

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

Form #2

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2009 JUN 25 PM 3:43
OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: Health and Human Resources
DHHR/Office of Health Facility Licensure & Certification TITLE NUMBER: 69

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §§9-6-2, 16-1-4, 16-5B-8, 15-5C-5

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Nurse Aide Abuse Registry

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON July 27, 2009 AT NOON ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Aimee Jackson, Paralegal
~~OHPLAC~~
1 Davis Square, Suite 101
Charleston, WV 25301-1799

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

Martha Gaegen Walker by Ja
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

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

Form #2

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2009 JUN 25 AM 11:03

OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

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

Martha J. Walker
Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

BRIEF SUMMARY OF THE RULE

This amends Nurse Aide Abuse Registry rule with the effective date July 1, 2003. This rule governs the placement of Nurse Aide's on the Abuse Registry and their due process rights, while also outlining what actions can result in placement on the Abuse Registry. The rule also delineates abuse and neglect investigation procedures and hearing and appeal processes.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE PROPOSED RULE

The Nurse Aide Abuse Registry rule has not been updated since April 4, 2003. Since the rule became effective in 2003 several investigative, notification and hearing procedures have changed and needed to be updated in the rule. Also definitions of actions that constitute abuse and neglect needed to be updated to reflect today's current climate of technology.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Nurse Aide Abuse Registry Rule

Type of Rule: X Legislative Interpretive Procedural

Agency: Health and Human Resources

Address: Building 3, Room 206
Capitol Complex
Charleston, WV 25305

Phone Number: 304-558-0687 Email: alice.w.shumlas@wv.gov or aimee.n.jackson@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what effect this measure will have on costs and revenues of state government.

This amends the Nurse Aide Abuse Registry rule with the effective date July 1, 2003. This rule governs the placement of Nurse Aide's on the Abuse Registry and their due process rights, while also outlining what actions can result in placement on the Abuse Registry. The rule also delineates abuse and neglect investigation procedures and hearing and appeal processes.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

Effect of Proposal	Fiscal Year		
	2009 Increase/Decrease (use "-")	2010 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Equipment			
Other			
2. Estimated Total Revenues			

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

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

Memorandum

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

The Nurse Aide Abuse Registry rule has not been updated since April 4, 2003. Since the rule became effective in 2003 several investigative, notification and hearing procedures have changed and needed to be updated in the rule. Also definitions of actions that constitute abuse and neglect needed to be updated to reflect today's current climate of technology. No changes in this rule increase the Department's expenses or revenues.

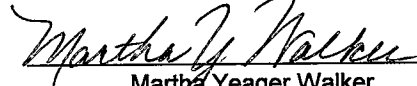
Date

6-24-09

Agency

Department of Health and Human Resources

Authorized Representative



Martha Yeager Walker
Secretary

FILED

TITLE 69
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

2009 JUN 25 AM 11:03

SERIES 6
NURSE AIDE ABUSE REGISTRY

OFFICE WEST VIRGINIA
SECRETARY OF STATE**§69-6-1. General.**

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

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

1.3. Filing Date. -- .

1.4. Effective Date. -- .

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

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

§69-6-2. Definitions.

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

2.1.a. Involuntary Seclusion. -- Separation of a resident from other residents or from his or her room or confinement to his or

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

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

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

2.4. Neglect. -- The failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness or an accident, unless such actions are beyond the Nurse Aide's control. Intent is not an element of neglect.

2.4.a. Inappropriate procedure – failure to follow the resident's treatment plan and/or the facility's policies regarding resident care.

2.4.b. -- Failure to appear in response to a subpoena. If a CNA receives a subpoena to appear at an Administrative Hearing regarding an incident of abuse, neglect or misappropriation and fails to appear, he or she may be placed on the Nurse Aide Abuse Registry for neglect.

2.5. Nurse Aide/Nursing Assistant. -- Any individual who is not a licensed health care provider or registered dietitian or volunteer who

provides nursing or nursing related services for hire to residents in a facility after successfully completing a state-approved training and competency evaluation program.

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

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

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

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

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

2.11. Sexual Abuse. -- Sexual harassment, sexual coercion, or sexual assault of a resident; sexual interaction between a Nurse Aide and a resident; or inciting any of this type of activity.

2.11.a – Including graphic images of a resident's body including, but not limited to, private areas.

