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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1997



ENROLLED

HOUSE BILL No. 2776

(By Delegates Douglas and Compton)



Passed April 12, 1997

In Effect Ninety Days From Passage

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ENROLLED
H. B. 2776

(BY DELEGATES DOUGLAS AND COMPTON)

[Passed April 12, 1997; in effect ninety days from passage.]

AN ACT to amend and reenact sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to further amend said article by adding thereto a new section, designated section nine-a; to amend said chapter by adding thereto a new article, designated article five-d; to amend and reenact sections one, two, three, five and six, article five-e of said chapter; to further amend said article by adding thereto a new section, designated section one-a; and to amend and reenact article five-h of said chapter, all relating to the licensure of nursing homes, personal care homes and residential board and care homes; requiring the registration of and authorizing the inspection of legally unlicensed health care homes; stating the purposes; defining terms; specifying the powers and duties of the director of the division of health; authorizing administrative and inspection staff; authorizing the proposal of legislative rules and requiring rules establishing minimum standards of operation; requiring licenses; establishing fees; requiring cost disclosure and surety for residents' funds; investigating complaints; inspecting and reporting of inspections; requiring plans of correction; assessing penalties and attorneys' costs and using funds derived therefrom; providing the opportunity for hearings; limiting suspending and revoking licenses; banning admissions; continuing disciplinary proceedings; closing homes and transferring

residents; appointing temporary management; assessing interest; collecting assessments; allowing administrative appeals and judicial review; providing legal counsel; specifying unlawful acts; providing for civil and criminal penalties, injunctions and private rights of action; making available inspection reports and records; making a registry of service providers available to the public; continuing licenses and rules; and establishing requirements for accounting for residents' personal funds.

Be it enacted by the Legislature of West Virginia:

That sections one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, fourteen, fifteen, sixteen, seventeen and eighteen, article five-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that said article be further amended by adding thereto a new section, designated section nine-a; that said chapter be further amended by adding thereto a new article, designated article five-d; that sections one, two, three, five and six, article five-e of said chapter be amended and reenacted; that said article be further amended by adding thereto a new section, designated section one-a; and that article five-h of said chapter be amended and reenacted, all to read as follows:

ARTICLE 5C. NURSING HOMES.

§16-5C-1. Purpose.

1 It is the policy of this state to encourage and promote
2 the development and utilization of resources to ensure the
3 effective and financially efficient care and treatment of
4 persons who are convalescing or whose physical or mental
5 condition requires them to receive a degree of nursing or
6 related health care greater than that necessary for well
7 individuals. Such care and treatment require a living
8 environment for such persons which, to the extent
9 practicable, will approximate a normal home environment.
10 To this end, the guiding principle for administration of the
11 laws of the state is that such persons shall be encouraged
12 and assisted in securing necessary care and treatment in
13 noninstitutional surroundings. In recognition that for
14 many such persons effective care and treatment can only
15 be secured from proprietary, voluntary and governmental

16 nursing homes it is the policy of this state to encourage,
17 promote and require the maintenance of nursing homes so
18 as to ensure protection of the rights and dignity of those
19 using the services of such facilities.

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

§16-5C-2. Definitions.

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

3 (a) “Deficiency” means a nursing home’s failure to
4 meet the requirements specified in article five-c, chapter
5 sixteen of this code and rules promulgated thereunder.

6 (b) “Director” means the secretary of the
7 department of health and human resources or his or her
8 designee.

9 (c) “Household” means a private home or residence
10 which is separate from or unattached to a nursing home.

11 (d) “Immediate jeopardy” means a situation in
12 which the nursing home’s noncompliance with one or
13 more of the provisions of this article or rules promulgated
14 thereunder has caused or is likely to cause serious harm,
15 impairment or death to a resident.

16 (e) “Nursing home” or “facility” means any
17 institution, residence or place, or any part or unit thereof,
18 however named, in this state which is advertised, offered,
19 maintained or operated by the ownership or management,
20 whether for a consideration or not, for the express or
21 implied purpose of providing accommodations and care,
22 for a period of more than twenty-four hours, for four or
23 more persons who are ill or otherwise incapacitated and in
24 need of extensive, ongoing nursing care due to physical or
25 mental impairment or which provides services for the
26 rehabilitation of persons who are convalescing from illness
27 or incapacitation.

28 The care or treatment in a household, whether for
29 compensation or not, of any person related by blood or

30 marriage, within the degree of consanguinity of second
31 cousin to the head of the household, or his or her spouse,
32 may not be deemed to constitute a nursing home within
33 the meaning of this article. Nothing contained in this
34 article applies to nursing homes operated by the federal
35 government; or extended care facilities operated in
36 conjunction with a hospital; or institutions operated for the
37 treatment and care of alcoholic patients; or offices of
38 physicians; or hotels, boarding homes or other similar
39 places that furnish to their guests only room and board; or
40 to homes or asylums operated by fraternal orders pursuant
41 to article three, chapter thirty-five of this code.

