WEST VIRGINIA CODE CHAPTER 16b ARTICLE 4

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§16B-4-1. Purpose.

It is the policy of this state to encourage and promote the development and utilization of resources to ensure the effective and financially efficient care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals. Such care and treatment require a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the state is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary, voluntary, and governmental nursing homes it is the policy of this state to encourage, promote, and require the maintenance of nursing homes so as to ensure protection of the rights and dignity of those using the services of such facilities.

The provisions of this article are hereby declared to be remedial and shall be liberally construed to effectuate its purposes and intents.

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§16B-4-2. Definitions.

As used in this article, unless a different meaning appears from the context:

"Deficiency" means a nursing home's failure to meet the requirements specified in §16B-4-1 *et seq*. of this code and rules promulgated thereunder.

"Department" means the Department of Health.

"Director" means the director of the office of Health Facility Licensure and Certification.

"Distance learning technologies" means computer-centered technologies delivered over the internet, broadcasts, recordings, instructional videos, or videoconferencing.

"Household" means a private home or residence which is separate from or unattached to a nursing home.

"Immediate jeopardy" means a situation in which the nursing home's noncompliance with one or more of the provisions of this article or rules promulgated thereunder has caused or is likely to cause serious harm, impairment or death to a resident.

"Inspector General" means the Inspector General of the Office of the Inspector General as described in §16B-2-1 of this code, or his or her designee.

"Nursing home" or "facility" means any institution, residence, or place, or any part or unit thereof, however named, in this state which is advertised, offered, maintained, or operated by the ownership or management, whether for a consideration or not, for the express or implied purpose of providing accommodations and care, for a period of more than 24 hours, for four or more persons who are ill or otherwise incapacitated and in need of extensive, ongoing nursing care due to physical or mental impairment or which provides services for the rehabilitation of persons who are convalescing from illness or incapacitation.

The care or treatment in a household, whether for compensation or not, of any person related by blood or marriage, within the degree of consanguinity of second cousin to the head of the household, or his or her spouse, may not be deemed to constitute a nursing home within the meaning of this article. Nothing contained in this article applies to nursing homes operated by the federal government; or extended care facilities operated in conjunction with a hospital; or institutions operated for the treatment and care of alcoholic patients; or offices of physicians; or hotels, boarding homes, or other similar places that furnish to their guests only room and board; or to homes or asylums operated by fraternal orders pursuant to §35-3-1 *et seq.* of this code.

"Nursing care" means those procedures commonly employed in providing for the physical, emotional, and rehabilitation needs of the ill or otherwise incapacitated which require technical skills and knowledge beyond that which the untrained person possesses, including, but not limited to, such procedures as: Irrigations, catheterization, special procedure

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contributing to rehabilitation, and administration of medication by any method which involves a level of complexity and skill in administration not possessed by the untrained person.

"Office of Health Facility Licensure and Certification" means the West Virginia Office of Health Facility Licensure Certification within the Office of Inspector General.

"Person" means an individual and every form of organization, whether incorporated or unincorporated, including any partnership, corporation, trust, association, or political subdivision of the state.

"Resident" means an individual living in a nursing home.

"Review organization" means any committee or organization engaging in peer review or quality assurance, including, but not limited to, a medical audit committee; a health insurance review committee; a professional health service plan review committee or organization; a dental review committee; a physician's advisory committee; a podiatry advisory committee; a nursing advisory committee; any committee or organization established pursuant to a medical assistance program; any committee or organization established or required under state or federal statutes rules or regulations; and any committee established by one or more state or local professional societies or institutes, to gather and review information relating to the care and treatment of residents for the purposes of:

Evaluating and improving the quality of health care rendered, reducing morbidity or mortality, or establishing and enforcing guidelines designed to keep within reasonable bounds the cost of health care.

"Sponsor" means the person or agency legally responsible for the welfare and support of a resident.

"Substantial compliance" means a level of compliance with the rules such that no deficiencies exist or such that identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

The Inspector General may define in the rules any term used herein which is not expressly defined.

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§16B-4-3. Powers, duties, and rights of Inspector General.

In the administration of this article, the Inspector General shall have the following powers, duties, and rights:

(a) To enforce rules and standards promulgated hereunder for nursing homes;

(b) To exercise as sole authority all powers relating to the issuance, suspension, and revocation of licenses of nursing homes;

(c) To enforce rules promulgated hereunder governing the qualification of applicants for nursing home licenses, including, but not limited to, educational requirements, financial requirements, personal, and ethical requirements;

(d) To receive and disburse federal funds and to take whatever action not contrary to law as may be proper and necessary to comply with the requirements and conditions for the receipt of such federal funds;

(e) To receive and disburse for authorized purposes any moneys appropriated to the department by the Legislature;

(f) To receive and disburse for purposes authorized by this article any funds that may come to the department by gift, grant, donation, bequest, or devise, according to the terms thereof, as well as funds derived from the department's operation, or otherwise;

(g) To make contracts, and to execute all instruments necessary or convenient in carrying out the Inspector General's functions and duties; and all such contracts, agreements, and instruments will be executed by the Inspector General;

(h) To appoint officers, agents, employees, and other personnel and fix their compensation;

(i) To offer and sponsor educational and training programs for nursing homes for clinical, administrative, management, and operational personnel;

(j) To undertake survey, research and planning projects, and programs relating to administration and operation of nursing homes and to the health, care, treatment, and service in general of such homes;

(k) To assess civil penalties for violations of facility standards, in accordance with §16B-4-10 of this code;

(l) To inspect any nursing home and any records maintained therein that are necessary to determine compliance with licensure laws or Medicare or Medicaid certification, subject to the provisions of §16B-4-9 and §16B-4-10 of this code;

(m) To establish and implement procedures, including informal conferences, investigations,

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and hearings, subject to applicable provisions of §29A-3-1 *et seq*. of this code, and to enforce compliance with the provisions of this article and with rules issued hereunder;

(n) To subpoena witnesses and documents, administer oaths and affirmations, and to examine witnesses under oath for the conduct of any investigation or hearing. Upon failure of a person without lawful excuse to obey a subpoena to give testimony, and upon reasonable notice to all persons affected thereby, the director may apply to the circuit court of the county in which the hearing is to be held for an order compelling compliance;

