

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

Form #3

Do Not Mark In This Box

FILED

2009 JUL 31 PM 12:38

OFFICE WEST VIRGINIA  
SECRETARY OF STATE

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

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

CITE AUTHORITY: Legislative

AMENDMENT TO AN EXISTING RULE: YES  NO

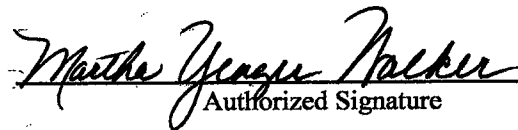
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 6

TITLE OF RULE BEING AMENDED: Nurse Aide Abuse Registry

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

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

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

  
Authorized Signature

## BRIEF SUMMARY OF THE RULE

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.

## 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.



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

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

[Empty box for explanation of above estimates]

**Memorandum**

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

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.

[Empty box for memorandum content]

Date

*July 31, 2009*

Agency

Department of Health and Human Resources

Authorized Representative

*Martha Yeager Walker*

Martha Yeager Walker  
Secretary

**QUESTIONNAIRE**

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

DATE: 7/29/09

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Aimee Jackson, Paralegal, OHEIAC, 1 Davis Square,  
Suite 101, Charleston WV 25301-1799

LEGISLATIVE RULE TITLE: Nurse Aide Abuse Registry

1. Authorizing statute(s) citation W. Va. Code §§ 9-6-2, 16-1-4, 15-5B-8, 15-5C-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:  
June 25, 2009

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

c. Date of Public Hearing(s) or Public Comment Period ended:  
July 27, 2009 @ noon.

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

Attached  X  No comments received \_\_\_\_\_

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

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

Aimee Jackson, Paralegal

OHFLAC

1 Davis Square Suite 101

Charleston, WV 25301-1799

Phone: (304) 558-0687

Fax: (304) 558-5607

Email: aimeejackson@wv.gov

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

Alice Warner Shumlas, General Counsel

OHFLAC

1 Davis Square Suite 101

Charleston, WV 25301-1799

Phone: (304) 558-2053

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

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

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b. Date of hearing or comment period:

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

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d. Attach findings and determinations and reasons:

Attached 

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## NURSE AIDE ABUSE REGISTRY COMMENTS:

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.

**Comment:** Basically concur with change but may not need "mental anguish" in this definition since harm is generally defined as physical or mental damage.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** Mental anguish is a legal term relating to mental/psychological/emotional pain or distress and is included in the federal definition. The entire CNA program is a federal mandate, which requires individual states to use the federal definitions. The regulation should stand as written.

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.

**Comment:** I would like to bring to your attention some of the areas we feel would not be appropriate changes or would leave too much of a grey area for definition. The addition of "failure to prevent an accident" to neglect. This is very broad and not easily defined. This area seems overly broad and hard to define, and it does seem that nurse aides could wind up on the abuse registry for violating one of these rules.

-- Sherri McKinney, District 1199 Service Employees International Union, July 23, 2009.

**Response:** The rule is not being changed to read "failure to prevent an accident" and Nurse Aide/Nursing Assistant's will not be held responsible for failing to prevent an accident beyond that Nurse Aide/Nursing Assistant's control. The regulation should stand as written.

**Comment:** It is my opinion that the last statement in 2.4 is not clear. Intent needs to be part of this section. The simple fact is that Nurse Aides, and others that could be affected by this law, are human and mistakes happen. Without the law supporting them a mistake could cause someone to not only lose a job but this could lead to years of not being able to find a job in any field, ultimately ruining the lives of these hard working individuals. Furthermore, Nurse Aides are hard to find and if people think that they have no room to make mistakes then they will avoid looking to our profession for careers. I realize that we touch lives in this profession and mistakes can be very costly but again we are humans and the law needs to reflect that.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Response:** Intent is not and has never been considered a part of neglect. If the action was intentional against a resident then it would be abuse and not neglect. The regulation should stand as written.

**Comment:** The definition of neglect as passed by the WV Legislature in HB 2788 is acceptable, however, I would like to see "resident" used in lieu of "an incapacitated" adult." Also any language that would add "accident" to the definition of abuse is ill advised.

-- Carrington Carter, NHA, White Sulphur Springs Center, Genesis Healthcare July 24, 2009.