42 (f) "Nursing care" means those procedures
43 commonly employed in providing for the physical,
44 emotional and rehabilitational needs of the ill or otherwise
45 incapacitated which require technical skills and knowledge
46 beyond that which the untrained person possesses,
47 including, but not limited to, such procedures as:
48 Irrigations, catheterization, special procedure contributing
49 to rehabilitation, and administration of medication by any
50 method which involves a level of complexity and skill in
51 administration not possessed by the untrained person.

52 (g) "Resident" means an individual living in a
53 nursing home.

54 (h) "Review organization" means any committee or
55 organization engaging in peer review or quality assurance,
56 including, but not limited to, a medical audit committee, a
57 health insurance review committee, a professional health
58 service plan review committee or organization, a dental
59 review committee, a physician's advisory committee, a
60 podiatry advisory committee, a nursing advisory
61 committee, any committee or organization established
62 pursuant to a medical assistance program, any committee
63 or organization established or required under state or
64 federal statutes, rules or regulations, and any committee
65 established by one or more state or local professional
66 societies or institutes, to gather and review information
67 relating to the care and treatment of residents for the
68 purposes of: (1) Evaluating and improving the quality of
69 health care rendered; (2) reducing morbidity or mortality;

70 or (3) establishing and enforcing guidelines designed to
71 keep within reasonable bounds the cost of health care.

72 (i) "Sponsor" means the person or agency legally
73 responsible for the welfare and support of a resident.

74 (j) "Person" means an individual and every form of
75 organization, whether incorporated or unincorporated,
76 including any partnership, corporation, trust, association
77 or political subdivision of the state.

78 (k) "Substantial compliance" means a level of
79 compliance with the rules such that no deficiencies exist or
80 such that identified deficiencies pose no greater risk to
81 resident health or safety than the potential for causing
82 minimal harm.

83 The director may define in the rules any term used
84 herein which is not expressly defined.

§16-5C-3. Powers, duties and rights of director.

1 In the administration of this article, the director shall
2 have the following powers, duties and rights:

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

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

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

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

17 (e) To receive and disburse for authorized purposes
18 any moneys appropriated to the division of health by the
19 Legislature;

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

25 (g) To make contracts, and to execute all instruments
26 necessary or convenient in carrying out the director's
27 functions and duties; and all such contracts, agreements
28 and instruments shall be executed by the director;

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

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

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

38 (k) To assess civil penalties for violations of facility
39 standards, in accordance with section ten of this article;

40 (l) To inspect any nursing home and any records
41 maintained therein that are necessary to determine
42 compliance with licensure laws or medicare or medicaid
43 certification, subject to the provisions of section ten of this
44 article;

45 (m) To establish and implement procedures,
46 including informal conferences, investigations and
47 hearings, subject to applicable provisions of article three,
48 chapter twenty-nine-a of this code, and to enforce
49 compliance with the provisions of this article and with
50 rules issued hereunder;

51 (n) To subpoena witnesses and documents,
52 administer oaths and affirmations, and to examine
53 witnesses under oath for the conduct of any investigation
54 or hearing. Upon failure of a person without lawful
55 excuse to obey a subpoena to give testimony and upon
56 reasonable notice to all persons affected thereby, the

57 director may apply to the circuit court of the county in
58 which the hearing is to be held for an order compelling
59 compliance;

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

74 (p) To delegate authority to the director's employees
75 and agents to perform all functions of the director except
76 the making of final decisions in adjudications;

77 (q) To submit an annual report to the governor, the
78 Legislature and the public sixty days before the governor
79 is required to submit an annual budget report to the
80 Legislature. The report shall describe the licensing and
81 investigatory activities of the department during the year,
82 and the nature and status of other activities of the
83 department, and may include comment on the acts,
84 policies, practices or procedures of any public or private
85 agency that effect the rights, health or welfare of residents
86 of nursing homes. The annual report shall include a list
87 of all nursing homes in the state, whether such homes are
88 proprietary or nonproprietary; the name of the owner or
89 owners; the total number of beds; the number of private
90 and semiprivate rooms; the costs per diem for private
91 residents; the number of full-time employees and their
92 professions; recreational programs; services and programs
93 available as well as the costs thereof; and whether or not
94 those nursing homes listed accept medicare and medicaid
95 residents. The report shall also contain the department's
96 recommendations as to changes in law or policy which it

97 deems necessary or appropriate for the protection of the
98 rights, health or welfare of residents of nursing homes in
99 the state;

100 (r) To establish a formal process for licensed
101 facilities to file complaints about the survey process or
102 surveyors; and

103 (s) To establish a committee to study and make a
104 recommendation to the Legislature on a central reporting
105 system for allegations of abuse.

§16-5C-4. Administrative and inspection staff.

1 The director may, at such time or times as he or she
2 may deem necessary, employ such administrative
3 employees, inspectors, or other persons as may be
4 necessary to properly carry out the provisions of this
5 article. All employees of the department shall be
6 members of the state civil service system and surveyors
7 shall be trained to perform their assigned duties. Such
8 inspectors and other employees as may be duly designated
9 by the director shall act as the director's representatives
10 and, under the direction of the director, shall enforce the
11 provisions of this article and all duly promulgated
12 regulations and, in the discharge of official duties, shall
13 have the right of entry into any place maintained as a
14 nursing home.