(o) To make complaint or cause proceedings to be instituted against any person or persons for the violation of the provisions of this article or of rules issued hereunder. Such action may be taken by the director without the sanction of the prosecuting attorney of the county in which proceedings are instituted if the officer fails or refuses to discharge his or her duty. The circuit court of the county in which the conduct has occurred or, if emergency circumstances require, the Circuit Court of Kanawha County shall have jurisdiction in all civil enforcement actions brought under this article and may order equitable relief without bond. In no such case may the Inspector General or any person acting under the Inspector General's direction be required to give security for costs;

(p) To delegate authority to the director's employees and agents to perform all functions of the director;

(q) To make available to the Governor, the Legislature, and the public at all times online access through the Office of Health Facility Licensure and Certification website, the following information. The online information will describe the licensing and investigatory activities of the Office of Health Facility Licensure and Certification during the year. The online information will include a list of all nursing homes in the state, whether such homes are proprietary or nonproprietary; the name of the administrator or administrators; the total number of beds; the legal name of the facility; state identification number; health investigations information and reports; life safety investigations information and reports; and whether or not those nursing homes listed accept Medicare and Medicaid residents; and

(r) To establish a formal process for licensed facilities to file complaints about the inspection process or inspectors.

(s) The Inspector General designates the director of the Office of Health Facility Licensure and Certification to enforce the provisions of this article, except where otherwise stated.

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§16B-4-4. Administrative and inspection staff.

The director may, at such time or times as he or she may deem necessary, employ such administrative employees, inspectors, or other persons as may be necessary to properly carry out the provisions of this article. All employees of the Office of Health Facility Licensure and Certification shall be members of the state civil service system and inspectors shall be trained to perform their assigned duties. Such inspectors and other employees as may be duly designated by the director shall act as the director's representatives and, under the direction of the director, shall enforce the provisions of this article and all duly promulgated regulations and, in the discharge of official duties, shall have the right of entry into any place maintained as a nursing home.

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§16B-4-5. Rules; minimum standards for nursing homes.

(a) All rules shall be proposed for legislative approval in accordance with the provisions of §29A-3-1 *et seq*. of this code. The Inspector General shall recommend the adoption, amendment, or repeal of such rules as may be necessary or proper to carry out the purposes and intent of this article.

(b) The Inspector General shall recommend rules establishing minimum standards of operation of nursing homes including, but not limited to, the following:

(1) Administrative policies, including:

(A) An affirmative statement of the right of access to nursing homes by members of recognized community organizations and community legal services programs whose purposes include rendering assistance without charge to residents, consistent with the right of residents to privacy;

(B) A statement of the rights and responsibilities of residents in nursing homes which prescribe, as a minimum, such a statement of residents' rights as included in the United States Department of Health and Human Services regulations, in force on the effective date of this article, governing participation of nursing homes in the Medicare and Medicaid programs pursuant to 42 U.S.C.A. §§ 1395 *et seq*. and 1396 *et seq*.;

(C) The process to be followed by applicants seeking a license;

(D) The clinical, medical, resident, and business records to be kept by the nursing home;

(E) The procedures and inspections for the review of utilization and quality of resident care; and

(F) The procedures for informal dispute resolution, independent informal dispute resolution, and administrative due process, and when such remedies are available;

(2) Minimum numbers of administrators, medical directors, nurses, aides, and other personnel according to the occupancy of the facility;

(3) Qualifications of the facility's administrators, medical directors, nurses, aides, and other personnel;

(4) Safety requirements;

(5) Sanitation requirements;

(6) Personal services to be provided;

(7) Dietary services to be provided;

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(8) Medical records;

(9) Social and recreational activities to be made available;

(10) Pharmacy services;

(11) Nursing services;

(12) Medical services;

(13) Physical facility;

(14) Resident rights;

(15) Visitation privileges that:

(A) Permit immediate access to a resident, subject to the resident's right to deny or withdraw consent at any time, by immediate family or other relatives of the resident;

(B) Permit immediate access to a resident, subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, by others who are visiting with the consent of the resident; and

(C) Permit access to other specific persons or classes of persons consistent with state and federal law; and

(16) Admission, transfer, and discharge rights.

(c) To ensure compliance with §29A-3-11(b)(3) of this code, the Inspector General shall amend his or her legislative rule to exempt federally certified Medicare and Medicaid nursing facilities from provisions addressed in the federal regulations.

(d) The director shall permit the nonclinical instruction portions of a nurse aide training program approved by the Office of Health Facility Licensure and Certification to be provided through distance learning technologies.

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§16B-4-6. License required; application; fees; duration; renewal.

No person may establish, operate, maintain, offer, or advertise a nursing home within this state unless and until he or she obtains a valid license therefor as hereinafter provided, which license remains unsuspended, unrevoked, and unexpired. No public official or employee may place any person in, or recommend that any person be placed in, or directly or indirectly cause any person to be placed in, any nursing home, as defined in §16B-4-2 of this code, which is being operated without a valid license from the Inspector General. The procedure for obtaining a license is as follows:

(a) The applicant shall submit an application to the director on a form to be prescribed by the director, containing such information as may be necessary to show that the applicant is in compliance with the standards for nursing homes, as established by this article and the rules lawfully promulgated hereunder. The application and any exhibits thereto shall provide the following information:

(1) The name and address of the applicant;

(2) The name, address, and principal occupation:

(A) Of each person who, as a stockholder or otherwise, has a proprietary interest of 10 percent or more in the applicant;

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

(C) Of each trustee and beneficiary of an applicant which is a trust; and

(D) Where a corporation has a proprietary interest of 25 percent or more in an applicant, the name, address, and principal occupation of each officer and director of the corporation;

(3) The name and address of the owner of the premises of the nursing home or proposed nursing home, if he or she is a different person from the applicant, and in such case, the name and address:

(A) Of each person who, as a stockholder or otherwise, has a proprietary interest 10 percent or more in the owner;

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

(C) Of each trustee and applicant, the name, address, and principal occupation of each officer and director of the corporation;

(4) Where the applicant is the lessee or the assignee of the nursing home or the premises of the proposed nursing home, a signed copy of the lease and any assignment thereof;

(5) The name and address of the nursing home or the premises of the proposed nursing

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home;

(6) A description of the nursing home to be operated;

(7) The bed quota of the nursing home;

(8) An organizational plan for the nursing home indicating the number of persons employed or to be employed and the positions and duties of all employees;

(9) The name and address of the individual who is to serve as administrator;

(10) Such evidence of compliance with applicable laws and rules governing zoning, buildings, safety, fire prevention, and sanitation as the director may require;

(11) A listing of other states in which the applicant owns, operates, or manages a nursing home or long-term care facility; and

(12) Such additional information as the director may require.