2.12. Verbal Abuse. -- Statements made using inappropriate volume or an excessively aggressive tone that are to, or in the presence of, a resident that result in ridicule or humiliation of the resident or the use of oral, written or gestured language that includes cursing, the use of demeaning, derogatory references to or descriptions of a resident or his or her family.

§69-6-3. Reporting.

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

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

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

3.1.c. A facility shall not discharge, discriminate or retaliate in any manner against any employee who in good faith reports suspected abuse, neglect or misappropriation of residents' property, or who testifies or will testify in good faith in any proceeding concerning abuse, neglect, or misappropriation of property of, residents in the facility, except an employee may be suspended, discharged, or restricted in duties if the employee:

3.1.c.1. Reported himself or herself;

or

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

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

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

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

3.2.c. Reports involving rape or sexual assault:

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

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

3.2.d. Within five (5) working days after the Immediate Report, the facility shall fax the ~~Follow-up Report (OHFLAC Form 225A)~~ Nurse Aide Registry Five Day Follow-up Report to the Nurse Aide Program.

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

3.3. Contents of a Report shall include the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4. Legible witnesses' statements that are typed or printed in black ink that contain as

much specific information as is obtainable and any physical evidence including pictures of injuries, videotape and documentation of a similar nature shall be kept pending investigation by the Nurse Aide Registry.

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

§69-6-4. Investigations.

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

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

4.2.a. A visit to the facility;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.4.d. In the alternative, the Secretary may implement sanctions such as requiring retraining of the nurse aide if warranted by the facts of the case.

§69-6-5. Notification.

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

5.1.a. The nature of the offense;

5.1.b. The date ~~and time~~ of the occurrence;

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

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

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

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

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

5.2. The Nurse Aide Program shall send notification of the information in Subsection 5.1 of this Section to the Nurse Aide by certified mail, return receipt requested, to his or her last known address.

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

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

5.3. The Nurse Aide has thirty (30) days from the date of receipt of the notice ~~to send a waiver or~~ to request a hearing.

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

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

5.3.a.2. The Nurse Aide Program shall classify the case as uncontested and within ten (10) business days notify the Nurse Aide of

placement of his or her name on the Nurse Aide Abuse Registry.

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

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

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

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

§69-6-6. Hearing.

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

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

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

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

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

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

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

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

6.7. During the hearing, each party may:

6.7.a. Present relevant written or verbal evidence;

6.7.b. Present witnesses and cross-examine witnesses; and

6.7.c. Have an attorney present.

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

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

6.10. If the ~~secretary~~ Secretary decides:

6.10.a. In favor of the accused Nurse Aide, ~~the Nurse Aide Program shall close the case and the Secretary shall~~ notify the Nurse Aide in writing; or

6.10.b. Against the accused Nurse Aide, and affirms placement on the Nurse Aide Abuse Registry, the Nurse Aide Program shall place the Nurse Aide's name on the Nurse Aide Abuse Registry within ~~ten (10)~~ thirty (30) days, and except in cases of neglect, the name shall remain

on the Nurse Aide Abuse Registry until a court of law reverses the decision ~~or the Nurse Aide Program is notified of the Nurse Aide's death.~~

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

6.11.a. The Nurse Aide;

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

6.11 c. The administrator of the facility in which the Nurse Aide is currently working if applicable.~~and~~

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

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

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

§69-6-7. Court Determination.

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

§69-6-8. Penalty for Continuing to Work While on the Abuse Registry for Neglect.

8.1. Any CNA who continues to work in long term care, assisted living, behavioral health of hospice after notification of placement on the Abuse Registry for neglect shall have that time

added to the placement time so that a total of twelve (12) months is served on the Abuse Registry.

~~§69-6-8.~~ §69-6-9. Facility Notice and Record Keeping.

~~8-1.~~ 9.1. Facilities shall provide a copy of this rule to each Nurse Aide on their staff and to each Nurse Aide at the time of hiring and keep signed proof that each Nurse Aide has received a copy of the rule.

~~§69-6-9.~~ §69-6-10. Enforcement.

~~9-1.~~ 10.1. This rule is enforced under W. Va. Code §§9-6-14, 16-1-17, 16-1-18, applicable licensure laws in W. Va. Code §§16-5B-1 *et seq.* and 16-5C-1 *et seq.* and rules promulgated under those Code sections.