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

1 (a) All rules shall be proposed for legislative
2 approval in accordance with the provisions of article three,
3 chapter twenty-nine-a of this code. The director shall
4 recommend the adoption, amendment or repeal of such
5 rules as may be necessary or proper to carry out the
6 purposes and intent of this article.

7 (b) The director shall recommend rules establishing
8 minimum standards of operation of nursing homes
9 including, but not limited to, the following:

10 (1) Administrative policies, including: (A) An
11 affirmative statement of the right of access to nursing

12 homes by members of recognized community
13 organizations and community legal services programs
14 whose purposes include rendering assistance without
15 charge to residents, consistent with the right of residents to
16 privacy; and (B) a statement of the rights and
17 responsibilities of residents in nursing homes which
18 prescribe, as a minimum, such a statement of
19 residents' rights as included in the United States
20 department of health and human services regulations, in
21 force on the effective date of this article, governing
22 participation of nursing homes in the medicare and
23 medicaid programs pursuant to titles eighteen and
24 nineteen of the Social Security Act;

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

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

30 (4) Safety requirements;

31 (5) Sanitation requirements;

32 (6) Personal services to be provided;

33 (7) Dietary services to be provided;

34 (8) Medical records;

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

37 (10) Pharmacy services;

38 (11) Nursing services;

39 (12) Medical services;

40 (13) Physical facility;

41 (14) Resident rights; and

42 (15) Admission, transfer and discharge rights.

§16-5C-6. License required; application; fees; duration; renewal.

1 Subject to the provisions of section seventeen of this
2 article, no person may establish, operate, maintain, offer or
3 advertise a nursing home within this state unless and until
4 he or she obtains a valid license therefor as hereinafter
5 provided, which license remains unsuspended, unrevoked
6 and unexpired. No public official or employee may place
7 any person in, or recommend that any person be placed
8 in, or directly or indirectly cause any person to be placed
9 in, any nursing home, as defined in section two of this
10 article, which is being operated without a valid license
11 from the director. The procedure for obtaining a license
12 is as follows:

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

20 (1) The name and address of the applicant;

21 (2) The name, address and principal occupation: (A)
22 Of each person who, as a stockholder or otherwise, has a
23 proprietary interest of ten percent or more in the
24 applicant; (B) of each officer and director of a corporate
25 applicant; (C) of each trustee and beneficiary of an
26 applicant which is a trust; and (D) where a corporation has
27 a proprietary interest of twenty-five percent or more in an
28 applicant, the name, address and principal occupation of
29 each officer and director of the corporation;

30 (3) The name and address of the owner of the
31 premises of the nursing home or proposed nursing home,
32 if he or she is a different person from the applicant, and in
33 such case, the name and address: (A) Of each person who,
34 as a stockholder or otherwise, has a proprietary interest of
35 ten percent or more in the owner; (B) of each officer and
36 director of a corporate applicant; (C) of each trustee and
37 beneficiary of the owner if it is a trust; and (D) where a

38 corporation has a proprietary interest of twenty-five
39 percent or more in the owner, the name and address of
40 each officer and director of the corporation;

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

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

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

49 (7) The bed quota of the nursing home as
50 determined by the health care cost review authority;

51 (8) (A) An organizational plan for the nursing home
52 indicating the number of persons employed or to be
53 employed and the positions and duties of all employees;
54 (B) the name and address of the individual who is to serve
55 as administrator; and (C) such evidence of compliance
56 with applicable laws, and rules governing zoning,
57 buildings, safety, fire prevention and sanitation as the
58 director may require;

59 (9) A listing of other states in which the applicant
60 owns, operates or manages a nursing home or long term
61 care facility;

62 (10) Such additional information as the director may
63 require; and

64 (11) Assurances that the nursing home is in
65 compliance with the provisions of article two-d of this
66 chapter.

67 (b) Upon receipt and review of an application for
68 license made pursuant to subdivision (a) of this section,
69 and inspection of the applicant nursing home pursuant to
70 section ten of this article, the director shall issue a license
71 if he or she finds:

72 (1) That an individual applicant, and every partner,
73 trustee, officer, director and controlling person of an

74 applicant which is not an individual, is a person
75 responsible and suitable to operate or to direct or
76 participate in the operation of a nursing home by virtue of
77 financial capacity, appropriate business or professional
78 experience, a record of compliance with lawful orders of
79 the department, if any, and lack of revocation of a license
80 during the previous five years or consistent poor
81 performance in other states;

82 (2) That the facility is under the supervision of an
83 administrator who is licensed pursuant to the provisions of
84 article twenty-five, chapter thirty of this code; and

85 (3) That the facility is in substantial compliance with
86 standards established pursuant to section five of this
87 article, and such other requirements for a license as may
88 be established by rule under this article.