(b) Upon receipt and review of an application for license made pursuant to §16B-4-6(a) of this code, and inspection of the applicant nursing home pursuant to §16B-4-9 and §16B-4-10 of this code, the director shall issue a license if he or she finds:

(1) That an individual applicant, and every partner, trustee, officer, director, and controlling person of an applicant which is not an individual, is a person responsible and suitable to operate or to direct or participate in the operation of a nursing home by virtue of financial capacity, appropriate business or professional experience, a record of compliance with lawful orders of the department, if any, and lack of revocation of a license during the previous five years or consistent poor performance in other states;

(2) That the facility is under the supervision of an administrator who is licensed pursuant to the provisions of §30-25-1 *et seq*. of this code; and

(3) That the facility is in substantial compliance with standards established pursuant to §16B-4-5 of this code, and such other requirements for a license as may be established by rule under this article.

Any license issued by the director shall state the maximum bed capacity for which it is issued, the date the license was issued, and the expiration date. Such licenses shall be issued for a period not to exceed 15 months for nursing homes: *Provided*, That any license in effect for which timely application for renewal, together with payment of the proper fee has been made to the director in conformance with the provisions of this article and the rules issued thereunder, and prior to the expiration date of the license, shall continue in effect until:

(A) Six months following the expiration date of the license; or

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(B) The date of the revocation or suspension of the license pursuant to the provisions of this article; or

(C) The date of issuance of a new license, whichever date first occurs.

Each license shall be issued only for the premises and persons named in the application and is not transferable or assignable: *Provided*, That in the case of the transfer of ownership of a facility with an unexpired license, the application by the proposed new owner shall be filed with the director no later than 30 days before the proposed date of transfer. Upon receipt of proof of the transfer of ownership, the application shall have the effect of a license for three months. The director shall issue or deny a license within three months of the receipt of the proof of the transfer of ownership. Every license shall be posted in a conspicuous place in the nursing home for which it is issued so as to be accessible to and in plain view of all residents of and visitors to the nursing home.

(c) A license is renewable, conditioned upon the licensee filing timely application for the extension of the term of the license accompanied by the fee, and contingent upon evidence of compliance with the provisions of this article and rules promulgated hereunder. Any application for renewal of a license shall include a report by the licensee in such form and containing such information as shall be prescribed by the director, including a statement of any changes in the name, address, management, or ownership information on file with the director. All holders of facility licenses as of the effective date of this article shall include, in the first application for renewal filed thereafter, such information as is required for initial applicants under the provisions of §16B-4-6(a) of this code.

(d) In the case of an application for a renewal license, if all requirements of §16B-4-6 of this code are not met, the director may at his or her discretion issue a provisional license, provided that care given in the nursing home is adequate for resident needs and the nursing home has demonstrated improvement and evidences potential for substantial compliance within the term of the license: *Provided*, That a provisional license may not be issued for a period greater than six months, may not be renewed, and may not be issued to any nursing home that is a poor performer.

(e) A nonrefundable application fee in the amount of $200 for an original nursing home license shall be paid at the time application is made for the license. Direct costs of initial licensure inspections or inspections for changes in licensed bed capacity shall be borne by the applicant and shall be received by the director prior to the issuance of an initial or amended license. The license fee for renewal of a license shall be at the rate of $15 per bed per year for nursing homes, except the annual rate per bed may be assessed for licenses issued for less than 15 months. Annually, the director may adjust the licensure fees for inflation based upon the increase in the consumer price index during the last 12 months. All such license fees shall be due and payable to the director, annually, and in the manner set forth in the rules promulgated hereunder. The fee and application shall be submitted to the director who shall retain both the application and fee pending final action on the application. All fees received by the director under the provisions of this article shall be deposited in

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accordance with §16-1-13 of this code.

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§16B-4-7. Cost disclosure; surety for resident funds.

(a) Each nursing home shall disclose in writing to all residents at the time of admission a complete and accurate list of all costs which may be incurred by them, and shall notify the residents 30 days in advance of changes in costs. The nursing home shall make available copies of the list in the nursing home's business office for inspection. Residents may not be liable for any cost not so disclosed.

(b) If the nursing home handles any money for residents within the facility, the licensee or his or her authorized representative shall either: (1) Give a bond; or (2) obtain and maintain commercial insurance with a company licensed in this state in an amount consistent with this subsection and with the surety as the director shall approve. The bond or insurance shall be upon condition that the licensee shall hold separately and in trust all residents' funds deposited with the licensee; shall administer the funds on behalf of the resident in the manner directed by the depositor; shall render a true and complete account to the depositor and the director when requested, and at least quarterly to the resident; and upon termination of the deposit, shall account for all funds received, expended, and held on hand. The licensee shall file a bond or obtain insurance in a sum at least 1.25 times the average amount of funds deposited with the nursing home during the nursing home’s previous fiscal year.

This insurance policy shall specifically designate the resident as the beneficiary or payee reimbursement of lost funds. Regardless of the type of coverage established by the facility, the facility shall reimburse, within 30 days, the resident for any losses directly and seek reimbursement through the bond or insurance itself. Whenever the director determines that the amount of any bond or insurance required pursuant to this subsection is insufficient to adequately protect the money of residents which is being handled, or whenever the amount of any such bond or insurance is impaired by any recovery against the bond or insurance, the director may require the licensee to file an additional bond or insurance in such amount as necessary to adequately protect the money of residents being handled.