**Comment:** Recommend language used in most recent definition passed by the WV Legislature in H.B. 2788 "Neglect" means the unreasonable failure by a caregiver to provide the care necessary to assure the physical safety or health of an incapacitated adult. (We recommend using the definition but inserting "a resident" in lieu of "an incapacitated adult.") We strongly disagree with language that adds accident to the definition of abuse. That infers that nursing aides can be no less than perfect. Being imperfect does not constitute neglect.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** This definition does not apply to this type of regulation. HB 2788 refers to criminal instances of neglect against an incapacitated adult. This rule does not apply to criminal actions. Accidents are not included in the definition of abuse, but rather in the definition of neglect. Finally, we are mandated to use the federal definitions. The regulation should stand as written.

2.4.A. INAPPROPRIATE PROCEDURE – FAILURE TO FOLLOW THE RESIDENT'S TREATMENT PLAN AND/OR THE FACILITY'S POLICIES REGARDING RESIDENT CARE.

**Comment:** This new definition of "Neglect" will result in Nurse Aides being terminated on their first infraction of company policy or care plan directive, related to patient care. This termination will be a direct result of the Nurse Aide being placed on the registry for any infraction of policy related to patient care.

- A Nurse Aide that leaves a wet washcloth on a patient's bed, violating patient care procedure, will be reported for neglect, and terminated.
- A new Nurse Aide that uses inappropriate technique in changing a brief, will be guilty of neglect and terminated, regardless that the brief was re-applied three minutes later in a proper manner.
- A state survey with citations related to patient care will result in a "witch hunt" that will involve a series of terminations due to neglect.

This new broad definition of "neglect" is extremely inappropriate and will bring the nursing home profession and industry to a stop in West Virginia. I can not think of *any* other licensing body in the country that expects it's constituents to stand up to such perfection, with such a high level of consequence.

--Jud Worth, PhD, LSW, NHA, Pocahontas Center, Genesis Healthcare - July 9, 2009

**Comment:** If this is interpreted as "one failure" to follow a plan of care resulting in "neglect", the proposal is too broad. If the "failure" results in a change of condition, then the statute should be instituted.

-- Donald C. Black, PT, NHA, Cortland Acres, - July 10, 2009

**Comment:** This is unacceptable; again making a mistake could lead someone to be placed on the registry. For example, with this broad statement, a NA could be placed on the registry because a resident's care plan called for the resident to have a two handle cup for drinking and a one handled cup is accidentally given. Because of a simple error the nurse Aide could be placed on a neglect and abuse law.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** I would like to bring to your attention some of the areas we feel would not be appropriate changes or would leave too much of a grey area for definition. The addition of "Inappropriate Procedure" section which is defined as failure to follow the resident's care plan. This area seems

overly broad and hard to define, and it does seem that nurse aides could wind up on the abuse registry for violating one of these rules.

– Sherri McKinney, District 1199 Service Employees International Union, July 23, 2009.

**Comment:** In regards to the definition of “inappropriate procedure,” I would like to see this phrase defined as “providing care or services that are directly contradictory of a resident’s treatment plan.”

– Carrington Carter, NHA , White Sulphur Springs Center, Genesis Healthcare July 24, 2009.

**Comment:** Recommend revision of definition for “inappropriate procedure” to “providing care or services that are directly contradictory of a resident’s care plan.” Facility policies may not address recent developments in professional standards and if care is not in direct conflict with the resident’s prescribed or assessed needs/care, desired outcomes may not be affected.

– Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** OHFLAC has no involvement with termination or any other personnel actions involving facility employees. Although this definition has not previously been in the rule, it is OHFLAC’s past and current procedure. Examples of inappropriate procedure are Nurse Aides who fail to change and reposition residents every two hours as required by the care plan, facility policies, and industry standards, Nurse Aides who transfer residents alone when the care plan calls for two staff assist, Nurse Aides who transfer resident without a care plan or facility policy required mechanical lift. To place a CNA on the Registry for inappropriate procedure (neglect) it has to be shown that the CNA had knowledge of the treatment plan and facility policies and procedures. The regulation should stand as written.

2.4.B. -- FAILURE TO APPEAR IN RESPONSE TO A SUBPOENA. IF A NURSE AIDE/NURSING ASSISTANT RECEIVES A SUBPOENA TO APPEAR AT AN ADMINISTRATIVE HEARING REGARDING AN INCIDENT OF ABUSE, NEGLIGENCE OR MISAPPROPRIATION AND FAILS TO APPEAR, HE OR SHE MAY BE PLACED ON THE NURSE AIDE ABUSE REGISTRY FOR NEGLIGENCE.