89 Any license granted by the director shall state the
90 maximum bed capacity for which it is granted, the date the
91 license was issued and the expiration date. Such licenses
92 shall be issued for a period not to exceed fifteen months
93 for nursing homes: *Provided*, That any license in effect
94 for which timely application for renewal, together with
95 payment of the proper fee has been made to the director
96 in conformance with the provisions of this article and the
97 rules issued thereunder, and prior to the expiration date of
98 the license, shall continue in effect until: (A) Six months
99 following the expiration date of the license; or (B) the date
100 of the revocation or suspension of the license pursuant to
101 the provisions of this article; or (C) the date of issuance of
102 a new license, whichever date first occurs. Each license
103 shall be issued only for the premises and persons named
104 in the application and is not transferable or assignable:
105 *Provided, however*, That in the case of the transfer of
106 ownership of a facility with an unexpired license, the
107 application by the proposed new owner shall be filed with
108 the director no later than thirty days before the proposed
109 date of transfer. Upon receipt of proof of the transfer of
110 ownership, the application shall have the effect of a license
111 for three months. The director shall issue or deny a
112 license within three months of the receipt of the proof of
113 the transfer of ownership. Every license shall be posted in

114 a conspicuous place in the nursing home for which it is
115 issued so as to be accessible to and in plain view of all
116 residents of and visitors to the nursing home.

117 (c) A license is renewable, conditioned upon the
118 licensee filing timely application for the extension of the
119 term of the license accompanied by the fee, and
120 contingent upon evidence of compliance with the
121 provisions of this article and rules promulgated hereunder.
122 Any application for renewal of a license shall include a
123 report by the licensee in such form and containing such
124 information as shall be prescribed by the director,
125 including the following:

126 (1) A balance sheet of the nursing home as of the
127 end of its fiscal year, setting forth assets and liabilities at
128 such date, including all capital, surplus, reserve,
129 depreciation and similar accounts;

130 (2) A statement of operations of the nursing home as
131 of the end of its fiscal year, setting forth all revenues,
132 expenses, taxes, extraordinary items and other credits or
133 charges; and

134 (3) If a nursing home is in compliance with the
135 requirements of the health care facility financial disclosure
136 act, as provided in article five-f, chapter sixteen of this
137 code, it will be considered to have met the requirements
138 established in subdivisions (1) and (2) of this subsection.

139 (4) A statement of any changes in the name, address,
140 management or ownership information on file with the
141 director. All holders of facility licenses as of the effective
142 date of this article shall include, in the first application for
143 renewal filed thereafter, such information as is required
144 for initial applicants under the provisions of subsection (a)
145 of this section.

146 (d) In the case of an application for a renewal license,
147 if all requirements of section five of this article are not
148 met, the director may at his or her discretion issue a
149 provisional license, provided that care given in the nursing
150 home is adequate for resident needs and the nursing
151 home has demonstrated improvement and evidences

152 potential for substantial compliance within the term of the
153 license: *Provided*, That a provisional license may not be
154 issued for a period greater than six months, may not be
155 renewed, and may not be issued to any nursing home that
156 is a poor performer.

157 (e) A nonrefundable application fee in the amount of
158 two hundred dollars for an original nursing home license
159 shall be paid at the time application is made for the
160 license. Direct costs of initial licensure inspections or
161 inspections for changes in licensed bed capacity shall be
162 borne by the applicant and shall be received by the
163 director prior to the issuance of an initial or amended
164 license. The license fee for renewal of a license shall be at
165 the rate of fifteen dollars per bed per year for nursing
166 homes, except the annual rate per bed may be assessed for
167 licenses issued for less than fifteen months. Annually, the
168 director may adjust the licensure fees for inflation based
169 upon the increase in the consumer price index during the
170 last twelve months. All such license fees shall be due and
171 payable to the director, annually, and in the manner set
172 forth in the rules promulgated hereunder. The fee and
173 application shall be submitted to the director who shall
174 retain both the application and fee pending final action on
175 the application. All fees received by the director under
176 the provisions of this article shall be deposited in
177 accordance with section thirteen, article one of this
178 chapter.

§16-5C-7. Cost disclosure; surety for resident funds.

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

9 (b) If the nursing home handles any money for
10 residents within the facility, the licensee or his or her
11 authorized representative shall either: (1) Give a bond; or
12 (2) obtain and maintain commercial insurance with a

13 company licensed in this state in an amount consistent
14 with this subsection and with the surety as the director
15 shall approve. The bond or insurance shall be upon
16 condition that the licensee shall hold separately and in
17 trust all residents' funds deposited with the licensee, shall
18 administer the funds on behalf of the resident in the
19 manner directed by the depositor, shall render a true and
20 complete account to the depositor and the director when
21 requested, and at least quarterly to the resident, and upon
22 termination of the deposit, shall account for all funds
23 received, expended, and held on hand. The licensee shall
24 file a bond or obtain insurance in a sum at least one and
25 twenty-five one-hundredths the average amount of funds
26 deposited with the nursing home during the nursing
27 home's previous fiscal year.

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

43 The provisions of this subsection do not apply if the
44 licensee handles less than thirty-five dollars per resident
45 per month in the aggregate.