The provisions of this subsection do not apply if the licensee handles less than $35 per resident per month in the aggregate. Nursing homes certified to accept payment by Medicare and Medicaid must meet the requirements for surety bonds as listed in the applicable federal regulations.

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§16B-4-8. Investigation of complaints.

(a) The director shall establish rules for prompt investigation of all complaints of alleged violations by nursing homes of applicable requirements of state law or rules, except for such complaints that the director determines are willfully intended to harass a licensee or are without any reasonable basis. Such procedures shall include provisions for ensuring the confidentiality of the complainant and for promptly informing the complaint and the nursing home involved of the results of the investigation.

(b) If, after its investigation, the director determines that the complaint has merit, the director shall take appropriate disciplinary action and shall advise any injured party of the possibility of a civil remedy.

(1) A nursing home or licensee adversely affected by an order or citation of a deficient practice issued pursuant to this section may request the independent informal dispute resolution process contained in §16B-4-12a of this code.

(2) No later than 20 working days following the last day of a complaint investigation, the director shall transmit to the nursing home a statement of deficiencies committed by the facility. Notification of the availability of the independent informal dispute resolution process and an explanation of the independent informal dispute resolution process shall be included in the transmittal.

(c) No nursing home may discharge or in any manner discriminate against any resident, legal representative, or employee for the reason that the resident, legal representative, or employee has filed a complaint or participated in any proceeding specified in this article. Violation of this prohibition by any nursing home constitutes ground for the suspension or revocation of the license of the nursing home as provided in §16B-4-11 and §16B-4-12 of this code. Any type of discriminatory treatment of a resident, legal representative, or employee by whom, or upon whose behalf, a complaint has been submitted to the director, or any proceeding instituted under this article, within 120 days of the filing of the complaint or the institution of such action, shall raise a rebuttable presumption that such action was taken by the nursing home in retaliation for such complaint or action.

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§16B-4-9. Inspections.

The director and any duly designated employee or agent shall have the right to enter upon and into the premises of any nursing home at any time for which a license has been issued, for which an application for license has been filed with the director, or which the director has reason to believe is being operated or maintained as a nursing home without a license. If entry is refused by the owner or person in charge of the nursing home, the director may apply to the circuit court of the county in which the nursing home is located or the Circuit Court of Kanawha County for a warrant authorizing inspection to conduct the following inspections:

(1) An initial inspection prior to the issuance of a license pursuant to §16B-4-6 of this code;

(2) A license inspection for a nursing home, which shall be conducted at least once every 15 months, if the nursing home has not applied for and received an exemption from the requirement as provided for in this section;

(3) The director, by the director's authorized employees or agents, shall conduct at least one inspection prior to issuance of a license pursuant to §16B-4-6 of this code, and shall conduct periodic unannounced inspections thereafter, to determine compliance by the nursing home with applicable rules promulgated thereunder. All facilities shall comply with regulations of the State Fire Commission. The State Fire Marshal, by his or her employees or authorized agents, shall make all fire, safety, and like inspections. The director may provide for such other inspections as the director may deem necessary to carry out the intent and purpose of this article. Any nursing home aggrieved by a determination or assessment made pursuant to this section, shall have the right to an administrative appeal as set forth in §16B-4-12 of this code;

(4) A complaint inspection based on a complaint received by the director. If, after investigation of a complaint, the director determines that the complaint is substantiated, the director may invoke any applicable remedies available pursuant to §16B-4-11 of this code.

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§16B-4-9a. Exemptions.

(a) The director may grant an exemption from a license inspection if a nursing home was found to be in substantial compliance with the provisions of this chapter at its most recent inspection and there have been no substantiated complaints thereafter. The director may not grant more than one exemption in any two-year period.

(b) The director may grant an exemption to the extent allowable by federal law from a standard survey, only if the nursing home was found to be in substantial compliance with certification participation requirements at its previous standard inspection and there have been no substantiated complaints thereafter.

(c) The director may grant an exemption from periodic license inspections if a nursing home receives accreditation by an accrediting body approved by the director and submits a complete copy of the accreditation report. The accrediting body shall identify quality of care measures that assure continued quality care of residents. The director may not grant more than one exemption in any two-year period.

(d) If a complaint is substantiated, the director has the authority to immediately remove the exemption.

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§16B-4-10. Reports of inspections; plans of correction; assessment of penalties and use of funds derived therefrom; hearings.

(a) Reports of all inspections made pursuant to §16B-4-8 and §16B-4-9 of this code shall be in writing and filed with the director and shall list all deficiencies in the nursing home's compliance with the provisions of this article and the rules adopted hereunder.

(1) No later than 10 working days following the last day of the inspection, the director shall transmit to the nursing home a copy of such report and shall specify a time within which the nursing home shall submit a plan for correction of such deficiencies.

(2) Additionally, notification of the availability of the independent informal dispute resolution process and an explanation of the independent informal dispute resolution process shall be included in the transmittal.

(3) A nursing home adversely affected by an order or citation of a deficient practice issued pursuant to this section may request the independent informal dispute resolution process contained in §16B-4-12a of this code.

(4) The plan submitted by the nursing home shall be approved, rejected, or modified by the director.

(5) The inspectors or the nursing home shall allow audio taping of the exit conference with the expense to be paid by the requesting party.

(b) With regard to a nursing home with deficiencies and upon its failure to submit a plan of correction which is approved by the director, or to correct any deficiency within the time specified in an approved plan of correction, the director, in consultation with the Inspector General, may assess civil penalties as hereinafter provided or may initiate any other legal or disciplinary action as provided by this article: *Provided*, That any action by the director shall be stayed until federal proceedings arising from the same deficiencies are concluded.

(c) Nothing in this section may be construed to prohibit the director from enforcing a rule, administratively or in court, without first affording formal opportunity to make correction under this section, where, in the opinion of the director, the violation of the rule jeopardizes the health or safety of residents, or where the violation of the rule is the second or subsequent such violation occurring during a period of 12 full months.

