at ¶ 75), or for coordinating investigation responsibilities with other state agencies involved in rendering protective services to adults, (Falk Aff. at ¶ 87).

Apart from pointing out that enforcement activities have increased since the retention of legal assistance for OHFLAC, defendants provide no resistance to plaintiffs' contention that they are entitled to summary judgment on the matters discussed. The court accordingly finds that defendants are in violation of the Keys Amendment, 42 U.S.C. 1382e, section 1397.1 of the HDS regulations, and West Virginia Code section 16-5C-3(a) for their failure to effectively enforce standards for nursing, personal care and residential board and care homes, and of West Virginia Code section 16-5C-8 for their failure in given instances to investigate with reasonable dispatch complaints of alleged violations of standards in personal care and residential board and care homes.<sup>9</sup>

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<sup>9</sup>An alternative for consideration would be the establishment of categories of complaints based on their nature and the assignment, by category, of the maximum period in which the investigation will transpire.

## II. Disparate Impact Claims

The second and third claims of the complaint are based on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, (hereinafter, ADA), 42 U.S.C. § 12132.<sup>10</sup>

For the second claim, the class of plaintiffs defined as "all present or future residents of residential board and care, personal care, and nursing homes in the State of West Virginia" alleges that the defendants' failure to meaningfully regulate or enforce regulatory standards applicable to their living arrangements has a disparate impact on members of the class in violation of section 504 of the Rehabilitation Act and Title II of the ADA. (Compl. at ¶ 86.)

Plaintiffs affected by the third claim, a subclass defined as "all present or future Medicaid eligible residents of residential board and care and personal care homes in the State of West Virginia," assert that defendants' failure to provide Medicaid-eligible residents of the homes in which they reside with meaningful access to Medicaid services has a disparate

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<sup>10</sup>In their complaint, plaintiffs also base their second and third claims on the equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution. Inasmuch as the motion for summary judgment does not put forth an equal protection argument, the court does not address the issue.

impact on members of the class in violation of section 504 of the Rehabilitation Act and Title II of the ADA. (Compl. at ¶ 87.)

Section 504 of the Rehabilitation Act of 1973 provides that: "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." U.S.C. § 794. Section 504, by its language, is limited to programs or activities receiving federal financial assistance. Title II of the ADA broadens the protection extended to individuals with disabilities by prohibiting discriminatory treatment from public entities, including state departments and agencies, without regard to the receipt of federal financial assistance. Coleman v. Zatechka, 824 F. Supp. 1360, 1367 (D. Neb. 1993); see 42 U.S.C. § 12131. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In general, section 504 of the Rehabilitation Act seeks "to assure evenhanded treatment and the opportunity for

[disabled]<sup>11</sup> individuals to participate in and benefit from programs receiving federal assistance." Alexander v. Choate, 469 U.S. 287, 304 (1985) (citing Southeastern Community College v. Davis, 442 U.S. 397 (1979)). The "evenhanded treatment" requirement of section 504 does not, however, impose an affirmative obligation on recipients of federal funds to expand existing programs. Johnson by Johnson v. Thompson, 971 F.2d 1487, 1494 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993); Duquette ex rel. Duquette v. Dupuis, 582 F. Supp. 1365, 1369 (D.N.H. 1984). Rather, section 504 ensures only that disabled individuals receive the same treatment as those who are not disabled. Chandler v. City of Dallas, 2 F.3d 1385, 1389-90 (5th Cir. 1993), petition for cert. filed Jan. 31, 1994; Johnson by Johnson, 971 F.2d at 1494. In other words, there is no requirement that all disabled persons be provided the same benefits as long as they receive "evenhanded treatment" in relation to the nondisabled. P.C. v. McLaughlin, 913 F.2d 1033, 1041 (2d Cir. 1990) (citing Traynor v. Turnage, 485 U.S. 535, 548 (1988) (quoting Alexander, 469 U.S. at 304)); see also Colin K. by John K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983) (expressing "serious doubts" that section 504 provides a claim "vis-a-vis other handicapped

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<sup>11</sup>Earlier versions of section 504 used the terms "handicapped individuals" and "individual with handicaps." The change to the word "disability" is "an effort to use currently acceptable terminology" and does not represent any substantive changes in the Rehabilitation Act. Coleman, 824 F. Supp. at 1367 n.17.

individuals"). But cf. Martin v. Voinovich, No. C-2-89-362, 1993 WL 542170, at \*\*96-97, to be published at 840 F. Supp. 1175, (S.D. Ohio Dec. 14, 1993) (failure to accommodate only the "severely handicapped" may be unreasonable and discriminatory if they are otherwise qualified to participate in the program and are excluded solely by reason of the degree of their disability); Garrity v. Gallen, 522 F. Supp. 171, 217 (D.N.H. 1981) (federally funded programs, "when viewed in their entirety, must be readily accessible to all handicapped persons," and thus "profoundly retarded" must be served to the same extent as "mildly retarded") (emphasis in original).

Although the command of evenhanded treatment does not require affirmative action, it is recognized that in some instances the line between a rightful refusal to extend affirmative action and unlawful discrimination is not always clear. E.g., Rothschild v. Grottenthaler, 716 F. Supp. 796, 800 (S.D.N.Y. 1989) (citing Davis, 442 U.S. at 412). Section 504 accordingly imposes the additional obligation of affording disabled individuals with the opportunity to participate in and benefit from programs offered by the recipient of federal financial assistance by providing them "meaningful access to the benefit that the grantee offers." Alexander, 469 U.S. at 301, 304. Federal grantees need not make "'fundamental'" or "'substantial'" changes in their programs to accommodate the disabled, id. at 300

(quoting Davis, 442 U.S. at 412-13), but "reasonable accommodations in the grantee's program or benefit may have to be made," to assure meaningful access by those with a disability, id. at 301. A "reasonable accommodation" is one which does not impose an undue financial or administrative burden on the offeree or necessitate a substantial alteration in its program. Nathanson v. Medical College of Pa., 926 F.2d 1368, 1383, 1387 (3d Cir. 1991); see also Harris v. Thiipen, 941 F.2d 1495, 1527 n.48 (11th Cir. 1991).

In the context of a state's participation in the federal Medicaid program, section 504 reserves to a participating state "substantial discretion to choose the proper mix of amount, scope and duration limitations on coverage." Id. at 303. Thus, within the confines of the Medicaid Act, a state may define the benefit it will provide, id., but it may not provide an otherwise qualified individual with a disability with health benefits or services that are not as effective as those provided to others, id. at 304 (citing 45 C.F.R. § 84.52(a)(3)(1984)). Nor may it adopt "criteria or methods of administration that have the purpose or effect of defeating or substantially impairing accomplishment of the objective of the recipient's program with respect to the [disabled]." Id. at 304-05 (quoting 45 C.F.R. § 84.4(b)(4)(ii) (1984)). The state accordingly must afford individuals with a disability meaningful and equal access to the

Medicaid benefits or services offered to those without a disability and may be required to adjust its programs to achieve that result. Id. at 305-06 & nn. 25-26.

The sub-class of Medicaid-eligible residents on whose behalf the third claim is brought contend that, although eligible for Medicaid, they lack transportation to the services of health care providers. They maintain that the state should accommodate their need for transportation by including in the residential board and care and personal care home regulations a requirement that medical care for residents will be obtained when needed and that transportation to that care will be available. They also assert that transportation could be ensured by requiring the state to adequately reimburse the provider for transportation costs.

In support of their claim that the failure to provide transportation is actionable under section 504, they point out, and defendants so stipulate, that lack of transportation impairs their ability to receive medical care and rehabilitative services, (Stip. 43(a)) and that the transportation guarantees they seek are required by the regulations governing adult family

care homes,<sup>12</sup> (Stip. 35). It is further agreed that the Medicaid Act requires assurance of transportation to all recipients of Medicaid services. See 42 C.F.R. § 431.53.

The subclass of plaintiffs seeking relief under the third claim having made a prima facie case that they are being denied meaningful access to Medicaid services for which they are eligible and that a reasonable accommodation is possible, the burden shifts to defendants to demonstrate that they are unable to make the accommodation or that the proposed accommodation is unreasonable. See Wood v. Omaha School Dist., 985 F.2d 437, 439 (8th Cir. 1993). Defendants have failed to come forward with any showing of unreasonableness with respect to plaintiffs' proposed accommodation and, in particular, the inclusion of transportation assurances in the regulations governing residential board and care and personal care homes. Indeed, having made the assurances in the adult family care home regulations and having failed to challenge them here, defendants must be deemed to acknowledge their reasonableness. Plaintiffs are accordingly entitled to a similar accommodation of transportation assurance in the regulations governing residential board and care and personal care homes.

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<sup>12</sup>"Adult family care homes" serve one to three ambulatory disabled or elderly individuals who need the support, protection and security of family living in a homelike environment that is less restrictive than that offered in personal care, residential board and care or nursing homes. (Stips. 1 & 12(a)-(b).)

Plaintiffs' second claim is based on the general proposition that the defendants' failure to meaningfully regulate or enforce regulatory standards is unlawful discrimination on the basis of disability and is thus actionable under section 504 or Title II of the ADA. The focus of the residential board and care and personal care residents is on the disparity between the treatment they receive and that afforded residents of nursing and adult family care homes where state regulatory standards and enforcement practices are in compliance with federal and state laws, emphasis is placed on quality of care and quality of life, privacy rights are better protected by limiting bedroom occupancy to one or two residents, more training is provided to personnel, accessibility for the handicapped is required, and reimbursement for care is at a higher rate.

To the extent that the second claim is viewed as seeking meaningful access to the benefits made available to residents of nursing and adult family care residents by governing regulations, most of the disparities will be eliminated by the court's rulings in favor of the plaintiffs on their first claim under the Keys Amendment. Requiring defendants to bring residential board and care and personal care home regulations into compliance with federal and state law by including substantially the same provisions now in existence for nursing and adult family care homes will correct the major deficiencies addressed by

plaintiffs. In other respects, the second claim must be viewed as alleging disparity vis-a-vis other disabled individuals, not the nondisabled. Moreover, the disparity, if any, is not based on the degree of disability but rather on the particular living arrangement inasmuch as it is those with both milder and more severe disabilities who are perceived to be better treated. The court accordingly concludes that the second claim is not actionable under section 504 or, by logical extension, see U.S. E.E.O.C. v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993) (applying section 504 case law in interpreting the ADA), under Title II of the ADA.