§16-5C-8. Investigation of complaints.

1 The director shall establish rules for prompt
2 investigation of all complaints of alleged violations by
3 nursing homes of applicable requirements of state law or
4 rules, except for such complaints that the director
5 determines are willfully intended to harass a licensee or
6 are without any reasonable basis. Such procedures shall

7 include provisions for ensuring the confidentiality of the
8 complainant and for promptly informing the complainant
9 and the nursing home involved of the results of the
10 investigation.

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

15 No nursing home may discharge or in any manner
16 discriminate against any resident, legal representative or
17 employee for the reason that the resident, legal
18 representative or employee has filed a complaint or
19 participated in any proceeding specified in this article.
20 Violation of this prohibition by any nursing home
21 constitutes ground for the suspension or revocation of the
22 license of the nursing home as provided in section eleven
23 of this article. Any type of discriminatory treatment of a
24 resident, legal representative or employee by whom, or
25 upon whose behalf, a complaint has been submitted to the
26 director, or any proceeding instituted under this article,
27 within one hundred twenty days of the filing of the
28 complaint or the institution of such action, shall raise a
29 rebuttable presumption that such action was taken by the
30 nursing home in retaliation for such complaint or action.

§16-5C-9. Inspections.

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

13 (1) An initial inspection prior to the issuance of a
14 license pursuant to section six of this article;

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

20 (3) The director, by the director's authorized
21 employees or agents, shall conduct at least one inspection
22 prior to issuance of a license pursuant to section six of this
23 article, and shall conduct periodic unannounced
24 inspections thereafter, to determine compliance by the
25 nursing home with applicable rules promulgated
26 thereunder. All facilities shall comply with regulations of
27 the state fire commission. The state fire marshal, by his
28 employees or authorized agents, shall make all fire, safety
29 and like inspections. The director may provide for such
30 other inspections as the director may deem necessary to
31 carry out the intent and purpose of this article. If after
32 investigating a complaint, the director determines that the
33 complaint is substantiated and that an immediate and
34 serious threat to a consumer's health or safety exists, the
35 director may invoke any remedies available pursuant to
36 section eleven of this article. Any nursing home
37 aggrieved by a determination or assessment made
38 pursuant to this section, shall have the right to an
39 administrative appeal as set forth in section twelve of this
40 article;

41 (4) A complaint inspection based on a complaint
42 received by the director. If, after investigation of a
43 complaint, the director determines that the complaint is
44 substantiated, the director may invoke any applicable
45 remedies available pursuant to section eleven of this
46 article.

§16-5C-9a. Exemptions.

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

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

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

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

**§16-5C-10. Reports of inspections; plans of correction;
assessment of penalties and use of funds derived
therefrom; hearings.**

1 (a) Reports of all inspections made pursuant to
2 section nine of this article shall be in writing and filed with
3 the director, and shall list all deficiencies in the nursing
4 home's compliance with the provisions of this article and
5 the rules adopted hereunder. The director shall send a
6 copy of such report to the nursing home and shall specify
7 a time within which the nursing home shall submit a plan
8 for correction of such deficiencies. The plan shall be
9 approved, rejected or modified by the director. The
10 surveyors or the nursing home shall allow audio taping of
11 the exit conference with the expense to be paid by the
12 requesting party.

13 (b) With regard to a nursing home with deficiencies
14 and upon its failure to submit a plan of correction which is
15 approved by the director, or to correct any deficiency
16 within the time specified in an approved plan of
17 correction, the director may assess civil penalties as
18 hereinafter provided or may initiate any other legal or
19 disciplinary action as provided by this article: *Provided,*
20 That any action by the director shall be stayed until

21 federal proceedings arising from the same deficiencies are
22 concluded.

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

31 (d) Civil penalties assessed against nursing homes
32 shall not be less than fifty nor more than eight thousand
33 dollars: *Provided*, That the director may not assess a
34 penalty under state licensure for the same deficiency or
35 violation cited under federal law and may not assess a
36 penalty against a nursing home if the nursing home
37 corrects the deficiency within twenty days of receipt of
38 written notice of the deficiency unless it is a repeat
39 deficiency or the nursing home is a poor performer.

40 (e) In determining whether to assess a penalty, and
41 the amount of penalty to be assessed, the director shall
42 consider:

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

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

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

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

51 (5) Any additional factors that may be relevant.

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

53 (1) For a deficiency which presents immediate
54 jeopardy to the health, safety or welfare of one or more
55 residents, the director may impose a civil penalty of not

56 less than three thousand nor more than eight thousand
57 dollars;

58 (2) For a deficiency which actually harms one or
59 more residents, the director may impose a civil penalty of
60 not less than one thousand nor more than three thousand
61 dollars;

62 (3) For a deficiency which has the potential to harm
63 one or more residents, the director may impose a civil
64 penalty of not less than fifty nor more than one thousand
65 dollars;

66 (4) For a repeated deficiency, the director may
67 impose a civil penalty of up to one hundred fifty percent
68 of the penalties provided in subdivisions (1), (2) and (3)
69 of this subsection; and

70 (5) If no plan of correction is submitted as
71 established in this rule, a penalty may be assessed in the
72 amount of one hundred dollars a day unless a reasonable
73 explanation has been provided and accepted by the
74 director.