(d) Civil penalties assessed against nursing home shall not be less than $50 nor more than $8,000: *Provided*, That the director, in consultation with the Inspector General, may not assess a penalty under state licensure for the same deficiency or violation cited under federal law and may not assess a penalty against a nursing home if the nursing home corrects the deficiency within 20 days of receipt of written notice of the deficiency unless it is a repeat deficiency or the nursing home is a poor performer.

(e) In determining whether to assess a penalty, and the amount of penalty to be assessed,

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the director, in consultation with the Inspector General shall consider:

(1) How serious the noncompliance is in relation to direct resident care and safety;

(2) The number of residents the noncompliance is likely to affect;

(3) Whether the noncompliance was noncompliance during a previous inspection;

(4) The opportunity the nursing home has had to correct the noncompliance; and

(5) Any additional factors that may be relevant.

(f) The range of civil penalties shall be as follows:

(1) For a deficiency which presents immediate jeopardy to the health, safety, or welfare of one or more residents, the director, in consultation with the Inspector General, may impose a civil penalty of not less than $3,000 nor more than $8,000;

(2) For a deficiency which actually harms one or more residents, the director, in consultation with the Inspector General, may impose a civil penalty of not less than $1,000 nor more than $3,000;

(3) For a deficiency which has the potential to harm one or more residents, the director, in consultation with the Inspector General, may impose a civil penalty of not less than $50 nor more than $1,000;

(4) For a repeated deficiency, the director, in consultation with the Inspector General, may impose a civil penalty of up to 150 percent of the penalties provided in §16B-4-10(f)(1) through §16B-4-10(f)(3) of this code; and

(5) If no plan of correction is submitted as established in this rule, a penalty may be assessed in the amount of $100 a day unless a reasonable explanation has been provided and accepted by the director, in consultation with the Inspector General.

(g) The director, in consultation with the Inspector General, shall assess a civil penalty of not more than $1,000 against an individual who willfully and knowingly certifies a material and false statement in a resident assessment. Such penalty shall be imposed with respect to each such resident assessment. The director, in consultation with the Inspector General, shall impose a civil penalty of not more than $5,000 against an individual who willfully and knowingly causes another individual to certify a material and false statement in a resident assessment. Such penalty shall be imposed with respect to each such resident assessment.

(h) The director, in consultation with the Inspector General, shall assess a civil penalty of not more than $2,000 against any individual who notifies, or causes to be notified, a nursing home of the time or date on which an inspection is scheduled to be conducted under this article or under 42 U.S.C.A. §§ 1395 *et seq.* and 1396 *et seq.*

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(i) If the director, in consultation with the Inspector General, assesses a penalty under this section, the director shall cause delivery of notice of such penalty by personal service or by certified mail. Said notice shall state the amount of the penalty, the action or circumstance for which the penalty is assessed, the requirement that the action or circumstance violates, and the basis upon which the director, in consultation with the Inspector General, assessed the penalty and selected the amount of the penalty.

(j) The Inspector General shall, in a civil judicial proceeding, recover any unpaid assessment which has not been contested under §16B-4-12 of this code within 30 days of receipt of notice of such assessment, or which has been affirmed under the provisions of that section and not appealed within 30 days of receipt of the Board of Review's final order, or which has been affirmed on judicial review, as provided in §16B-4-13 of this code. All money collected by assessments of civil penalties or interest shall be paid into a special resident benefit account and shall be applied by the Inspector General for:

(1) The protection of the health or property of facility residents;

(2) Long-term care educational activities;

(3) The costs arising from the relocation of residents to other nursing homes when no other funds are available; and

(4) In an emergency situation in which there are no other funds available, the operation of a facility pending correction of deficiencies or closure.

(k) The opportunity for a hearing on an action taken under this section shall be as provided in §16B-4-12 of this code.

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§16B-4-11. Ban on admissions; closure; transfer of residents; appointment of temporary management; assessment of interest; collection of assessments; promulgation of rules to conform with federal requirements.

(a) The director, in consultation with the Inspector General, may reduce the bed quota of the nursing home or impose a ban on new admissions, where he or she finds upon inspection of the nursing home that the licensee is not providing adequate care under the nursing home's existing bed quota, and that reduction in quota or ban on new admissions, or both, would place the licensee in a position to render adequate care. A reduction in bed quota or a ban on new admissions, or both, may remain in effect until the nursing home is determined by the director to be in substantial compliance with the rules. In addition, the director shall determine that the facility has the management capability to ensure continued substantial compliance with all applicable requirements. The director, in consultation with the Inspector General, shall evaluate the continuation of the admissions ban or reduction in bed quota on a continuing basis, and may make a partial lifting of the admissions ban or reduction in bed quota consistent with the purposes of this section. If the residents of the facility are in immediate jeopardy of their health, safety, welfare, or rights, the Inspector General may seek an order to transfer residents out of the nursing home as provided for in §16B-4-11(d) of this code. Any notice to a licensee of reduction in bed quota or a ban on new admissions shall include the terms of such order, the reasons therefor, and a date set for compliance.

(b) The director, in consultation with the Inspector General, may deny, limit, suspend, or revoke a license issued under this article or take other action as set forth in this section, if he or she finds upon inspection that there has been a substantial failure to comply with the provisions of this article or the standards or rules promulgated pursuant hereto.

(c) The suspension, expiration, forfeiture, or cancellation by operation of law or order of a license issued by the director, or the withdrawal of an application for a license after it has been filed with the director, may not deprive the director, in consultation with the Inspector General, of the authority to institute or continue a disciplinary proceeding, or a proceeding for the denial of a license application, against the licensee or applicant upon any ground provided by law or to enter an order denying the license application, suspending, or revoking the license, or otherwise taking disciplinary action on any such ground.