### III. Wheelchair Accessibility

The subclass of plaintiffs described as "all present or future residents of residential board and care and personal care homes," allege in the eighth claim that by failing to enforce wheelchair accessibility in personal care and residential board and care homes, defendants are in violation of section 504 of the Rehabilitation Act of 1973 and Title III of the ADA, 42 U.S.C. 12182, which prohibits discrimination in places of public accommodation on the basis of disability. (Compl. ¶ 92.) Inasmuch as the court has reservations with respect to the applicability of the public accommodation provisions of Title III of the ADA to

the homes affected by the eighth claim<sup>13</sup> and the relief sought by plaintiffs will essentially be obtained by virtue of the court's ruling on the first claim to the extent that it requires regulations providing for accessibility for the handicapped, summary judgment on the eighth claim will be denied.

#### IV. Conclusion

For the reasons stated, it is ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, granted in part and denied in part.

The motion is granted in the following respects:

1. As to the first claim, to the extent that the court found that existing regulations governing residential board and care and personal care homes are in violation of federal and state law and that the defendants have failed to adequately enforce the regulations.

2. As to the third claim, to the extent that plaintiffs seek to require defendants to include in the regulations

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<sup>13</sup>For example, Title III does not include in its definition of "public accommodation" an "establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor." 42 U.S.C. 12181(7)(A).

for residential board and care and personal care homes transportation assurances comparable to those contained in existing adult family care home regulations.

The motion is denied with respect to the second and eighth claims.

The parties are accordingly ordered to confer and develop a remedial plan for correcting and implementing proposed changes to existing residential board and care and personal care regulations and enforcement procedures which will incorporate the court's findings herein and to submit the plan to the court within ninety days, together with a proposed timetable for implementing the changes.

The Clerk is directed to forward copies of this order to all counsel of record. -

DATED: March 21, 1994

  
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JOHN T. COPENHAVER, JR.  
United States District Judge

WEST VIRGINIA COMPREHENSIVE LONG-TERM CARE PLAN

Section 1. Goals and General Requirements.

1.01. Goals:

1.01.01 The overriding goal of this plan is to provide the most normalized, least restrictive long-term care setting for every person consistent with the care and needs of the individual.

1.01.02 DHHR will establish a Long-Term Care Committee, the membership of which will consist of representatives of all divisions of the Department, other agencies and advocates, to provide leadership in reforming the system, to be in place by July 1, 1994.

1.01.03 The Department recognizes that it has to coordinate all policies and planning for long-term care, including in-home services and personal assistance.

1.02. General Requirements:

1.02.01. The parties have agreed to jointly draft implementation plans, policies and regulations as hereinafter provided to accomplish the normalization goals of this plan. The agreed details of these plans, policies and regulations hereafter developed shall be submitted to the Court on the timetables hereinafter set forth.

1.02.02. Resident survey. The core of long-term care planning is a resident care survey to be developed from the needs assessments.

1.02.03. Community participation shall be an essential part of policy.

1.02.04. Accessibility for persons with disabilities is a core value for dignity for long-term care populations.

1.02.05. Accountability for resident well-being shall be specifically assigned to the operator/provider in each policy/regulation. This includes but is not limited to accountability for refusing to admit a person whose needs cannot be met, transferring persons whose needs so indicate, at the direction of the case manager, and providing all transportation for treatment needs and community participation.

1.02.06. Regulatory staff shall be adequate to provide for all investigations and inspections on a timely basis, and for regulatory follow-up.

1.02.07. Reimbursement policy shall be consistent with the overall policy goals of this plan.

1.02.08 The objective of this Plan initiative will be a client-driven system.

Section 2.

Implementation Generally.

2.01 Needs Assessment and Instrument:

2.01.01. - Each person presently in or going into long-term care settings (including home settings) shall have initial and periodic needs assessment. Each needs assessment shall provide for the periodicity schedule, depending on the needs of the individual but no less frequently than annually. (For Residential Board and Care Homes and Personal Care Homes, see Appendix A - Regulations.)

2.01.02. DHHR shall have a uniform screening instrument by January 1, 1995.

2.01.03. Coordination with managed care. With the advent of managed care, the purchase of services will be coordinated with the residential needs of the individual.

2.02 Individualized Care:

2.02.01. Every person in an assisted long-term care setting shall have a plan of care identifying treatment/services in conformity with the person's needs assessment. (For Residential Board and Care Homes and Personal Care Homes, see Appendix A - Regulations.) DHHR shall develop a conceptual design model for the plan of care to be used in long-term

care; other models may be used so long as the basic elements in the DHHR model are included. This shall be in place by March 1, 1995.

2.02.02. The plan of care must include, to the extent appropriate to the individual, needed physical therapies, other rehabilitation therapies, personal care services, basic living skills training. (For Residential Board and Care Homes and Personal Care Homes only, see Appendix A - Regulations.)

2.02.03. Potential eligibility for Medicaid for every resident shall be explored. The state shall set up a mechanism to review Medicaid eligibility for each long-term care resident.

2.03 Coordinator of Long-Term Care:

2.03.01. A Coordinator of Long-Term Care shall be established within the Department of Health and Human Resources. The Coordinator will work with the Long-Term Care Committee. Individual work units within the Department need to be interfaced.

2.03.02. The Coordinator shall also develop a plan for promoting in-home services by July 1, 1995.

2.04 Redefinition of Qualifications of All Personnel in Long-Term

Care Settings:

Minimum standards will be established for all categories of caregivers and operators by July 1, 1995.

2.05. Residential Settings and Options Development/Training:

2.05.01. The Committee and Coordinator shall be responsible for the resource development of and technical assistance for quality appropriate residential settings and options for long-term care. Adequate staff shall be made available statewide for such residential recruitment and development. This shall be in place by January 1, 1995.

2.05.02. The focus shall be on developing and training quality adult family care homes, residential board and care homes, and other small residential settings and options.

2.05.03. Recruitment and Training Committees shall be developed in each DHHR Region.

2.05.04. Setting development shall include procedures to promote attendant services and other services needed to include in-home care as a significant element of long-term care.

2.05.05. The agency will assist residents living in nonconforming facilities to move to these quality residential settings and options hereinbefore provided, to the extent assistance is requested.

2.06. Reimbursement:

2.06.01. The reimbursement policy shall encourage the development of small and normalized residential settings and services.

2.06.02. The reimbursement plan for adult family care homes shall be finalized and implemented by December 1, 1994.

2.06.03. The reimbursement plan for residential board and care homes shall be finalized by December 1, 1994. Supplements for all residential board and care homes shall begin on or before December 1, 1994.

2.06.04. The reimbursement policies for personal care homes shall be finalized by December 1, 1994.

2.06.05. All increments in reimbursements shall be keyed to meeting specific quality-of-care and facility standards. No state supplement shall be provided unless such state standards are met.

2.06.06 Reimbursement policies shall be oriented to providing reimbursement consistent with the severity of client problems and focused on producing desired outcomes.

2.07. Quality of Care/Facility Standards:

2.07.01. Admission policies for each level of long-term residential setting which are consistent with the individual needs assessments shall be established by July 1, 1994. (For Residential Board and Care Homes and Personal Care Homes, see Appendix A - Regulations.)

2.07.02. Referral, Plan of Care

(a) Procedures for referral to appropriate resources shall be established, including but not limited to those indicated by the plan of care. Such resources shall include but are not limited to those necessary to meet behavioral health needs, personal care needs, basic living skills training, all rehabilitation therapies, as well as facility and community recreational and social activities. (For Residential Board and Care Homes and Personal Care Homes, see Appendix A - Regulations.)

(b) Every person in a personal care home, residential board and care home and adult family care home context shall be afforded the greatest possible normalized living environment including a normalized bedroom setting, with a normalized bed, bed table, dresser, closet, lighting, chair, individually accessible storage for clothing and personal hygiene items, and constant access. (For Residential Board and Care Homes and Personal Care Homes, see Appendix B - Regulations.)

2.07.03. Accessibility

Facility standards that assure accessibility for those with physical disabilities shall be established. (See Appendix C - Regulations for Residential Board and Care Homes and Personal Care Homes.)

2.07.04. Personnel

(a) Standards by facility type which prescribe minimum numbers and qualifications of personnel to assure quality care shall be established. (For Residential Board and Care Homes and Personal Care Homes, see Appendix B - Regulations.)

(b) Standards by facility type for administrator qualifications shall be established. (For Residential Board and Care Homes and Personal Care Homes, see Appendix B - Regulations.)

2.07.05. Civil Remedies

Regulatory procedures by facility type for informing residents of civil remedies for regulatory violations shall be established. (For Residential Board and Care Homes and Personal Care Homes, see Appendix C - Regulations.) Regulations shall assure that all enforcement procedures can be accessed by clients, their representatives, and ombudsmen.

2.07.06. Bonding

Regulatory procedures for resident money bonding shall be established. (For Residential Board and Care Homes and Personal Care Homes, see Appendix C - Regulations.)

2.07.07. Facility Classification

A personal care home classification and rating system which assures compliance with all standards shall be established in regulation.

2.07.08. Facility Standards

(a) Regulations for residential care and personal care settings shared by persons with behavioral health needs shall provide for an activities coordinator for all homes serving over thirty persons, shall provide for a plan of care which includes productive daily activities, and shall provide for individualized/normalized rather than institutional setting bathrooms. Said regulations shall also provide for collaboration between behavioral health centers and home providers for the delivery of services. Regulations for personal care home settings should assure at least 80 square feet per person in bedrooms, excluding closets, by July 1, 1997. The parties do not agree upon the maximum number of persons per bedroom and said issue shall be submitted to the Circuit Court of Kanawha County, West Virginia for resolution by the established procedure in E. H. v. Matin, Civil No. 81-MISC-585.

(b) Regulations for settings serving clients with behavioral health needs shall detail the collaboration between behavioral health centers and residential providers. (For Residential Board and Care Homes and Personal Care Homes, see Appendix A - Regulations.)

(c) Bedrooms and bathrooms may not be established or maintained in such a way that they serve as corridors to other rooms. (Appendix B)

(d) Standards and enforcement policies shall assure that the facilities are located in residential or partially residential areas. (Appendix B)

2.07.09. Timetable

Standards required by this subsection 2.07 (2.07.01-2.07.08) for Adult Family Care Homes shall be developed and implemented by December 1, 1994. The standards required by this subsection 2.07 for residential board and care homes and personal care homes shall be implemented before June 1, 1995.