75 (g) The director shall assess a civil penalty of not
76 more than one thousand dollars against an individual who
77 willfully and knowingly certifies a material and false
78 statement in a resident assessment. Such penalty shall be
79 imposed with respect to each such resident assessment.
80 The director shall impose a civil penalty of not more than
81 five thousand dollars against an individual who willfully
82 and knowingly causes another individual to certify a
83 material and false statement in a resident assessment. Such
84 penalty shall be imposed with respect to each such resident
85 assessment.

86 (h) The director shall assess a civil penalty of not
87 more than two thousand dollars against any individual
88 who notifies, or causes to be notified, a nursing home of
89 the time or date on which an inspection is scheduled to be
90 conducted under this article or under titles eighteen or
91 nineteen of the federal Social Security Act.

92 (i) If the director assesses a penalty under this
93 section, the director shall cause delivery of notice of such

94 penalty by personal service or by certified mail. Said
95 notice shall state the amount of the penalty, the action or
96 circumstance for which the penalty is assessed, the
97 requirement that the action or circumstance violates, and
98 the basis upon which the director assessed the penalty and
99 selected the amount of the penalty.

100 (j) The director shall, in a civil judicial proceeding,
101 recover any unpaid assessment which has not been
102 contested under section twelve of this article within thirty
103 days of receipt of notice of such assessment, or which has
104 been affirmed under the provisions of that section and not
105 appealed within thirty days of receipt of the director's final
106 order, or which has been affirmed on judicial review, as
107 provided in section thirteen of this article. All money
108 collected by assessments of civil penalties or interest shall
109 be paid into a special resident benefit account and shall be
110 applied by the director for: (1) The protection of the
111 health or property of facility residents; (2) long term care
112 educational activities; (3) the costs arising from the
113 relocation of residents to other nursing homes when no
114 other funds are available; and (4) in an emergency
115 situation in which there are no other funds available, the
116 operation of a facility pending correction of deficiencies
117 or closure.

118 (k) The opportunity for a hearing on an action taken
119 under this section shall be as provided in section twelve of
120 this article.

§16-5C-11. License limitation, suspension, revocation; continuation of disciplinary proceedings; closure, transfer of residents, appointment of temporary management; assessment of interest; collection of assessments; promulgation of rules to conform with federal requirements; hearings.

1 (a) The director may reduce the bed quota of the
2 nursing home or impose a ban on new admissions, where
3 he or she finds upon inspection of the nursing home that
4 the licensee is not providing adequate care under the
5 nursing home's existing bed quota, and that reduction in
6 quota or ban on new admissions, or both, would place the
7 licensee in a position to render adequate care. A

8 reduction in bed quota or a ban on new admissions, or
9 both, may remain in effect until the nursing home is
10 determined by the director to be in substantial compliance
11 with the rules. In addition, the director shall determine
12 that the facility has the management capability to ensure
13 continued substantial compliance with all applicable
14 requirements. The director shall evaluate the continuation
15 of the admissions ban or reduction in bed quota on a
16 continuing basis, and may make a partial lifting of the
17 admissions ban or reduction in bed quota consistent with
18 the purposes of this section. If the residents of the facility
19 are in immediate jeopardy of their health, safety, welfare
20 or rights, the director may seek an order to transfer
21 residents out of the nursing home as provided for in
22 subsection (e) of this section. Any notice to a licensee of
23 reduction in bed quota or a ban on new admissions shall
24 include the terms of such order, the reasons therefor, and a
25 date set for compliance.

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

32 (c) Whenever a license is limited, suspended or
33 revoked pursuant to this section or the director imposes
34 other action set forth in this section, the director shall file a
35 complaint stating facts constituting a ground or grounds
36 for such limitation, suspension or revocation or other
37 action. Upon the filing of the complaint, the director shall
38 notify the licensee in writing of the filing of the complaint
39 within twenty days of exit conference, enclosing a copy of
40 the complaint, and shall advise the licensee of the
41 availability of a hearing pursuant to section twelve of this
42 article. Such notice and copy of the complaint shall be
43 served on such licensee by certified mail, return receipt
44 requested.

45 (d) The suspension, expiration, forfeiture or
46 cancellation by operation of law or order of the director
47 of a license issued by the director, or the withdrawal of an

48 application for a license after it has been filed with the
49 director, may not deprive the director of the director's
50 authority to institute or continue a disciplinary
51 proceeding, or a proceeding for the denial of a license
52 application, against the licensee or applicant upon any
53 ground provided by law or to enter an order denying the
54 license application or suspending or revoking the license
55 or otherwise taking disciplinary action on any such
56 ground.