(d) In addition to other remedies provided in this article, upon petition from the Inspector General, a circuit court in the county in which a facility is located, or in Kanawha County if emergency circumstances occur, may determine that a nursing home’s deficiencies under this article, or under 42 U.S.C.A. §§ 1395 *et seq*. and 1396 *et seq.*, if applicable, constitute an emergency immediately jeopardizing the health, safety, welfare, or rights of its residents, and issue an order to:

(1) Close the nursing home;

(2) Transfer residents in the nursing home to other nursing homes; or

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(3) Appoint temporary management to oversee the operation of the facility and to assure the health, safety, welfare, and rights of the nursing home's residents, where there is a need for temporary management while:

(A) There is an orderly closure of the facility; or

(B) Improvements are made in order to bring the nursing home into compliance with all the applicable requirements of this article and, if applicable, 42 U.S.C.A. §§ 1395 *et seq*. and 1396 *et seq*.

If the Inspector General petitions a circuit court for the closure of a nursing home, the transfer of residents, or the appointment of temporary management, the circuit court shall hold a hearing no later than seven days thereafter, at which time the Inspector General and the licensee or operator of the nursing home may participate and present evidence. The burden of proof is on the Inspector General.

A circuit court may divest the licensee or operator of possession and control of a nursing home in favor of temporary management. The temporary management shall be responsible to the court and shall have such powers and duties as the court may grant to direct all acts necessary or appropriate to conserve the property and promote the health, safety, welfare, and rights of the residents of the nursing home, including, but not limited to, the replacement of management and staff, the hiring of consultants, the making of any necessary expenditures to close the nursing home, or to repair or improve the nursing home so as to return it to compliance with applicable requirements, and the power to receive, conserve, and expend funds, including Medicare, Medicaid, and other payments on behalf of the licensee or operator of the nursing home. Priority shall be given to expenditures for current direct resident care or the transfer of residents. Expenditures other than normal operating expenses totaling more than $20,000 shall be approved by the circuit court.

The person charged with temporary management shall be an officer of the court, is not liable for conditions at the nursing home which existed or originated prior to his or her appointment, and is not personally liable, except for his or her own gross negligence and intentional acts which result in injuries to persons or damage to property at the nursing home during his or her temporary management. All compensation and per diem costs of the temporary manager shall be paid by the nursing home. The costs for the temporary manager for any 30-day period may not exceed the 75th percentile of the allowable administrator's salary as reported on the most recent cost report for the nursing home's peer group as determined by the director. The temporary manager shall bill the nursing home for compensation and per diem costs. Within 15 days of receipt of the bill, the nursing home shall pay the bill or contest the costs for which it was billed to the court. Such costs shall be recoverable through recoupment from future reimbursement from the state Medicaid agency in the same fashion as a benefits overpayment.

The temporary management shall promptly employ at least one person who is licensed as a nursing home administrator in West Virginia.

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A temporary management established for the purpose of making improvements in order to bring a nursing home into compliance with applicable requirements may not be terminated until the court has determined that the nursing home has the management capability to ensure continued compliance with all applicable requirements, except if the court has not made such determination within six months of the establishment of the temporary management, the temporary management terminates by operation of law at that time, and the nursing home shall be closed. After the termination of the temporary management, the person who was responsible for the temporary management shall make an accounting to the court, and after deducting from receipts the costs of the temporary management, expenditures, civil penalties, and interest no longer subject to appeal, in that order, any excess shall be paid to the licensee or operator of the nursing home.

(e) The assessments for penalties and for costs of actions taken under this article shall have interest assessed at five percent per annum beginning 30 days after receipt of notice of such assessment or 30 days after receipt of the Board of Review's final order following a hearing, whichever is later. All such assessments against a nursing home that are unpaid shall be added to the nursing home's licensure fee and may be filed as a lien against the property of the licensee or operator of the nursing home. Funds received from such assessments shall be deposited as funds received in §16B-4-10 of this code.

(f) The opportunity for a hearing on an action by the Inspector General taken under this section shall be as provided in §16B-4-12 of this code.

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§16B-4-12. License denial, limitation, suspension, or revocation.

(a) The director, in consultation with the Inspector General, shall deny, limit, suspend, or revoke a license issued if the provisions of this article or if the rules promulgated pursuant to this article are violated. The director, in consultation with the Inspector General, may revoke a nursing home's license and prohibit all physicians and licensed disciplines associated with that nursing home from practicing at the nursing home location based upon an annual, periodic, complaint, verification, or other inspection and evaluation.

(b) Before any such license is denied, limited, suspended, or revoked, however, written notice shall be given to the licensee, stating the grounds for such denial, limitation, suspension, or revocation.

(c) An applicant or licensee has 10 working days after receipt of the order denying, limiting, suspending, or revoking a license to request a formal hearing contesting the denial, limitation, suspension, or revocation of a license under this article. If a formal hearing is requested, the applicant or licensee and the director shall proceed in accordance with the provisions of §29A-5-1 *et seq*. of this code.

(d) If a license is denied or revoked as herein provided, a new application for license shall be considered by the director if, when, and after the conditions upon which the denial or revocation was based have been corrected and evidence of this fact has been furnished. A new license shall then be granted after proper inspection, if applicable, has been made and all provisions of this article and rules promulgated pursuant to this article have been satisfied.

(e) If the license of a nursing home is denied, limited, suspended, or revoked, the administrator or owner or lessor of the nursing home property shall cease to operate the facility as a nursing home as of the effective date of the denial, limitation, suspension, or revocation. The owner or lessor of the nursing home property is responsible for removing all signs and symbols identifying the premises as a nursing home within 30 days. Any administrative appeal of such denial, limitation, suspension, or revocation shall not stay the denial, limitation, suspension, or revocation.

(f) Upon the effective date of the denial, limitation, suspension, or revocation, the administrator of the nursing home shall advise the director and the Board of Pharmacy of the disposition of all medications located on the premises. The disposition is subject to the supervision and approval of the director. Medications that are purchased or held by a nursing home that is not licensed may be deemed adulterated.

(g) The period of suspension for the license of a nursing home shall be prescribed by the director but may not exceed one year.

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§16B-4-12a. Independent informal dispute resolution.

(a) A facility or licensee adversely affected by an order or citation of a deficient practice issued pursuant to this article or by a citation issued for a deficient practice pursuant to federal law may request the independent informal dispute resolution process. A facility may contest a cited deficiency as contrary to law or unwarranted by the facts or both.

(b) The director shall contract with up to three independent review organizations to conduct an independent informal dispute resolution process for facilities. The independent review organization shall be accredited by the Utilization Review Accreditation Commission.