2.08. Enforcement Policies for All Residential Settings:

2.08.01. Enforcement Generally

(a) Establish in policy and regulation (i) periodic inspection procedure, (ii) prompt investigation of complaints and

appeal of violation; and (iii) civil penalty scale/procedures for assessment by violation type, following all inspections. (See Appendix C - Regulations for Residential Board and Care Homes and Personal Care Homes - Draft by July 1, 1994 and final by July 1, 1995) (Nursing Homes: The Department is expecting new HCFA regulations governing nursing home enforcement in the summer of 1994, which are needed before nursing home enforcement proceedings are redrafted. The parties will submit draft Emergency Rules by December 1, 1994 to be effective before June 1995 as an Emergency Rule, and to be fully effective thereafter as prescribed by state law.

(b) OHFLAC shall develop and use a General Enforcement Guide which will provide guidance to inspectors/surveyors, and will detail procedures for supplementary enforcement in all settings generally, including but not limited to closing, admissions, assessments, use of consultants, new management, repeat survey visits, specific technical assistance, civil penalties, etc. This shall include detailed procedures for all enforcement mechanisms. This will be agreed to by the parties and submitted to the Court by July 1, 1995.

(c) All enforcement policies and procedures shall include procedures for coordination with the roles of the long-term care ombudsman and Adult Protective Services.

2.08.02. Technical Assistance and Training

(a) Detailed written policies, procedures, and staffing for technical assistance in complying with standards for each level of care, and for educational and training programs, shall be established by July 1, 1995.

(b) Residential Board and Care Homes:

(i) Beginning August, 1994, staff from DHHR will annually sponsor at a minimum of two locations around the State an educational and training program for residential board and care operators and other interested persons.

(ii) The Department shall develop the training curriculum and identify trainers.

(iii) The training subjects shall include at a minimum: the licensure application process; facility inspections; deficiency statements/plans of correction; facility administrative requirements and resident care employee requirements; needs assessment, service plans, case admission/referrals for services/discharge/recordkeeping; resident rights; resident activities; nutrition, abuse and exploitation; facility requirements; and departmental enforcement procedures.

(iv) Any provider who needs assistance on any matter relating to standards or enforcement may contact the program

administrator in OHFLAC and receive responses or on-site assistance, as appropriate.

(v) Providers and potential providers shall be provided assistance from the person responsible to the coordinator who is responsible for developing appropriate residential settings under Section 2.05.01 of this Plan.

(c) Personal Care Homes:

(i) Beginning August 1, 1995, staff from DHHR will annually sponsor at at least two locations around the State an educational and training program for personal care providers and other interested persons. Attendance shall be mandatory for at at least one responsible person from a facility for follow-up licensure.

(ii) The Department shall develop the training curriculum and identify trainers.

(iii) Training subjects shall include at a minimum the following: the licensure application process; facility inspections; deficiency statements/plans of correction; facility administrative requirements and resident care employee requirements; needs assessment and service plans, care, transportation, admission/referrals for services/discharge/recordkeeping; nursing requirements; resident rights; medication administration; resident activities;

nutrition, abuse and exploitation; facility and site requirements; and departmental enforcement procedures.

(iv) Any provider who needs assistance on any matter relating to standards or enforcement may contact the program administrator in OHFLAC and receive responses or on-site assistance, as appropriate.

(v) Providers and potential providers shall be provided assistance from the person responsible to the coordinator who is responsible for developing appropriate residential settings under Section 2.05.01 of this Plan.

(d) Training of Surveyors: All surveyors of long-term care settings shall have training with respect to the needs of persons with developmental disabilities, mental illness, and aging.

#### 2.08.03. Nonconforming Facilities

(a) Facility correction and resident transfer procedures for facilities not conforming to all state standards including (i) resident and family disclosure, (ii) relocation timelines and facilities, (iii) SSA reporting shall be in effect by July 1, 1995. (See Appendix C - Regulations for Residential Board and Care Homes and Personal Care Homes.) (Nursing Homes - to be developed)

(b) Grandfather provisions shall not permit outdated physical plants to continue without meeting facility standards. Regulations may provide for phase in periods for facilities to meet facility standards. (See Appendix B)

2.08.04. Public Information

(a) Procedures for public listings of nonconforming facilities shall be established by July 1, 1995. (See Appendix C - Regulations for Residential Board and Care Homes and Personal Care Homes.) (Nursing Homes - to be developed)

(b) The Secretary shall make available from the time of receipt information and documents concerning applications, inspections, investigations and facilities in violation of standards, including the details thereof.

2.08.05. Disclosure of Costs

Procedures for written disclosure of costs for personal care homes shall be established and implemented. (See Appendix C.)

2.08.06. Staffing

Enforcement for these four long-term care settings requires a significant increase in staff. The parties shall agree on the numbers and types needed by April 1, 1995. If agreement is not reached, the

issue shall be submitted to the Court. Meetings thereon shall take place in October and January.

current as of 8/2/95

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## APPENDIX A

### NEEDS ASSESSMENTS, ADMISSION POLICIES, CARE, ETC.

#### 1. Residential Board and Care Homes

Standards governing admission policies which include continuous needs assessments and referral to appropriate resources as required by Section 1397.20(a)(1)(i).

5.3.5 If an individual has an identified mental or developmental disorder, he or she shall not be admitted to a residential board and care home unless the residential board and care home can provide evidence of continued professional follow-up to address the individuals' mental health needs or he or she is a client of a licensed behavioral health agency which has assigned a case manager, who coordinates, monitors and integrates all aspects of the individuals' behavioral health service needs.

5.3.6.c. Services to be offered and a full disclosure of fees for services, including the home's policy regarding annual contract price and refunds.

5.3.6.d. Information and referral services to be provided by the home with respect to assisting the resident's utilization of social, recreation, and vocational activities within the community.

5.3.6.f. How the home will assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident and how the home will arrange for transportation to and from these services.

8.2.4. The residential board and care home shall provide each resident a written, signed and dated health assessment by a licensed physician or other licensed health care professional authorized to perform such assessments by applicable State laws and rules not more than forty-five (45) days prior to the resident's admission, or no more than five (5) working days following admission, and at least annually thereafter. The admission and annual health assessment shall include screening for tuberculosis and other communicable diseases if indicated by exposure, prevalence or risk according to current medical practice in congregate living situations as indicated by the director of the division of health of the department of health and human resources.

8.2.6. When a resident is in need of specialized professional health care, the residential board and care home shall assist the resident as needed in making arrangements with the appropriate agency or professional care-giver for the care needed.

8.2.6.a. If a resident exhibits symptoms of, or if, after an individual is admitted, the residential board and care home learns that the individual has a of a mental or developmental disorder, and the resident is not receiving services to meet his or her current needs or is not a client of a behavioral health center or does not have a case manager, the home shall advise the individual or their,

legal representative of their behavioral health service options within the community and allow them the opportunity to obtain necessary services within thirty (30) days. If the resident or their legal representative fails to meet the resident's needs in this area in a timely manner then the residential board and care home shall refer the individual to a licensed behavioral health agency. Cross reference Section 7.3.3.

9.1.9. The residential board and care home shall permit a resident to refuse any treatment. The home may inform a resident, however, that failure to follow his or her plan may result in a behavioral or a medical condition which requires services which are not available in a residential board and care home.

9.2.1. Every resident shall have an individualized functional needs assessment which shall be completed within thirty (30) days after admission and shall include:

9.2.1.a. a periodic health assessment which includes a list of treatments and activities necessary to meet physical health needs;

9.2.1.b. a psychological assessment for any person with behavioral health needs, completed upon admission and every three (3) years thereafter unless the resident has experienced significant changes that would warrant re-evaluation.

9.2.1.c. A social needs assessment, reviewed at least once annually, which shall include a resident history, emergency contact names and telephone numbers, a list of activity and recreational preferences, current financial status (if the home is managing resident funds), and information related to the resident's directives; and

9.2.1.d. a nursing assessment, reviewed at least once annually, if the resident is receiving limited and intermittent nursing services, or as required by standards governing services provided by an outside agency if an agency is providing services to the individual within the home, which shall include a review of systems, vital signs, allergies, nutritional status, psychosocial status, medications and reason for use, and progress related to any therapy provided during the current review period.

9.2.2 Every resident shall have a service plan consistent with the functional needs assessment which shall be developed within forty-five (45) days of admission and updated at the time of any significant or permanent change in condition, but at least once every six (6) months and shall include but not limited to the following areas of needs:

9.2.2.a. activities of daily living services;

9.2.2.b. instrumental activities of daily living services;

9.2.2.c. a plan for ensuring that social and recreational needs are met;

9.2.2.d. a plan to meet the resident's identified therapy services;

9.2.2.e. a plan to meet the identified medical and nursing services;

9.2.2.f. medication administration services; and

9.2.2.g. a plan to ensure that transportation services are met.

9.2.3. The home shall provide treatment and care in accordance with the functional needs assessment and service plan.

Transportation assurances governing recipients of Medicaid services residing in residential board & care and personal care homes.

5.3.6. The relationship of a resident to the residential board and care home shall be covered by a contract entered into at the time of or prior to the individual's admission. The contract shall specify...

5.3.6.f. How the home will assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident and how the home will arrange for transportation to and from these services.

7.4.4. The home will assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident and will arrange for transportation to and from these services: Provided, an ambulance will be used only in emergencies.

## 2. Personal Care Homes

6.1.4. A personal care home shall not admit an individual before a determination has been made that the facility can meet the needs of the resident. The decision-making process shall involve an interview between the administrator, or a designee responsible for admission and retention decisions, and the resident and the resident's responsible person, if any.

6.1.6 The personal care home shall obtain the following information concerning the prospective resident in writing from the resident's physician or any licensed health care practitioner or agency approved by the director prior to admission;

6.1.6.a. Diagnosis;

6.1.6.b. Recurring health problems;

6.1.6.c. Impairments;

6.1.6.d. Physician's orders for care and treatments, including diet, aids to physical functioning and medications;

6.1.6.e. A statement that the services provided by the personal care home are appropriate to meet the needs of the prospective resident;

6.1.6.f. A statement that specifies whether the prospective resident does or does not need to have a staff member awake during resident sleep time hours; and

6.1.6.g. Any other information relevant for the care and supervision of the prospective resident by the personal care home.

6.3.3. If an individual has an identified mental or developmental disorder, he or she shall not be admitted to a personal care home unless the personal care home can provide evidence of continued professional follow up to address the individual's current mental health needs or he or she is a client of a licensed behavioral health agency which has assigned a case-manager, who coordinates, monitors and integrates all aspects of the individual's behavioral health services needs.