57 (e) In addition to other remedies provided in this
58 article, upon petition from the director, a circuit court in
59 the county in which a facility is located, or in Kanawha
60 County if emergency circumstances occur, may
61 determine that a nursing home's deficiencies under this
62 article, or under titles eighteen or nineteen of the federal
63 Social Security Act, if applicable, constitute an emergency
64 immediately jeopardizing the health, safety, welfare or
65 rights of its residents, and issue an order to:

66 (1) Close the nursing home;

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

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

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

74 (B) Improvements are made in order to bring the
75 nursing home into compliance with all the applicable
76 requirements of this article and, if applicable, titles
77 eighteen and nineteen of the federal Social Security Act.

78 If the director petitions a circuit court for the closure
79 of a nursing home, the transfer of residents, or the
80 appointment of temporary management, the circuit court
81 shall hold a hearing no later than seven days thereafter, at
82 which time the director and the licensee or operator of the
83 facility may participate and present evidence. The burden
84 of proof is on the director.

85 A circuit court may divest the licensee or operator of
86 possession and control of a nursing home in favor of
87 temporary management. The temporary management
88 shall be responsible to the court and shall have such
89 powers and duties as the court may grant to direct all acts
90 necessary or appropriate to conserve the property and
91 promote the health, safety, welfare and rights of the
92 residents of the nursing home, including, but not limited
93 to, the replacement of management and staff, the hiring of
94 consultants, the making of any necessary expenditures to
95 close the nursing home or to repair or improve the
96 nursing home so as to return it to compliance with
97 applicable requirements, and the power to receive,
98 conserve and expend funds, including medicare, medicaid
99 and other payments on behalf of the licensee or operator
100 of the nursing home. Priority shall be given to
101 expenditures for current direct resident care or the transfer
102 of residents. Expenditures other than normal operating
103 expenses totaling more than twenty thousand dollars shall
104 be approved by the circuit court.

105 The person charged with temporary management
106 shall be an officer of the court, is not liable for conditions
107 at the nursing home which existed or originated prior to
108 his or her appointment and is not personally liable, except
109 for his or her own gross negligence and intentional acts
110 which result in injuries to persons or damage to property
111 at the nursing home during his or her temporary
112 management. All compensation and per diem costs of the
113 temporary manager shall be paid by the nursing home.
114 The costs for the temporary manager for any thirty-day
115 period may not exceed the seventy-fifth percentile of the
116 allowable administrators salary as reported on the most
117 recent cost report for the nursing home's peer group as
118 determined by the director. The temporary manager shall
119 bill the nursing home for compensation and per diem
120 costs. Within fifteen days of receipt of the bill, the nursing
121 home shall pay the bill or contest the costs for which it was
122 billed to the court. Such costs shall be recoverable
123 through recoupment from future reimbursement from the
124 state medicaid agency in the same fashion as a benefits
125 overpayment.

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

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

147 (f) The assessments for penalties and for costs of
148 actions taken under this article shall have interest assessed
149 at five percent per annum beginning thirty days after
150 receipt of notice of such assessment or thirty days after
151 receipt of the director's final order following a hearing,
152 whichever is later. All such assessments against a nursing
153 home that are unpaid shall be added to the nursing
154 home's licensure fee and may be filed as a lien against the
155 property of the licensee or operator of the nursing home.
156 Funds received from such assessments shall be deposited
157 as funds received in section ten of this article.

158 (g) The director may propose additional rules and
159 emergency rules that expand the power of the director in
160 excess of that provided in this article to the extent required
161 to comply with federal requirements, but any such rules
162 shall expand the power of the director to the minimum
163 extent required by federal requirements. Such rules are
164 subject to the provisions of article three, chapter
165 twenty-nine-a of this code.

166 (h) The opportunity for a hearing on an action by
167 the director taken under this section shall be as provided
168 in section twelve of this article.

**§16-5C-12. Administrative appeals for civil assessments,
license limitation, suspension or revocation.**

1 (a) Any licensee or applicant aggrieved by an order
2 issued pursuant to sections five, six, ten or eleven of this
3 article shall have the opportunity to request an informal
4 and formal hearing at which the licensee or applicant may
5 contest such order as contrary to law or unwarranted by
6 the facts or both. All of the pertinent provisions of article
7 five, chapter twenty-nine-a of this code shall apply to and
8 govern such hearing and the administrative procedures in
9 connection with any formal hearing.

10 The director may impose the following prior to or
11 during the pendency of a hearing:

12 (1) A reduction in the bed quota pursuant to section
13 eleven of this article;

14 (2) Transfer of residents and a ban on new
15 admissions pursuant to section eleven of this article.

16 (b) Informal hearings shall be held within twenty
17 working days of the director's receipt of timely request
18 for appeal, unless the licensee or applicant aggrieved by
19 the order consents to a postponement or continuance. In
20 no event may the informal hearing occur more than thirty
21 business days after the director receives timely request for
22 appeal. At the informal hearing, neither the licensee or
23 applicant nor the director may be represented by an
24 attorney. Within ten days of the conclusion of the
25 informal hearing, the director shall issue an informal
26 hearing order, including a basis for the decision.