(c) The independent informal dispute resolution process is not a formal evidentiary proceeding and utilizing the independent informal dispute resolution process does not waive the facility's right to a formal hearing.

(d) The independent informal dispute resolution process consists of the following:

(1) No later than 10 working days following the last day of the survey or inspection, or no later than 20 working days following the last day of a complaint investigation, the director shall transmit to the facility a statement of deficiencies committed by the facility. Notification of the availability of the independent informal dispute resolution process and an explanation of the independent informal dispute resolution process shall be included in the transmittal;

(2) When the facility returns its plan to correct the cited deficiencies to the director, the facility may request in writing the independent informal dispute resolution process to refute the cited deficiencies;

(3) Within five working days of receipt of the written request for the independent informal dispute resolution process made by a facility, the director shall refer the request to an independent review organization from the list of certified independent review organizations approved by the state. The director shall vary the selection of the independent review organization on a rotating basis. The director shall acknowledge in writing to the facility that the request for independent review has been received and forwarded to an independent review organization for review. The notice shall include the name and address of the independent review organization.

(4) Within 10 working days of receipt of the written request for the independent informal dispute resolution process made by a facility, the independent review organization shall hold an independent informal dispute resolution conference unless additional time is requested by the facility. Before the independent informal dispute resolution conference, the facility may submit additional information.

(5) The facility may not be accompanied by counsel during the independent informal dispute resolution conference. The manner in which the independent informal dispute resolution

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conference is held is at the discretion of the facility, but is limited to:

(A) A desk review of written information submitted by the facility;

(B) A telephonic conference; or

(C) A face-to-face conference held at the facility or a mutually agreed upon location.

(6) If the independent review organization determines the need for additional information, clarification, or discussion after conclusion of the independent informal dispute resolution conference, the director and the facility shall present the requested information.

(7) Within 10 calendar days of the independent informal dispute resolution conference, the independent review organization shall provide and make a determination, based upon the facts and findings presented, and shall transmit a written decision containing the rationale for its determination to the facility and the director.

(8) If the director disagrees with the determination, the director may reject the determination made by the independent review organization and shall issue an order setting forth the rationale for the reversal of the independent review organization's decision to the facility within 10 calendar days of receiving the independent review organization's determination.

(9) If the director accepts the determination, the director shall issue an order affirming the independent review organization's determination within 10 calendar days of receiving the independent review organization's determination.

(10) If the independent review organization determines that the original statement of deficiencies should be changed as a result of the independent informal dispute resolution process and the director accepts the determination, the director shall transmit a revised statement of deficiencies to the facility within 10 calendar days of the independent review organization’s determination.

(11) Within 10 calendar days of receipt of the director’s order and the revised statement of deficiencies, the facility shall submit a revised plan to correct any remaining deficiencies to the director.

(e) A facility has 10 calendar days after receipt of the director’s order to request a formal hearing for any deficient practice cited under this article. If the facility requests a formal hearing, the director and the facility shall proceed in accordance with the provisions of §29A-5-1 *et seq*. of this code.

(f) Under the following circumstances, the facility is responsible for certain costs of the independent informal dispute resolution review, which shall be remitted to the director within 60 days of the informal hearing order:

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(1) If the facility requests a face-to-face conference, the facility shall pay any costs incurred by the independent review organization that exceed the cost of a telephonic conference, regardless of which part ultimately prevails.

(2) If the independent review organization's decision supports the originally written contested deficiency or adverse action taken by the director, the facility shall reimburse the director for the cost charged by the independent review organization. If the independent review organization's decision supports some of the originally written contested deficiencies, but not all of them, the facility shall reimburse the director for the cost charged by the independent review organization on a pro rata basis.

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§16B-4-13. Judicial review.

(a) Any applicant or licensee who is dissatisfied with the decision of the formal hearing as a result of the hearing provided for in §16B-4-12 of this code may, within 30 days after receiving notice of the decision, petition the West Virginia Intermediate Court of Appeals for judicial review of the decision.

(b) The court may affirm, modify, or reverse the decision of the Board of Review and either the applicant, licensee, or Inspector General may appeal from the court's decision to the Supreme Court of Appeals.

(c) The judgment of the West Virginia Intermediate Court of Appeals shall be final unless reversed, vacated, or modified on appeal to the Supreme Court of Appeals in accordance with the provisions of §29A-6-1 *et seq*. of this code.

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§16B-4-14. Legal counsel and services of the Inspector General.

(a) Legal counsel and services for the Office of Health Facility Licensure and Certification in all administrative hearings may be provided by the Attorney General or a staff attorney and all proceedings in any circuit court and the Supreme Court of Appeals shall be provided by the Attorney General, or his or her assistants, or an attorney employed by the Inspector General in proceedings in any circuit court, by the prosecuting attorney of the county as well, all without additional compensation.

(b) The Governor may appoint counsel for the Office of Health Facility Licensure and Certification, who shall perform such legal services in representing the interests of residents in nursing homes in matters under the jurisdiction of the Inspector General as the Governor shall direct. It shall be the duty of such counsel to appear for the residents in all cases where they are not represented by counsel. The compensation of such counsel shall be fixed by the Governor.

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§16B-4-15. Unlawful acts; penalties; injunctions; private right of action.

(a) Whoever establishes, maintains, or is engaged in establishing or maintaining a nursing home without a license granted under §16B-4-6 of this code, or who prevents, interferes with or impedes in any way the lawful enforcement of this article, is guilty of a misdemeanor and, upon conviction thereof, shall be punished for the first offense by a fine of not more than $100, or by confinement in jail for a period of not more than 90 days, or by both fine and confinement, at the discretion of the court. For each subsequent offense, the fine may be increased to not more than $250, with confinement in jail for a period of not more than 90 days, or by both fine and confinement, at the discretion of the court. Each day of a continuing violation after conviction is considered a separate offense.