6.4.1. If upon review a resident is determined to have not had the opportunity to fulfill the provisions established in §7.1.8. and §7.2.7 of this rule or they have needs that are not being met without written informed consent from the resident or his/her legal representative, the licensee shall bear the cost of reassessment of the resident's functional needs within thirty (30) days and have the results submitted to the secretary. The continued stay will be contingent upon meeting the following conditions:

6.4.1.a. the licensee has met facility standards for the provision of such care; and

6.4.1.b. the resident or his/her legal representative has provided written informed consent for such services, and

6.4.1.c. the licensed health care professional has provided a written order based on medical necessity for the provision of such services; and

6.4.1.d. the needs of the resident are being met in accordance with acceptable standards of care.

6.4.2. If a resident has individual one-on-one needs that are not met by the allowable service provision in the home as established by this rule, and the individual has medical coverage or financial means that permits accessing of additional services, the administrator shall make a referral to an appropriate agency or shall seek to arrange for the provision of these services.

6.4.3. Individuals who qualify for and are receiving services coordinated by a licensed hospice may receive these services in a personal care home, except that services utilizing equipment which requires auxiliary electrical power in the event of a power failure, such as ventilators, suction apparatus, and intravenous or tube feeding pumps, shall not be used unless the personal care home has a backup power generator. In the event that a resident is receiving limited or intermittent nursing care or hospice services, the personal care home shall assure that the resident has privacy in care and the ability to evacuate in an emergency. The provision of services to the resident receiving limited or intermittent nursing care or hospice care shall not interfere with the provision of services to other residents.

6.4.4. If a resident exhibits symptoms of a mental or developmental disorder, and the resident is not receiving services to meet his or her current needs, is not a client of a behavioral health center,

or does not have a case manager, the home shall advise the individual or his or her legal representative of behavioral health service options within the community. The resident shall have thirty (30) days to obtain necessary services. If the resident or his or her legal representative fails to meet the resident's needs in this area in a timely manner then the personal care home shall refer the individual to a licensed behavioral health agency.

7.1.1. The personal care home shall evaluate the continued appropriateness of residence of an individual in the home.

7.1.8. The personal care home shall allow a resident to refuse any treatment. The home may inform a resident, however, that failure to follow his or her individualized service plan may result in a behavioral or medical condition which requires services which are not available in a personal care home.

7.2.1. Every resident shall have an individualized functional needs assessment which shall be completed within thirty (30) days after admission and shall include:

7.2.1.a. A periodic health assessment which includes of treatments and activities necessary to meet physical health needs;

7.2.1.b. A psychological assessment for any person with behavioral health needs, completed upon admission and every three (3) years thereafter unless the resident has experienced significant changes that would warrant re-evaluation;

7.2.1.c. A social needs assessment, reviewed at least once annually, which shall include a resident history, emergency contact names and telephone numbers, a list of activity and recreational preferences, current financial status (if the home is managing resident funds), and information related to the resident's directives; and

7.2.1.d. A nursing assessment, reviewed at least once annually, unless the resident is receiving limited and intermittent nursing services which would increase the frequency of the review to once every six (6) months, or as required by standards governing services provided by an outside agency if an agency is providing services to the individual within the home, which shall include a review of systems, vital signs, allergies, nutritional status, psychosocial status, medications and reason for use, and progress related to any therapy provided during the current review period.

7.2.2. Service Plan - every resident shall have a service plan consistent with the functional needs assessment which shall be developed within forty-five (45) days of admission and updated at the

time of any significant or permanent changes in condition, but at least once every six (6) months and shall include but not be limited to the following areas of needs:

7.2.2.a. Activities of daily living services;

7.2.2.b. Instrumental activities of daily living services;

7.2.2.c. Social and recreational services;

7.2.2.d. Therapy services;

7.2.2.e. Medical and nursing services;

7.2.2.f. Medication administration services; and

7.2.2.g. Transportation services.

7.2.3. The home shall provide treatment and care in accordance with the functional needs assessments and services plan.

7.3.2. The personal care home shall provide each resident a written, signed and dated health assessment by a licensed physician or other licensed health care professional authorized to perform the assessments by applicable State laws and rules not more than forty-five (45) days prior to the resident's admission, or no more than five (5) working days following admission, and at least annually thereafter. The admission and annual health assessment shall include screening for tuberculosis and other communicable diseases if

indicated by exposure, prevalence or risk according to current medical practice in congregate living situations as indicated by the director of the division of health of the department of health and human resources.

7.3.3. All physician orders shall be reviewed at least once every three (3) months for accuracy by the registered professional nurse unless there is a medical condition requiring a more frequent review by the resident's physician.

7.3.6. The personal care home shall measure and record the resident's height in his or her record upon admission and annually thereafter.

7.3.7. The personal care home shall weigh and record each resident's weight in his or her record upon admission, except that a resident requiring limited and intermittent nursing care shall be weighed at least monthly or as ordered by the physician.

7.3.8. The personal care home shall report undesirable changes in weight of five (5) pounds or more to the resident's physician within seventy-two (72) hours of the weighing.

7.4.7. Copies of the prescriptions or written orders for drugs shall be retained in the resident's record. Verbal orders shall be reviewed and signed by a practitioner licensed by law to prescribe medications within ten (10) working days from the original

order date.

7.9.4. The record shall contain the following information relevant to the personal supervision and assistance to be provided to the resident by the home:

7.9.4.c. All contact with the resident's physician by the personal care home staff;

8.6.1. A resident may meet with and participate in the activities of social, religious, and community groups, at his or her discretion.

Standards governing proper placement in an appropriate level of care by giving meaning to that portion of W.Va. Code § 16-5C-2(e) which states that personal care homes may not house person requiring "extensive, ongoing nursing care."

3.13. Extensive Nursing Care - The nursing care required when there is a major deviation from normal in a body system or multiple body systems of such magnitude that the deviations are life threatening and the individual's condition is unstable and unpredictable.

6.3.1. A personal care home shall not admit a resident in need of extensive, ongoing nursing care.

6.3.2. No resident shall be admitted or retained if:

6.3.2.a. The home does not have the capability or services to provide appropriate care;

6.3.2.b. The resident requires a level of service for which the home is not licensed or does not provide; or

6.3.2.c. The home does not have the staff appropriate in numbers and with appropriate skill to provide these services.

6.3.3. If an individual has an identified mental or developmental disorder, he or she shall not be admitted to a personal care home unless the personal care home can provide evidence of continued professional follow up to address the individual's current mental health needs or he or she is a client of a licensed behavioral health agency which has assigned a case-manager, who coordinates, monitors and integrates all aspects of the individual's behavioral health service needs.

6.4.4. If a resident exhibits symptoms of a mental or developmental disorder, and the resident is not receiving services to meet his or her current needs, is not a client of a behavioral health center, or does not have a case manager, the home shall advise the individual or his or her legal representative of behavioral health service options within the community. The resident shall have thirty (30) days to obtain necessary services. If the resident or his or her legal representative fails to meet the resident's needs in this area in a timely manner then the personal care home shall refer the individual to a licensed behavioral health agency.

6.5.3. The home shall make provisions for transfer of the resident to another health care facility when the resident's physical or mental condition has changed such that the personal care home can no longer meet the resident's needs as required and defined

by this rule.

7.1.8. The personal care home shall allow a resident to refuse any treatment. The home may inform a resident, however, that failure to follow his or her service or treatment plan may result in behavioral or medical conditions which requires services which are not available in a personal care home.

8.4.4. Access to Treatment. Necessary treatments such as medical services, mental health services, dental services, physical therapy and other rehabilitation services shall be obtained. Transportation to necessary services shall either be provided by the facility, arranged through the service provided, or by an interested third party.

## APPENDIX B

## FACILITIES AND STAFFING

1. Residential Board and Care Homes

Standards governing protection of residents' civil rights by providing accessibility for handicapped residents as required by Section 1397.20(a)(1)(iv) and its incorporation of current federal law respecting accessibility for individuals with a physical disability.

5.3.6.b. A statement of nondiscrimination against residents on the basis of race, national origin, religion, age, sex or disability.

11.1.3. Existing and newly constructed buildings to be offered, maintained, and operated as a residential board and care home shall provide for accessibility for individuals with a physical disability. This shall include at least the entirety of the main floor including the living rooms, kitchen and dining areas, and at least a portion of bedroom and bathroom space. These provisions shall apply to new and existing facility as of January 1, 1996.

11.2.4. Residential board and care homes shall be located in residential areas or partially residential areas if in accordance with local zoning laws.

Standards governing minimum numbers and qualification of personnel as required by W.Va. Code § 16-5C-5(b)(2).

6.1. The administrator shall assure that all staff are:

6.1.1. Assigned duties in accordance with their level of education, preparation for their responsibilities, and experience;

6.1.2. of good character;

6.1.3. clean and well-groomed;

6.1.4. at least eighteen (18) years of age (unless certified as a Nurse Aide);

6.1.5. able and willing to accept supervision and training;

6.1.6. licensed in accordance with any applicable State law; and

6.1.7. Not known to him or her as indicated by reference checks as an employee who has abused or neglected dependent persons.

6.1.8. Screened for tuberculosis and other communicable diseases if indicated by exposure, prevalence or currently accepted medical practice in congregate living situations as indicated by the director of the division of health of the department of health and human resources.

6.1.9. Caring for residents with needs that are within the scope of their practice and training.

6.2. Staffing Requirements.

6.2.1. Each residential board and care home shall maintain a minimum of 1 residential care staff between the hours of 6:00 a.m. and 11:00 p.m. who shall be designated as supervisor-in-charge when the administrator is not present.

6.2.2. Awake staff shall be present in the residential board and care home during normal resident sleeping hours unless the resident is certified by a licensed health care professional as not being in need of sleep time supervision.

6.2.3. A multi-story home shall maintain at least one (1) awake staff while residents are sleeping or if the residents in population require limited or intermittent nursing care. An exception to this provision, allowing for the presence of one (1) awake staff, shall be made only if the multi-story home residents are certified by a licensed health care professional as not being in need of sleep time supervision and the residential board and care home has an immediate emergency call system to awake the staff.

6.2.5. The Director shall establish for each facility the minimum number of resident care staff for each shift.

6.2.6. The secretary shall establish for each residential board and care home the daily minimum number of residential care staff hours based on an average numerical assessment of the residents' personal assistance needs as identified by the resident assessment

instrument provided by the secretary.

6.2.7. Each resident shall be rated utilizing the assessment tool provided by the secretary to determine personal assistance needs. Staffing shall be provided based upon the Table 64-65.2 found at the end of this rule.

6.2.8. Each residential board and care home shall maintain and furnish to the Secretary upon request information from personnel records setting forth the number (in full-time equivalents) and types of employees on duty in the home at any given time.

