

TITLE 69
LEGISLATIVE RULE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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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. - *April 9, 2010*

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

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

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

§69-6-2. Definitions.

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

2.1.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 unless such actions are beyond the Nurse Aide's control.

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

2.5. Nurse Aide or Nursing Assistant. - Any individual who is not a licensed health care provider or registered dietitian or volunteer who provides nursing or nursing related services for hire to residents in a facility after successfully completing a state-approved training and

competency evaluation program. The terms Nurse Aide and Nursing Assistant are considered interchangeable and have the same meaning.

2.6. 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 careless that causes or is likely to cause death, physical injury, pain or psychological harm to the resident; inappropriate or improper use of restraints or isolation; and acts of retaliation even in response to a physical attack.

2.10. Psychological and Emotional Abuse. - Humiliating, harassing, teasing or threatening a resident; 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 - Sexual abuse also includes graphic images of a resident's body including, but not limited to, private areas.

2.12. Test-eligible Nurse Aide or Nursing Assistant. - Any individual who is not a licensed health care provider or registered dietitian or volunteer, who provides nursing or nursing related services for hire to residents in a nursing home after successfully completing a state-approved nurse aide training program, but who has not yet successfully completed the state-approved competency test. An individual may not work as a nurse aide or nursing assistant on a full-time basis for more than four (4) months, unless the individual has passed the state-approved competency test.

2.13. Verbal Abuse. - Statements made to, or in the presence of, a resident that result in ridicule or humiliation of the resident or the use of oral, written or gestured language that includes cursing, the use of demeaning, derogatory references to or descriptions of a resident or his or her family.

§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 the Nurse Aide Program, the 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 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 accompany the resident to the nearest emergency room for examination.

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

3.2.d. Within five (5) working days

after the Immediate Report, the facility shall fax the Nurse Aide Registry Five Day Follow-up Report to the Nurse Aide Program.

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

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

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

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

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

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

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

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

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

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

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

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

3.4. The Nurse Aide Program shall keep, pending investigation, legible witnesses' statements that are typed or printed in black ink that contain as much specific information as is obtainable and any physical evidence including

pictures of injuries, videotape and documentation of a similar nature.

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

§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;

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.

§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 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.

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

5.3.a. If the Nurse Aide fails 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 the provisions of this section.

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, *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 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.

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

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

6.6.a. OHFLAC is responsible for obtaining the services of a court reporter and hearing examiner and bearing those costs; 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 shall issue a written decision with supporting Findings of Fact and Conclusions of Law.

6.10. If the Secretary decides:

6.10.a. In favor of the accused Nurse Aide, 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 thirty (30) days. The Nurse Aide's name shall remain on the Nurse Aide Abuse Registry until a court of law reverses the decision, or the Nurse Aide petitions for removal of his or her name from the Nurse Aide Abuse Registry at the expiration of his or her placement period.

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

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.

6.11.d. The federal inspector general's

office.

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

6.13. In the alternative, the Nurse Aide has the right to file an appeal of the 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. Facility Notice and Record Keeping.

8.1. 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. Enforcement.

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

§ 69-6-10. Sanctions

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

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

10.1.b. Mitigating circumstances include:

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

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

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

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

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

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

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

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

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