**Comment:** I also understand Nurse aides can now also be added to the abuse registry if they fail to respond to a subpoena and appear at an administrative hearing. This could be an issue for people who move frequently, if the subpoena doesn’t reach them. We often find aides frequently move and even the nursing facility a lot of times does not have a correct phone number or address. It would be a travesty for a good nurse aide to be put on the registry for failure to comply when they did not receive notice.

– Sherri McKinney, District 1199 Service Employees International Union, July 23, 2009.

**Comment:** Although I agree that a NA should show up for all hearings when they receive a subpoena, this, however, should not be under neglect. If someone is just a witness and they don’t show up, they have never hurt or neglected a resident and just because they don’t show up they are now considered an abuser. There has to be a better way to do this.

– Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Response:** The Nurse Aide Registry does not rely on the facility to provide a current address for the Nurse Aide/Nursing Assistant. All Nurse Aides/Nursing Assistants are required to keep the Nurse Aide Registry informed of their current address and contact information. Furthermore if the Nurse Aide Registry is unable to prove service of the subpoena to the Nurse Aide then the Registry would be unable to place the Nurse Aide for neglect for failing to respond to a subpoena. The alternative method is to petition the Circuit Court for a Bench Warrant and have Sherriff bring the reluctant

witness in to testify, which would incur significant expense for the Nurse Aide Registry. The regulation should stand as written.

2.13. 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.

**Comment:** I consider this too broad because all clinician must at times adjust volume and /or tone to acquire the attention of a resident. Also we deal every day with persons with hearing deficits and attention limitations and volume and tone changes/elevations must be used.

-- Donald C. Black, PT, NHA, Cortland Acres, - July 10, 2009

**Comment:** Under section 2.13, I disagree with recommended language "using inappropriate volume," but do concur with "an excessively aggressive tone." Our facility has many residents as well as staff members who are hearing impaired making "inappropriate volume" very subjective.

-- Carrington Carter, NHA , White Sulphur Springs Center, Genesis Healthcare July 24, 2009.

**Comment:** I would like to bring to your attention some of the areas we feel would not be appropriate changes or would leave too much of a grey area for definition. The addition of "inappropriate volume or an excessively aggressive tone" to verbal abuse. Being a loud individual does not constitute abuse, facility settings are sometimes loud, or residents with hearing issues require much more volume in one's voice. This area seems overly broad and hard to define, and it does seem that nurse aides could wind up on the abuse registry for violating one of these rules.

-- Sherri McKinney, District 1199 Service Employees International Union, July 23, 2009.

**Comment:** This change is too broad and inappropriate volume or aggressive tone is not measurable. This could be different for every person. Does this mean because I personally don't hear well and I tend to talk louder that I could be placed on the list because someone feels that my tone is off or too loud when it is caused by an impairment that I have?

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** Disagree with recommended language "using inappropriate volume." Concur with "an excessively aggressive tone." Recommend removal of volume due to population being served with high prevalence of hearing impairments. Additionally, there may be staff members who have difficulty hearing who speak loudly and don't realize it. The terminology overall of "inappropriate volume" is very subjective.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** OHFLAC concurs with the suggestions and has modified the rule, removing inappropriate volume.

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.

**Comment:** Recommend change in language to state "when rape or sexual assault of a resident is suspected, the designated staff person shall immediately *accompany* the resident to the nearest emergency room for examination."

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** OHFLAC concurs with the suggestion and has modified the rule to change "take" to "accompany".

3.4.A. WITNESSES' SIGNATURES SHALL BE IN BLUE INK.

**Comment:** This is just an unneeded change. A facility could have a hard time trying to comply with this. Most health records are completed in BLACK ink. This is just another form of paperwork compliance that has nothing to do with patient care.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** Do not believe this language is necessary in light of emergence of electronic health records and documentation.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** Blue ink is used to denote an original signature and to ensure that the statement is genuine. Currently witness statements are not recorded electronically. The regulation should stand as written.

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.

**Comment:** Concur with addition of language with revision of language. Recommend revision to read "In the alternative, the Secretary may implement sanctions warranted by the facts of the case that include mandatory retraining of specific tasks or re-education of materials offered during initial training and/or orientation." We would hope that the intent of this change is to provide alternatives to being placed on the registry for minor infractions that would otherwise result in loss of employment opportunities.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** OHFLAC concurs with the suggestion and the rule has been modified to reflect the change.

~~5.2.B. IF THE POSTAL SERVICE RETURNS THE LETTER A SECOND TIME, OHFLAC SHALL USE PERSONAL SERVICE FOR DELIVERY.~~

**Comment:** Recommend keeping existing language.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** The costs of personal service have become prohibitive. The regulation should stand as written.