6.2.9. The residential board and care home shall provide for qualified relief personnel to substitute for staff during vacation, illness or other absences from the home.

6.3. Employee Orientation.  
(Class III)

6.3.1. The residential board and care home shall implement a written plan for orientation and in-service training. All employees and household members shall be made aware of:

6.3.1.a. The purpose of the facility;

6.3.1.b. The services provided;

6.3.1.c. The daily routines;

6.3.1.d. Required compliance with the rule for residential board and care home as it relates to their duties and responsibilities.

6.3.2. Orientation and training for employees with resident care responsibilities shall be provided within the first 15 days of employment and shall include:

6.3.2.a. Personal grooming care;

6.3.2.b. Personal hygiene care;

6.3.2.c. Feeding assistance;

6.3.2.d. Providing assistance in other activities of daily living;

6.3.2.f. CPR (as applicable) and First Aid;

6.3.2.g. abuse, neglect, mistreatment and procedures to address the occurrence of such;

6.3.2.h. the rights and responsibilities of residents;

6.3.2.l. Emergency plans for the home, including fire safety and evacuation plans; Provided, this training is provided to new employees and new admissions within the first twenty-four (24) hours of association with the home;

6.3.2.m. The care of aged, infirm or disabled adults with consideration for individual capabilities and needs.

6.3.2.n. specific duties and their responsibilities toward residents;

6.3.2.p. confidential treatment of personal information;

6.3.2.r. Documentation requirements;

6.3.2.s. Communication skills and communication procedures;

6.3.2.t. Transportation procedures;

6.3.2.u. Signs and symptoms of alteration in skin integrity.

6.3.2.v. Infection control.

6.3.4. The residential board and care home shall provided ongoing inservice training to residential staff. The training shall be relevant to the provision of services to individuals residing in the residential board and care home and shall be provided through inservice training programs or institutes, workshops, classes, or conferences. Training shall be provided annually in the following areas:

6.3.4.a. resident rights;

6.3.4.b. abuse, neglect, mistreatment, and procedures to address the occurrence of such incidents;

6.3.4.c. emergency care of residents (first aid and CPR);

6.3.4.d. emergency plans for the home, including fire safety and evacuation plans; and

6.3.4.e. the responsibilities of the direct care staff toward assisting residents (i.e., individualized service plans).

6.6.1.e. The facility shall maintain a record of staff orientation and ongoing training.

Adequate minimum qualifications for administrators by training and experience as required by W.Va. Code § 16-5C-6(b)(2).

5.2.1. A residential board and care home shall have an administrator who is at least twenty-one (21) years of age and be qualified by training to be responsible for the day-to-day operations of a residential board and care home.

5.2.2. The administrator shall have completed high school or shall have a general education development (GED) certificate. Except that individuals who are administrators of currently licensed residential board and care homes may complete this requirement within twenty-four (24) months following the effective date of this amended rule.

5.2.3. The administrator of a residential board and care home shall have a personal history which is free of: evidence of abuse, fraud, or substantial and repeated violations of applicable laws and rules in the operation of any health or social care facility or service organization, or in the care of dependent persons; and convictions within the previous five (5) years of a crime relevant for the provision of care to a dependent population.

5.2.4. The administrator shall on an annual basis participate in at least ten (10) hours of formal training related to the administration and operation of a residential board and care home. Said training shall include all training offered by the Department. Records of attendance shall be maintained on file at the residential board and care home.

5.2.5. The administrator shall be responsible and accountable for the development and execution of all policies and procedures required by this rule.

5.2.7. The licensee shall notify the secretary in writing within ten (10) days of any permanent change in the administrator, consultant registered professional nurse or supervising nurse (if required) of a residential board and care home. An emergency administrator or supervising nurse who shall be capable of protecting the physical and mental well-being of residents may be employed only upon prior verbal approval from the secretary which the secretary shall confirm in writing. A licensee shall not operate a home more than sixty (60) days without a qualified administrator or supervising nurse acting in these capacities, unless the secretary grants an extension, based on a determination that a reasonable attempt has been made to find a suitable replacement.

## 6.2. Staffing Requirements.

6.2.1. Each residential board and care home shall maintain a minimum of one (1) residential care staff between the hours of 6:00 a.m. and 11:00 p.m. who shall be designated as the supervisor-in-charge when the administrator is not present. A resident shall not be designated as the supervisor-in-charge.

6.2.2. Awake staff shall be present in the residential board and care home during normal resident sleeping hours unless all residents are certified by a licensed health care professional as not being in need of sleep time supervision.

6.2.4. An administrator or supervisor-in-charge shall be on duty at all times. When regular staff and supervisory staff are absent due to illness and vacations, there shall be coverage by substitute personnel with comparable qualifications.

11.2.4. Residential board and care homes shall be located in residential areas or partially residential areas if in accordance with local zoning laws.

11.5.1. Bedrooms shall provide no less than eighty (80) square feet of space for single occupancy rooms and no less than sixty (60) square feet for each resident of a multiple occupancy room. This shall not include closet or bathroom space.

11.5.4. Each bedroom shall have at least one (1) light controlled by a switch at the door to the room.

11.5.12. Each resident of each bedroom shall be provided with the following bedroom setting-type (not hospital) furniture:

11.5.12.a. A bedside table, chest or its equivalent accessible to the bed, with drawers for the storage of personal items;

11.5.12.b. A bed lamp or bedside light suitable for reading and accessible to the bed;

11.5.12.c. A comfortable chair of sturdy construction suitable for resident use;

11.5.12.d. An adequate personalized dresser for storage of clothing, etc;

11.5.12.e. A closet which may be shared by no more than one other person.

## 2. Personal Care Homes

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Standards governing protection of residents' civil rights by providing accessibility for handicapped residents as required by 45 CFR 1397.20(a)(1)(iv) and its incorporation of federal law respecting accessibility for individuals with a physical disability.

11.1.1. The provisions of Section 11 shall apply to physical facilities, operations, maintenance and equipment for all personal care homes or additions. Requirements of Section 11 that require extensive renovation shall be in place by January 1, 1997.

11.1.6. Except as provided in Section 11.1. of this rule, the following documents are adopted as standards for on-site inspections:

11.1.6.a. The American Disability Act (ADA) and the American National Standards Institutes (ANSI) codes shall be followed as applicable to free-standing personal care homes;

11.1.6.b. The State building code promulgated in W.Va. Administrative Rules, Fire Commission, Building code 87 4. FOOTNOTE: Available from the State Fire Commission or the Secretary of State. Section 4 of the above referenced Building Code rule incorporates by reference the BOCA National Building code; BOCA National Plumbing code; BOCA national Mechanical Code; BOCA National Existing Structures Code; BOCA National Energy Conservation and CABO one and two family dwelling code. You may purchase these books, collectively or separately, from Building Officials and Code Administrators International, 4051 West Flossmoor Rd., Contra Club Hills, Illinois 60477-5795, 1-614-890-1064 or view a set at the Secretary of State's Office.

11.1.6.c. Where local codes or regulations permit standards lower than those required by this rule, local building codes and zoning restrictions shall be observed; and

11.1.6.d. Evidence of compliance signed by local fire, building and zoning officials shall be available on site for review.

11.2.1. Sites for all new homes and sites of additions to existing homes shall be inspected by the secretary prior to the architect beginning work on final drawings and specifications.

11.2.2. The home shall be located so as to be conveniently accessible to physicians, medical facilities, emergency vehicles, visitors, staff, and necessary services.

11.2.2. Homes shall be located in a residential setting as convenient as possible for necessary services and access.

11.2.5. The location to be such that the facility's hard surface access road can be directly attached to a hard surface highway which would provide access to hospitals and allow medical and fire personnel access to the home.

11.2.8. Parking areas must be constructed using clean, solid earth bed, a compacted stone based and a hard surface all weather finish coat with a slope which permits good drainage. Parking spaces for all staff, one parking space for each five (5) beds (minimum) and a minimum of two

(2) handicapped parking space located at the main entrance. This parking area is to be maintained so as to be free of broken, gaped or uneven paving.

11.2.9. Hard surface concrete walks, minimum 48 inches wide with light broom top surface texture are to be provided at all exits, and connect into the main walk or parking area.

11.3.1. Existing and newly constructed buildings to be offered, maintained, and operated as a personal care home shall provide for accessibility in their entirety to individuals with a physical disability. The American Disability Act (ADA) and the American National Standards Institute (ANSI) Codes shall be followed as applicable to free-standing personal care homes.

11.3.13. Ramps shall not be less than forty-eight (48) inches wide nor steeper than one (1) foot of rise in twelve foot of run, and shall be finished with a non-slip surface.

11.3.14. Handrails shall be the proper height and be provided on all inside and outside stairs, ramps, and elevators. Low windows, open porches, change in floor level and similar accident hazards shall be protected so that the danger of accident is minimized. Danger areas on the property outside the building shall be safeguarded. Handrails will be installed between 32-34 inches high and support a concentrated load of 250 pounds.

11.3.18. Corridors, stairways and elevators shall be width and design that will easily accommodate the removal of residents by stretcher, and shall be constructed and maintained and in compliance with all fire and safety regulations and requirements. Non-slip surfaces shall be required for stairways. Elevators shall comply with all appropriate State and Federal laws.

11.4.1. Existing homes shall contain single occupancy bedrooms with at least eighty (80) square feet of floor area and multiple occupancy bedrooms shall contain at least sixty (60) square feet of floor area per resident, exclusive of closet space. All bedrooms shall have at least eighty (80) square feet of space per occupant exclusive of closet space and bathroom by July 1, 1997.

11.4.3. Within twenty-four (24) months following passage of this rule, no bedroom shall be occupied by more than four (4) persons in existing homes. Homes newly constructed or renovated shall have no more than two (2) persons per room.

11.4.6. Each resident bedroom shall have a direct access to a corridor without passing through a bathroom or another resident's bedroom.

11.4.7. Beds shall be placed only in bedrooms and shall not be placed in corridors, living rooms, kitchens, dining rooms, a basement, attic, or any other area not commonly used as a bedroom or in any area.

accessible only by ladder of folding stairs or through a trap door.

11.4.11. Each bedroom shall have at least one (1) light controlled by a switch at the door to the room.

11.4.13. Each resident of each bedroom shall be provided with at least the following bedroom-type (not hospital) furniture:

11.4.13.a. A bedside table, chest or its equivalent located by the head of the bed, and bed lamp.