(b) The director, in consultation with the Inspector General, may in his or her discretion bring an action to enforce compliance with this article or any rule or order hereunder whenever it appears to the director, in consultation with the Inspector General, that any person has engaged in, or is engaging in, an act or practice in violation of this article or any rule or order hereunder, or whenever it appears to the director, in consultation with the Inspector General, that any person has aided, abetted or caused, or is aiding, abetting, or causing, such an act or practice. Upon application by the Inspector General, the circuit court of the county in which the conduct has occurred or is occurring, or if emergency circumstances occur the Circuit Court of Kanawha County, has jurisdiction to grant without bond a permanent or temporary injunction, decree, or restraining order.

Whenever the director, in consultation with the Inspector General, has refused to grant or renew a license, or has revoked a license required by law to operate or conduct a nursing home, or has ordered a person to refrain from conduct violating the rules of the Inspector General, and the person has appealed the action of the director, the court may, during pendency of the appeal, issue a restraining order or injunction upon proof that the operation of the nursing home or its failure to comply with the order of the director adversely affects the well-being or safety of the residents of the nursing home. Should a person who is refused a license or the renewal of a license to operate or conduct a nursing home or whose license to operate is revoked or who has been ordered to refrain from conduct or activity which violates the rules of the Inspector General fails to appeal or should the appeal be decided favorably to the Inspector General, then the court shall issue a permanent injunction upon proof that the person is operating or conducting a nursing home without a license as required by law, or has continued to violate the rules of the Inspector General.

(c) Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries suffered as a result of such deprivation. Upon a finding that a resident has been deprived of such a right or benefit, and that the resident has been injured as a result of such deprivation, and unless there is a finding that the nursing home exercised all care reasonably necessary to prevent and limit the deprivation and injury to the resident, compensatory damages shall be assessed in an amount sufficient to compensate the resident for such injury. In addition,

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where the deprivation of the right or benefit is found to have been willful or in reckless disregard of the lawful rights of the resident, punitive damages may be assessed. A resident may also maintain an action pursuant to this section for any other type of relief, including injunctive and declaratory relief, permitted by law. Exhaustion of any available administrative remedies is not required prior to commencement of suit under this subsection.

(d) The amount of damages recovered by a resident, in an action brought pursuant to this section, is exempt for purposes of determining initial or continuing eligibility for medical assistance under §9-5-1 *et seq.* of this code, and may neither be taken into consideration, nor required to be applied toward the payment or part payment of the cost of medical care or services available under that article.

(e) Any waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, is void as contrary to public policy.

(f) The penalties and remedies provided in this section are cumulative and are in addition to all other penalties and remedies provided by law.

(g) Nothing in this section or any other section of the code shall limit the protections afforded nursing homes or their health care providers under §55-7b-1 *et seq*. of this code. Nursing homes and their health care providers shall be treated in the same manner as any other health care facility or health care provider under §55-7b-1 *et seq*. of this code. The terms "health care facility" and "health care provider" as used in this subsection shall have the same meaning as set forth in §55-7b-2(f) and (g) of this code.

(h) The proper construction of this section and the limitations and provisions of §55-7b-1 *et seq.* of this code shall be determined by principles of statutory construction.

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§16B-4-16. Separate accounts for residents' personal funds; consent for use; records; penalties.

(a) Each nursing home subject to the provisions of this article shall hold in a separate account and in trust each resident's personal funds deposited with the nursing home.

(b) No person may use or cause to be used for any purpose the personal funds of any resident admitted to any such nursing home unless consent for the use thereof has been obtained from the resident, or from a committee, or guardian, or relative.

(c) Each nursing home shall maintain a true and complete record of all receipts for any disbursements from the personal funds account of each resident in the nursing home, including the purpose and payee of each disbursement, and shall render a true account of such record to the resident or his or her representative upon demand and upon termination of the resident's stay in the nursing home.

(d) Any person or corporation who violates any subsection of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned in jail not more than one year, or both fined and imprisoned.

(e) Reports provided to review organizations are confidential unless inaccessibility of information interferes with the director's ability to perform his or her oversight function as mandated by federal regulations and this section.

(f) Notwithstanding §16B-4-16(b) or any other provision of this code, upon the death of a resident, any funds remaining in his or her personal account shall be made payable to the person or probate jurisdiction administering the estate of said resident: *Provided*, That if after 30 days there has been no qualification over the decedent resident's estate, those funds are presumed abandoned and are reportable to the State Treasurer pursuant to the West Virginia Uniform Unclaimed Property Act, §36-8-1 *et seq*. of this code.

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§16B-4-17. Federal law; legislative rules.

Notwithstanding any provision in this code to the contrary, the Inspector General shall promulgate legislative rules, in compliance with the provisions of §29A-3-1 *et seq*. of this code, pertaining to nursing homes, when those rules are required for compliance with federal law or regulations. The rules may be filed as emergency rules.

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§16B-4-18. Hospice palliative care required to be offered.

(a) When the health status of a nursing home facility resident declines to the state of terminal illness or when the resident receives a physician’s order for "comfort measures only", the facility shall notify the resident with information about the option of receiving hospice palliative care. If a nursing home resident is incapacitated, the facility shall also notify any person who has been given the authority of guardian, a medical power of attorney, or health care surrogate over the resident, information stating that the resident has the option of receiving hospice palliative care.

(b) The facility shall document that it has notified the resident, and any person who has been given a medical power of attorney or health care surrogate over the resident, information about the option of hospice palliative care and maintain the documentation so that the director may inspect the documentation, to verify the facility has complied with this section.

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§16B-4-19. Employment restrictions.

All personnel of a nursing home by virtue of ownership, employment, engagement, or agreement with a provider or contractor shall be subject to the provisions of the West Virginia Clearance for Access: Registry and Employment Screening Act, §16B-15-1 *et seq*. of this code and the rules promulgated pursuant thereto.

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§16B-4-20. Jury trial waiver to be a separate document.

(a) Every written agreement containing a waiver of a right to a trial by jury that is entered into between a nursing home and a person for the nursing care of a resident, must have as a separate and stand-alone document any waiver of a right to a trial by jury.

(b) Nothing in this section may be construed to require a court of competent jurisdiction to determine that the entire agreement or any portion thereof is enforceable, unenforceable, conscionable, or unconscionable.

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