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.

**Comment:** I feel that OHFLAC should be held to strict guidelines when it comes to this. The Nurse Aide, legal representatives and others need to know quickly so they may prepare and/or get on with life. 15 days has been sufficient and should not be change. This is more than enough time to get the notices out.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** Recommend that language remains as currently written. Nurse Aides should be entitled to timely notices of hearings.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** Because of the dramatic increase in the volume of hearing requests and the corresponding delay between the setting of the date and the actual hearing fifteen days has become difficult for OHFLAC to meet. As soon as a hearing date has been chosen and accepted by the hearing examiner the Nurse Aide is promptly notified. Also the CNA is not penalized because he or she remains in good standing until the Secretary's Final Administrative Order is issued and/or pending the outcome of any Circuit Court Appeal. The regulation should stand as written.

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

**Comment:** Why would the program not close the case if the nurse aide was exonerated? I would this Double Jeopardy if the program doesn't. If the Judge or Secretary finds in favor of the Nurse Aid then that should be the end, so the case should be closed.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Response:** The Secretary's decision automatically closes the case. Once the Secretary has made his or her decision the case is closed. The regulation should stand as written.

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 NEGLIGENCE, 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.

**Comment:** I feel that extending the time the program has to place a NA on the list would put others at risk. If the person has committed the crime and been "convicted" of it, they should immediately be placed on the list. This is placing other residents and citizens outside of LTC centers at risk. The Program should be held responsible for quickly notifying the public of those prey on the frail and elderly.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** There is no right answer to this change. Being put on the registry in a timely manner to protect the residents versus adequate time for hearing appeals so that the nurse aide is afforded due

process is a real challenge. Perhaps there should be language that includes "at which time all appeals are exhausted."

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** Although the rule currently in effect says the Nurse Aide's name will be placed within ten days, it is the Nurse Aide Registry's current practice to wait thirty days to allow the Nurse sufficient time to file an appeal if he or she so desires which is his or her Due Process right. The regulation should stand as written.

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.

**Comment:** I believe that there should be a date for appeals, but 30 days is not enough. 180 days would be more appropriate. Considering that some, if not most, Nurse Aides may not be financially able to obtain a Attorney. If they need to appeal and do not have an understanding 180 days would allow them more time to seek legal counsel. Giving them a time limit of 30 days may be a disadvantage to those that cannot afford it.

-- Michael Gore, NHA Boone Nursing and Rehabilitation, July 20, 2009.

**Comment:** We have concern over limiting the time to file an appeal to 30 days. Securing an attorney and filing an appeal may take longer than 30 days.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** Thirty days is the standard appeal period for almost all legal matters. OHFLAC is merely following West Virginia Code, the West Virginia Rules of Civil Procedure and years of precedent. Should a Circuit Court Judge grant an appeal after the 30 day period has expired, OHFLAC is bound by that Judge's decision to remove the Nurse Aide's name from the Registry until that appeal has reached its conclusion. The regulation should stand as written.

8.1. ANY CNA WHO CONTINUES TO WORK IN LONG TERM CARE, ASSISTED LIVING, BEHAVIORAL HEALTH OR 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.

**Comment:** Concur with this addition, but it raises a much bigger issue related to the absence of all the other C.N.A.'s who are being certified and recertified through OHFLAC (i.e. home health, hospitals, senior centers, etc.) yet are not monitored by this rule. Excluding oversight of a certification program based on venue is not public policy when it comes to protecting vulnerable patients. It is the equivalent of the Nursing Board only monitoring the practice of nursing in acute care settings.

-- Jesse Samples, CEO, West Virginia Health Care Association, July 23, 2009

**Response:** OHFLAC's statutory authority per the federal law only covers Long Term Care Facilities (Nursing Homes) and Skilled Nursing Units of hospitals. Expansion of this oversight would be cost prohibitive. The regulation should stand as written.

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

FILED

2005 JUL 31 PM 12:38

**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 Nurse Aide/Nursing Assistant 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, if there is proof of service.

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.

2.5.a. The terms Nurse Aide and Nursing Assistant are considered interchangeable and have the same meaning.

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

2.12 2.13. Verbal Abuse. -- Statements made using 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~~ accompany 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 warranted by the facts of the case that include mandatory retraining of specific

tasks or re-education of materials offered during initial training and/or orientation.

**§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~~ Secretary 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 or 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.