11.4.13.b. Closet, locker, or wardrobe space with a minimum dimension of twenty (20) by twenty-two (22) by seventy-two (72) inches excluding shelf and storage space. In addition, a chest of drawers to meet resident's needs for the storage of clothing and personal items shall be provided for each resident.

Standard governing minimum numbers and qualifications of personnel as required by W.Va. Code § 16-5C-5(b)(2).

5.3.1.i. Screened for tuberculosis prior to employment by the personal care home.

5.7.1.g. A health record containing the results of pre-employment and annual physical examinations, including screening for tuberculosis and other contagious diseases as indicated by exposure, prevalence or currently accepted medical practice in congregate living situations as indicated by the director of health of the State department of health and human resources.

5.4.2. Orientation and training for employees with resident care responsibilities shall be provided within the first 15 days of employment and shall include:

5.4.2.a. procedures to be followed in the event of a missing resident, accidents, fire, natural disaster or other emergencies;

5.4.2.b. CPR and First Aid;

5.4.2.c. abuse, neglect, mistreatment and procedures to address the occurrence of such;

5.4.2.d. the rights and responsibilities of residents;

5.4.2.e. confidential treatment of personal information;

5.4.2.f. specific duties and their responsibilities toward residents;

5.7.1.g. All staff shall submit documentation annually that confirms the absence of tuberculosis. This documentation shall be valid for one year from the date written.

5.4.2.g. personal assistance procedures with return demonstration of staff proficiency;

5.4.2.h. documentation requirements;

5.4.2.i. communication skills and communication procedures;

5.4.2.j. transportation procedures;

5.4.2.k. infection control.

5.9.3. The minimum residential care staff requirements established by Sections 5.9.7. and 5.9.8. of this rule do not include staffing requirements for licensed nurses to meet the needs of residents who require limited or intermittent nursing services.

5.9.4. Each personal care home shall maintain a minimum of 1 residential care staff between the hours of 6:00 a.m. and 11:00 p.m. who shall be designated as supervisor-in-charge when the administrator is not present. A resident shall not be designated as the supervisor-in-charge.

5.9.5. Awake staff shall be present in the personal care home during normal resident sleeping hours unless the residents are certified by a licensed health care professional as not being in

need of sleep time supervision.

5.9.6. A multi-story home shall maintain at least one (1) awake staff during resident sleeping hours and shall maintain one (1) awake staff per story if the personal care home has a bed capacity of eleven (11) or more beds or if the residents in population require limited or intermittent nursing care. An exception to this provision, allowing for the presence of one (1) awake staff, shall be made only if the multi-story home residents are certified by a licensed health care professional as not being in need of sleep time supervision and the personal care home has an immediate emergency call system to awake the staff.

5.9.7. The secretary shall establish for each personal care home the daily minimum number of residential care staff hours based on an average numerical assessment of the residents; personal assistance needs as identified by the resident assessment instrument provided by the secretary.

5.9.8. Each resident shall be rated utilizing the resident assessment instrument provided by the secretary to determine his or her personal assistance needs. Staffing shall be provided based upon the table found at the end of this rule, except that multi-story personal care homes shall have one (1) staff per story at all times unless the facility meets the provisions established in Section 5.9.6. of this rule.

5.9.9. The number of resident care employees who are responsible and capable of providing personal care services and who work according to a specific established schedule shall be sufficient to provide those services to all residents as identified in their individualized service plans.

5.9.10. Each personal care home shall maintain and furnish to the secretary upon request information from personnel records setting forth the number (in full-time equivalents) and types of employees on duty in the home at any given time.

5.9.12. Other residential support staff shall be retained as necessary to meet the laundry, food service, housekeeping and maintenance requirements of these rules.

Standards governing adequate minimum qualifications for administrators by training and experience as required by W.Va. Code § 16-5C-6(b)(2).

5.2.1. The administrator of a personal care home shall:

5.2.1.a. Be at least twenty-one (21) years of age;

5.2.1.b. Obtain ten (10) continuing education units (hours) per year;

5.2.1.c. Know the requirements of this rule;

5.2.1.d. Be able to conform to applicable statutes, rules and regulations;

5.2.1.e. Be able to keep or supervise the keeping of financial and other records;

5.2.1.f. Complete all annual training courses offered by the secretary;

5.2.1.g. Effective the first day of June, nineteen hundred ninety five (June 1, 1995), have an associates degree, or its equivalent in a related field: Provided, that this requirement does not apply to individuals who are personal care home administrators or who have been personal care home administrators prior to the first day of June, nineteen hundred ninety-five (June 1, 1995; and

5.2.1.h. Have a history which is free of evidence of abuse, fraud, or substantial and repeated violations of applicable laws and rules in the operation of any health or social care facility or service organization, or in the care of dependent persons; and of convictions within the previous five (5) years of a crime substantially related to dependent populations.

5.2.2. The administrator shall be responsible and accountable for the development and execution of all policies and procedures required by this rule.

## APPENDIX C

## ENFORCEMENT

1. Residential Board and Care Homes

Specify time periods, after a deficient facility fails to correct violations for: Informing residents and/or families and guardians of residents of standards which the facility does not meet, and the time period during which residents may relocate, if they wish, before the deficient facility is reported to the Social Security Administration and providing residents with a list of approved facilities and agencies which will help them move.

Establish procedures for enforcing standards which require the reporting of deficient facilities to the Social Security Administration as required by Section 1397.20.20(c).

4.7.8. If, within one hundred twenty (120) days of an inspection or complaint investigation, a facility has failed to comply with the requirements of this rule, the Director shall inform all residents of the facility of these regulations, and (b) the time period during which residents may relocate if they wish prior to the deficient facility being reported to the Social Security Administration.

4.7.8.a. The Secretary shall provide all residents with a list of approved facilities and agencies to assist them to move if they wish. The purpose is to let the residents know that the regulations are not being followed, and to give them assistance to move.

4.7.9. Within two hundred ten (210) days of an inspection or complaint investigation after which deficiencies are not timely corrected, the Director shall cause the name and address of the deficient facility to be transmitted to the appropriate Regional Office of the Social Security Administration as a deficient facility.

Establish procedures for enforcing standards which make available to the public the list of facilities found in violation of a standard as required by Section 1397(d)(2)(iv), in a timely manner.

4.2.2. The applicant shall submit the application on forms provided by the Secretary and the application shall be accompanied by a licensed fee in the form of a check or money order payable to the West Virginia Office of Health Facility Licensure and Certification. The provider of the home shall provide to the Secretary a balance sheet showing all expenses and all income on forms provided by the Secretary, including but not limited to, reimbursement of the operators, owners, lease payment, number of residents, number of SSI recipients, monthly rates charged and resident census form.

4.9.1. The secretary shall make available for public inspection and shall, upon request, provide copies of the following at a reasonable cost:

4.9.1.a. Information concerning and actual applications and exhibits;

4.9.1.b. Inspection reports;

4.9.1.c. Reports of investigations conducted in response to complaints;

4.9.1.d. A current list of the names and addresses of residential board and care homes found to be in violation of this rule, including the detail of each violations; and

4.9.1.e. Any other reports filed with or issued by the secretary pertaining to the compliance of a residential board and care home with applicable laws and rules.

Informing parties injured by a facility's violation of required standards of the possibility of seeking civil remedies as required by W.Va. Code § 16-5C-8.

Bonding requirements for facilities handling residents' monies in excess of twenty-five (\$25) dollars per resident and five hundred (\$500) dollars for all residents in any month as required by W.Va. Code § 16-5C-7(b).

4.7.7. If, after an investigation, the secretary determines that the complaint has merit, he or she shall advise any injured party of the possibility of a civil remedy under W.Va. Code § 16-5C-8. In addition, residents, residents' families or representatives or ombudsmen may also pursue independently in court remedies for violations of these rules.

7.5.4. The residential board and care home shall, if it handles resident monies in excess of twenty-five dollars (\$25.00) per resident and in excess of five hundred dollars (\$500.00) for all patients in any month, give a bond in an amount and with such surety as the secretary shall approve sufficient to cover all resident accounts at all times. the licensee shall file a bond in the sum to be fixed by the secretary based upon the magnitude of the operations of the applicant but which sum may not be less than two-thousand five-hundred dollars (\$2,500.00) as shown in Table 64-65.3 found at the end of this rule. Whenever the amount of any bond which is filed pursuant to this subsection is insufficient to adequately

protect the money of patients being handled, or whenever the amount of such bond is impaired, the licensee shall file an additional bond in such amount as necessary to adequately protect the money of patients being handled.

7.5.4.a. The system shall not commingle resident funds with the home's funds or with the funds of any person other than another resident.

7.5.4.b. The resident account record shall show in detail with supporting documentation all monies received on behalf of the resident and the disposition of all funds received. Persons shopping for residents shall provide a list showing a description and price of items purchased, along with payment receipts for these items.

7.5.4.c. The home shall render a true and complete accounting upon request to the depositor and the secretary and at least quarterly to the resident and his or her legal representative.

7.5.4.d. Upon termination of the deposit, the home shall account to the depositor for all funds received, expended and held on hand.

13.1. The secretary shall administer penalties for violations of this rule and of W.Va. Code §§ 16-5C-1 et seq. and 16-5H-1 et seq. as specified in W.Va. Code §§ 16-5C-1 et seq., 16-5H-1 et seq., and this rule.

13.2. In addition to all other actions and penalties specified in law or this rule, the secretary shall have the authority to ban new admissions by order until further notice by the secretary or reduce the bed capacity of the home or both, when on the basis of inspection he or she makes the following findings:

13.2.1. That the licensee has not provided adequate care as indicated by any of the following conditions:

13.2.1.a. An F rating in one (1) or more of Sections five (\$64-65-5) through twelve (\$64-65-12), as applicable, of this rule;

13.2.1.b. An immediate and serious threat;

13.2.1.c. Poor care outcomes resulting in an avoidable decline in a resident's condition; or

13.2.1.d. A decline in a resident's functional abilities resulting from neglect or abuse; and

13.2.2. That an admission ban or reduction in bed capacity or both would place the home in a position to render adequate care.

13.3. The secretary shall notify a licensee of an admissions ban or reduction in bed capacity or both, stating the terms of the order, the reasons thereof and the date set for compliance.

13.4. In addition to all other actions and penalties specified by law and this rule, the secretary has the authority to revoke a license which has been obtained through the use of fraud or subterfuge.

#### Other Enforcement Procedures

12.1.1. Upon completion of a report of inspection, the Secretary shall determine what, if any, civil penalties are to be imposed pursuant to the W.Va. Code and this rule, and issue citations. Supplemental penalties shall be assessed for a facility's failure to correct continuing violations, Provided: that where supplemental penalties have been assessed for continued failure to correct a deficiency of a non-life threatening nature, the Secretary shall, prior to issuing a written citation, notify the licensee or non-licensed operator by registered or certified mail, return receipt requested, that civil penalties will be imposed on a date to be specified by the Secretary unless the corrective actions specified by the Director are implemented in an acceptable manner.

13.5. All citations shall be in writing and shall include at least the following:

13.6. The penalty;

13.7. A description of the nature of the violation fully stating the manner in which the licensee or non-licensed operator violated a specific statutory provision or provision of the rule;

13.8. The basis upon which the Secretary assessed the penalty and selected the amount of civil penalty.

13.9. The name of any resident jeopardized by the violation shall not be specified in the citation.

13.10. For each violation of a Class I standard, a civil penalty shall be assessed of not less than one hundred (\$100) dollars or more than ten thousand (\$10,000) dollars. For each violation of a Class II standard, a civil penalty shall be assessed of not less than fifty (\$50.00) dollars and not more than one thousand (\$1000) dollars. For each violation of a Class III standard, a civil penalty shall be assessed of not less than twenty-five (\$25) dollars and not more than two hundred fifty (\$250) dollars.

13.11. Each day a violation continues after the date by which correction as required by an approved plan of correction, or if an approved plan of correction was not submitted, the dated on which such plan was due shall constitute a separate violation.

13.12. In both determining to assess a civil penalty and in fixing the amount of the civil penalty to be imposed for violations, the Director shall consider:

13.13. The gravity of the violation, which shall include:

13.14. The degree of substantial probability that death or serious physical harm will result and, if applicable, did result from the violation;

13.15. The severity of serious physical harm most likely to result, and if applicable, that did result from the violation;

13.16. The extent to which the provisions of the applicable statutes or regulations were violated.

13.17. If a licensee or a non-licensed operator does not plan to contest a citation which imposes a penalty, he or she shall submit to the Secretary, within ten (10) business days after the issuance of the citation, the total sum of the penalty assessed.

13.18. If a licensee or a non-licensed operator desires to contest a citation which imposes a penalty or the date specified for correction of a violation, he or she shall, within four (4) business days after service of the citation or specification of time in which a violation is to be corrected, serve upon the Secretary, either personally or by registered or certified mail, the licensee's or non-licensed operator's written notice pursuant to Rules of Procedures for Contested Case Hearings and Declaratory Rulings, West Virginia Board of Health Procedural Rules, 64 CSR 1, 1971.

13.19. The assessments for penalties and for costs of legal action taken under W.Va. Code § 16-5C shall have

interest assessed to two (2%) percent on the last day of each month in which occurs the thirtieth (30th) day after receipt of notice of such assessment or after the month in which occurs the thirtieth day after receipt of the Secretary's final order following a hearing, whichever is later. All such assessments against a facility that are unpaid shall be added to the facility's licensure fee and may be filed as a lien against the property of the licensee or operator of the facility. Funds received W.Va. Code § 16-5C-12 within thirty (30) days of receipt of notice of such assessment, or which has been affirmed under the provisions of that section and not appealed within thirty (30) days of receipt of the Director's final order, or which has been affirmed on judicial review, as provided in W.Va. Code § 16-5C-13. All money collected by assessments of civil penalties or interests shall be paid into a special resident benefit account and shall be applied by the Director only for the protection of the health or property of residents of facilities operated within the State of West Virginia, including payment for the cost of relocation of patients to other facilities, operation of a home pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost.

## 2. Personal Care Homes

Standards governing procedures for periodic inspection of facilities as required by Section 1397.20(b)(1)(i).

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4.6.1. The secretary shall make inspections needed to implement W.Va. Code § 16-5C-1 et seq. and this rule.

4.6.5. The secretary shall conduct periodic unannounced inspections to determine the home's continued compliance with applicable statutes and regulations.

4.6.5.a. The inspection shall be conducted by one or more individuals who are competent to investigate health needs, life safety issues, and behavioral health needs. The team members shall inspect and review all regulatory requirements, except where proceeding under Section 4.5.4. of this rule. The team shall make a detailed inquiry of a number of residents in the personal care home through resident interviews and resident record reviews.

4.6.5.b. The team shall make a detailed inquiry into the number of residents in the facility and the appropriateness of their placement in the home through resident interviews and resident record reviews.

4.6.6. The secretary shall prepare a written report of inspections made pursuant to this rule within fifteen (15) days and shall mail a copy to the licensee or administrator as applicable, and the State ombudsmen specifically listing any violation of this rule.

4.6.7. The administrator of the personal care home shall post a copy of the secretary's

report in a place where residents have access to the report. The report shall remain posted until the next inspection.

Standards governing the time period within a deficient facility must correct violations of standards, and after a deficient facility fails to correct violations, for informing residents and/or families and guardians of residents of standards which the facility does not meet, and the time period during which residents may, if they wish, before the deficient facility is reported to the Social Security Administration and provide residents with a list of approved facilities and agencies which will help them move as required by Section 1397.20(b)(2)(ii).

Establish procedures for enforcing standards which make available to the public the list of facilities found in violation of a standard, as required by Section 1397.20(d)(2)(iv), in a timely manner.

4.9.2. If, within one hundred twenty (120) days of an inspection or complaint investigation, a facility fails to comply with the requirements of this rule, the Secretary shall inform in writing all residents of the facility of the violations which the facility has made, and of the time period during which residents may be relocated if they wish prior to the deficient facility being reported to the Social Security Administration.

4.9.1. The secretary shall make available for public inspection and shall, upon request, provide copies of the following at a reasonable cost:

4.9.1.a. Information concerning and actual applications and exhibits;

4.9.1.b. Inspection reports;

4.9.1.c. Reports of investigations conducted in response to complaints;

4.9.1.d. A current list of the names and addresses of personal care homes found to be in violation of this rule, including the details of each violation; and

Establish procedures for enforcing standards which require the reporting of deficient facilities to the Social Security Administration as required by Section 1397.20(c).

4.9.1.e. Any other reports filed with or issued by the secretary pertaining to the compliance of a personal care home with applicable laws and rules.

4.9.3. If a personal care home which is found to have violated one (1) or more requirements of this rule during a routine inspection or a complaint or other investigation fails to correct the violations within two hundred ten (210) days of the completion of the inspection or investigation, the secretary shall report the personal care home's lack of compliance with this rules to the Social Security Administration. The secretary shall also provide all residents with a list of approved facilities and agencies to assist them to move.FOOTNOTE: Under the provisions of 42 U.S.C. 1616(e) and 45 CFR, Part 1397--Standard Setting Requirements for Medical and Nonmedical Facilities Where SSI Recipients Reside, all states are required to "establish, maintain, and ensure the enforcement of standards for any category (emphasis added) of institutions, foster homes, or group living arrangements, in which, as determined by the State, a significant number of recipients of Supplemental Social Security Income (SSI) benefits resides or is likely to reside. SSI residents who live in relevant facilities which violate any of the standards will be subject to a reduction in their SSI payments... in an amount equal to any State supplementary benefit or other payment made

by the State for any medical or remedial care provided them by the facility. As part of its responsibilities under the federal regulations, States are required to make certain reports to the residents of deficient facilities and to the appropriate regional office of the United States Social Security Administration.

FOOTNOTE: See also footnote above. The purpose of the notification is to inform residents that they do not have the protection of the violated requirement; the list is intended to provide assistance to the residents in moving if the lack of compliance by the personal care home endangers them or causes a reduction in their SSI benefits.

4.2.2. The applicant shall submit the application to the secretary on forms provided by the secretary accompanied by a check or money order payable to the office of health facilities licensure and certification in an amount established in accordance with W.Va. Code § 16-5C-6. The provider of the home shall provide to the secretary a balance sheet showing all expenses and all income on forms provided by the secretary, including but not limited, reimbursement of the operators, owner, lease payment, number of residents, number of SSI recipients, number of SSD recipients, monthly rates charged and resident census form.

Standards governing informing parties injured by a facility's violation of required standards of the possibility of seeking civil remedies as required by W.Va. Code § 16-5C-8.

Standards governing bonding requirements for facilities handling residents' monies in excess of twenty-five dollars per resident and five hundred dollars for all residents in any month as required by W.Va. Code § 16-5C-7(b).

4.7.5. If a complaint is substantiated, the secretary shall advise any injured party of the possibility of civil remedy as required by W.Va. Code § 16-5C-8. In addition, residents, their families or representatives, or ombudsman may also pursue independently in court remedies for violations of these rules.

7.7.2. The licensee shall maintain liability or insurance policy in an amount that will cover all injuries to any residents up to two hundred thousand (\$200,00) dollars per resident.

7.7.3. If the licensee agrees to manage a resident's funds there shall be a system utilizing generally acceptable accounting principals to manage the funds in the resident's best interest.

7.7.4. The personal care home shall, if it handles resident monies in excess of twenty-five (\$25) dollars per resident and in excess of five hundred (\$500) dollars for all patients in any month, give a bond in an amount and with such surety as the Secretary shall approve, sufficient to cover all resident accounts at all times. The licensee shall file a bond in the sum to be fixed by the Secretary based upon the magnitude of the operations of the applicant but which sum may not be less than two thousand five hundred (\$2,500) dollars. Whenever the amount of any bond which is filed pursuant to this subsection is insufficient to adequately protect the money of patients which is being

handled, or whenever the amount of such bond is impaired, the operator shall file an additional bond in such amount as necessary to adequately protect the money of patients being handled.

7.7.4.b. The resident account record shall show in detail with supporting documentation all monies received on behalf of the resident and the disposition of all funds received. Persons shopping for resident shall provide a list showing a description and price of items purchased, if the purchase exceeds one-dollar (\$1.00) along with payment of receipts for these items.

7.7.4.c. The home shall render a true and complete accounting upon request to the depositor and the secretary and at least quarterly to the resident and his or her legal representative. Information shall be given to the resident upon request.

7.7.4.e. Residents personal funds exceeding two-hundred dollars (\$200) shall be deposited in an interest bearing account at a local bank.

8.5.2. If the personal care home manages funds for residents, it shall be by written request, in the manner directed by the depositor and in accordance with Section 7.7 of this rule.

Standards governing written disclosure of costs which may be incurred as required by W.Va. Code § 6-5C-7(a).

6.2.1. There shall be a written agreement with each resident who is admitted and it shall comply with this rule. Contained in the agreement shall be a detailed explanation of all costs, annual contract price, and refunds, how personal finances will be managed, how health care will be provided and/or arranged for, the process of lodging complaints, the agreement to provide a copy of all reports of inspections in response to complaints, and the details of all access to activities.

6.2.2. Provided separately at the time of agreement shall be:

6.2.2.a. The house rules governing resident responsibilities including the home's policies on smoking alcohol consumption, visitation, recreational activities (including television), personal laundry and use and storage of personal belongings such as furnishings and clothing), consistent with this rule, shall be disclosed in writing to the prospective resident in advance of the agreement but not made a part thereof.

6.2.2.b. A resident's bill of rights consistent with the provisions of this rule shall be attached and incorporated by reference;

6.2.2.c. How residents, their sponsors, and the public can lodge complaints and raise concerns within the home;

6.2.2.d. How the home will address and prepare for emergency situations that affect the well-being of the residents which may include but is not limited to the following: fire evacuation, natural disasters, severely inclement weather, industrial accidents, major incidents, missing residents and immediate or serious threats;

6.2.2.e. How to gain access to rules and regulations for personal care homes, copies of current government inspection reports and written plans of correction.

6.2.2.f. How the home will assist the resident in making appointments for appropriate medical, dental, nursing or mental health services as needed by the resident; and

6.2.2.g. How the home will arrange access for transportation to and from services.

Standards governing classification of standards and assignment of a numerical value for evaluating levels of compliance as required by W.Va. Code § 16-5C-5(c) and (d).

#### 4.11. Classification of Standards

4.11.1. Class I standards are those the violation of which would present either an imminent danger to the health, safety or welfare of any resident or substantial probability that death or serious physical harm would result.

4.11.2. Class II standards are those the violation of which would have a direct or immediate relationship to the health, safety or welfare of any resident but which would not create imminent danger.

4.11.3. Class III standards are those the violation of which would have an indirect or potential impact on the health, safety or welfare of any resident.

#### 4.12. Point System Scoring

4.12.1. A Class I standard shall be scored as ten (10) points if a personal care home fully complies with the standard. If the home fails to comply fully with the Class I standard and the secretary determines that the lack of compliance presents either an imminent danger to any resident or substantial probability that death or serious harm to any resident would result, the score assigned to the Class I standard shall be zero (0). If the home fails to demonstrate full or substantial compliance

with the standard, but complies partially, the standard shall be scored as five (5) points. If the home fails to comply at least partially with a Class I standard, or if the violation is a repeat of a violation cited during the previous licensure inspection, the standard shall be scored as zero (0).

4.12.2. A Class II standard shall be scored as nine (9) points if the personal care home fully complies with the standard. If the home fails to comply fully with the Class II standard and the secretary determines that serious harm to the health, safety, or welfare of any resident would result, the score assigned to the Class II standard shall be zero (0). If the home fails to comply fully or substantially with the standard, but complies partially, the standard shall be scored as four (4) points. If the home fails to comply at least partially with the standard or if the violation is a repeat of a violation cited during the previous licensure inspection, the standard shall be scored as zero (0).

4.12.3. A Class III standard shall be scored as eight (8) points if the personal care home complies fully with the standard. If the home fails to comply fully with the standard, but complies substantially the standard shall be scored as five (5) points. If the home fails to comply fully or substantially with the standard, but complies partially, the standard shall be scored as four (4) points. If the home fails to comply at

least partially, or if the violation is a repeat of a violation cited during the previous licensure inspection, the standard shall be scored as zero (0).

4.12.4. The Secretary shall determine substantial, partial, or lack of compliance with a standard based on the severity or scope, or both, of the noncompliance rather than the quantity of components out of compliance under a specific standard.

4.12.5. If a standard is not applicable for a particular personal care home, a full compliance value shall be assigned for that item for scoring and rating purposes.

Standards governing a rating system as required by W.Va. Code § 16-5C-5(e).

#### 4.13. Rating

4.13.1. The Secretary shall assign a rating to each personal care home based on the result of the licensure inspection.

4.13.2. The rating shall be assigned and included on the license issued to the personal care home based on the results of the licensure inspection.

4.13.3. Scores and ratings for individual categories are shown in Table 64-14.1 found at the end of this rule.

4.13.4. Points scored in any individual category are not to be permitted to offset deficiencies within another category. Therefore, a total of value points is not computed.

4.13.5. For purposes of assigning an overall rating:

4.13.5.a. A category rating of "A" is assigned a score of four (4);

4.13.5.b. A category rating of "B" is assigned a score of three (3);

4.13.5.c. A category rating of "C" is assigned a score to two (2); and

4.13.5.d. A category rating of "F" is assigned a score of zero (0). The category rating scores are then totaled and an average category rating score is computed.

4.13.6. The secretary assigns an overall rating to a personal care home as follows:

4.13.6.a. if a home is given a rating of "F" on as many as one category or has an average category rating score of less than 2.0, an overall rating of "F" shall be assigned:

4.13.6.b. for an average score of 2.0 through 2.59, an overall rating of "C" shall be assigned;

4.13.6.c. for an average score of 2.6 through 3.59, an overall rating of "B" shall be assigned; and

4.13.6.d. for an average score of 3.6 through 4.0 an overall rating of "A" shall be assigned.

4.13.7. The secretary may issue a provisional license to a home with an overall rating of "F" as described in Section

4.5 of this rule and in W.Va. Code § 16-5C-15.

4.13.8. Any home which has been determined by the secretary to be not in compliance with any Class I standard shall not be assigned a rating and shall not be issued a provisional license as specified in 4.5.2. of this Rule.

4.13.9. A rating of no greater than a "B" shall be assigned to a home which has been denied a provisional license base don violation of a Class I standard and is subsequently reapply for an initial license as specified in 4.5.5 of this Rule.

Standards governing procedures for the assessment of civil penalties as required by W.Va. Code § 16-5C-10(d).

14.1.3. Among enforcement options, the Secretary may assess civil penalties, suspend, revoke, or deny renewal of the license of a personal care home for cause after notice as required by this rule and the provisions of W.Va. Code § 16-5C-1 et seq. Cause may include but is not limited to one or more of the following:

14.1.3.a. failure to provide adequate care for residents;

14.1.3.b. failure to submit a Plan of Correction;

14.1.3.c. failure to submit a plan of Correction which is approved by the Secretary;

14.1.3.d. failure to correct deficiencies within the time frame specified in an approved Plan of Correction;

14.1.3.e. failure to comply with this rule;

14.1.3.f. A violation of any provision of this rule which produces imminent danger to residents;

14.1.3.g. violation of the prohibitions of this rule against discharge of resident so or employees for reason of complaints regarding the home;

14.1.3.h. the use of subterfuge or other dishonest action in applying for an original renewal license; or

14.1.3.i. abuse of residents.

14.2.1. Upon completion of a report of inspection, the Secretary shall determine what, if any, civil penalties are to be imposed pursuant to W.Va. Code and this rule, and issue citations. Supplemental penalties shall be assessed for a facility's failure to correct continuing violations, provided: that where supplemental penalties have been assessed for continued failure to correct a deficiency of a non-life threatening nature, the Secretary shall, prior to issuing a written citation, notify the licensee or non-licensed operator by registered or certified mail, return receipt requested, that civil penalties will be imposed on a date to be specified by the Secretary unless the corrective actions specified by the Secretary are implemented in an acceptable manner.

14.2.2. All citations shall be in writing and shall include at least the following:

14.2.2.a. The penalty;

14.2.2.b. A description of the nature of the violation fully stating the manner in which the licensee or non-licensed operator violated a specific statutory provision or provision of the rule;

14.2.2.c. The basis upon which the Secretary assessed the penalty and selected the amount of civil penalty.

14.2.3. The name of any resident jeopardized by the violation shall not be specified in the citation.

14.2.4. For each violation of a Class I standard, civil penalty shall be assessed of not less than one hundred (\$100) dollars or more than ten thousand (\$10,000) dollars. For each violation of a Class II standard, a civil penalty shall be assessed of not less than fifty (\$50) dollars and not more than one thousand (\$1000) dollars. For each violation of a Class III standard, a civil penalty shall be assessed of not less than twenty-five (\$25) dollars and not more than two hundred fifty (\$250) dollars.

14.2.5. Each day a violation continues after the date by which correction as required by an approved plan of correction, or if an approved plan of correction was not submitted, the date on which such plan was due shall constitute a separate violation.

14.2.6. In both determining to assess a civil penalty and in fixing the amount of the civil penalty to be imposed for violations, the Secretary shall

consider:

14.2.6.a. the gravity of the violation, which shall include:

14.2.6.a.A. the degree of substantial probability that death or serious physical harm will result and, if applicable, did result from the violation;

14.2.6.a.B. the severity of serious physical harm most likely to result, and if applicable, that did result from the violation;

14.2.6.a.C. the extent to which the provisions of the applicable statutes or regulations were violated.

14.2.7. If a licensee does not plan to contest a citation which imposes a penalty, he or she shall submit to the secretary, within ten (10) business days after the issuance of the citation, the total sum of the penalty assessed.

14.2.8. If a licensee desires to contest a citation which imposes a penalty or the date specified for correction of a violation, he or she shall, within four (4) business days after service of the citation or specification of time in which a violation is to be corrected, serve upon the secretary, either personally or by registered or certified mail, the licensee's written notice pursuant to W.Va. Administrative Rules, Department of Health and Human Resources, Rules of Procedure for Contested Case Hearings and Declaratory Rulings, 64 CSR 1.

14.2.9. The assessments for penalties and for costs of legal action take under W.Va. Code § 16-5C shall have interest assessed at two (2%) percent on the last day of each month in which occurs the thirtieth (30th) day after receipt of notice of such assessment or after the month in which occurs the thirtieth day after receipt of the Secretary's final order following a hearing, whichever is later. all such assessments against a facility that are unpaid shall be added to the facility's licensure fee and may be filed as a lien against the property of the licensee or operator of the facility. Funds received W.Va. Code § 16-5C-10(i).

14.2.10. The Secretary shall, in a civil judicial proceeding, recover any unpaid assessment which has not been contested under W.Va. Code § 16-5C-12 within thirty (30) days of receipt of notice of such assessment, or which has been affirmed under the provisions of that section and not appealed within thirty (30) days of receipt of the Secretary's final order, or which has been affirmed on judicial review, as provided in W.Va. Code § 16-5C-13. All money collected by assessments of civil penalties or interests shall be paid into a special resident benefit account and shall be applied by the Secretary only for the protection of the health or property of residents of facilities operated within the State of West Virginia, including payment for the costs of relocation of patients to

other facilities, operation of a home pending correction of deficiencies or closure, and reimbursement of residents for personal funds lost.