27 (c) If the applicant or licensee requested a formal
28 hearing only, the director and the licensee shall proceed in
29 accordance with the provisions of the department of health
30 rules of procedure for contested case hearings and
31 declaratory rulings. If the applicant or licensee also
32 requested an informal hearing and if the order is not
33 favorable to the applicant or licensee, the director shall

34 notify the administrative hearing examiner of the request
35 for an appeal within five business days of issuing the
36 informal hearing order.

§16-5C-14. Legal counsel and services for the director.

1 (a) Legal counsel and services for the director in all
2 administrative hearings may be provided by the attorney
3 general or a staff attorney and all proceedings in any
4 circuit court and the supreme court of appeals shall be
5 provided by the attorney general, or his or her assistants,
6 or an attorney employed by the director in proceedings in
7 any circuit court by the prosecuting attorney of the
8 county as well, all without additional compensation.

9 (b) The governor may appoint counsel for the
10 director, who shall perform such legal services in
11 representing the interests of residents in nursing homes in
12 matters under the jurisdiction of the director as the
13 governor shall direct. It shall be the duty of such counsel
14 to appear for the residents in all cases where they are not
15 represented by counsel. The compensation of such
16 counsel shall be fixed by the governor.

§16-5C-15. Unlawful acts; penalties; injunctions; private right of action.

1 (a) Whoever advertises, announces, establishes or
2 maintains, or is engaged in establishing or maintaining a
3 nursing home without a license granted under section six
4 of this article, or who prevents, interferes with or impedes
5 in any way the lawful enforcement of this article shall be
6 guilty of a misdemeanor and, upon conviction thereof,
7 shall be punished for the first offense by a fine of not
8 more than one hundred dollars, or by imprisonment in the
9 county or regional jail for a period of not more than
10 ninety days, or by both such fine and imprisonment, at the
11 discretion of the court. For each subsequent offense, the
12 fine may be increased to not more than two hundred fifty
13 dollars, with imprisonment in the county or regional jail
14 for a period of not more than ninety days, or by both such
15 fine and imprisonment, at the discretion of the court.
16 Each day of a continuing violation after conviction shall
17 be considered a separate offense.

18 (b) The director may in his or her discretion bring an
19 action to enforce compliance with this article or any rule
20 or order hereunder whenever it shall appear to the director
21 that any person has engaged in, or is engaging in, an act
22 or practice in violation of this article or any rule or order
23 hereunder, or whenever it shall appear to the director that
24 any person has aided, abetted or caused, or is aiding,
25 abetting or causing such an act or practice. Upon
26 application by the director, the circuit court of the county
27 in which the conduct has occurred or is occurring, or if
28 emergency circumstances occur, the circuit court of
29 Kanawha County, shall have jurisdiction to grant without
30 bond a permanent or temporary injunction, decree or
31 restraining order.

32 Whenever the director shall have refused to grant or
33 renew a license, or shall have revoked a license required
34 by law to operate or conduct a nursing home, or shall have
35 ordered a person to refrain from conduct violating the
36 rules of the director, and the person deeming himself or
37 herself aggrieved by such refusal or revocation or order
38 shall have appealed the action of the director, the court
39 may, during pendency of such appeal, issue a restraining
40 order or injunction upon proof that the operation of the
41 nursing home or its failure to comply with the order of the
42 director adversely affects the well-being or safety of the
43 residents of the nursing home. Should a person who is
44 refused a license or the renewal of a license to operate or
45 conduct a nursing home or whose license to operate is
46 revoked or who has been ordered to refrain from conduct
47 or activity which violates the rules of the director, fail to
48 appeal or should such appeal be decided favorably to the
49 director, then the court shall issue a permanent injunction
50 upon proof that the person is operating or conducting a
51 nursing home without a license as required by law, or has
52 continued to violate the rules of the director.

53 (c) Any nursing home that deprives a resident of any
54 right or benefit created or established for the well-being of
55 this resident by the terms of any contract, by any state
56 statute or rule, or by any applicable federal statute or
57 regulation, shall be liable to the resident for injuries
58 suffered as a result of such deprivation. Upon a finding

59 that a resident has been deprived of such a right or benefit,
60 and that the resident has been injured as a result of such
61 deprivation, and unless there is a finding that the nursing
62 home exercised all care reasonably necessary to prevent
63 and limit the deprivation and injury to the resident,
64 compensatory damages shall be assessed in an amount
65 sufficient to compensate the resident for such injury. In
66 addition, where the deprivation of any such right or
67 benefit is found to have been willful or in reckless
68 disregard of the lawful rights of the resident, punitive
69 damages may be assessed. A resident may also maintain
70 an action pursuant to this section for any other type of
71 relief, including injunctive and declaratory relief,
72 permitted by law. Exhaustion of any available
73 administrative remedies may not be required prior to
74 commencement of suit hereunder.

75 The amount of damages recovered by a resident, in
76 an action brought pursuant to this section, shall be exempt
77 for purposes of determining initial or continuing
78 eligibility for medical assistance under article four, chapter
79 nine of this code, and may neither be taken into
80 consideration nor required to be applied toward the
81 payment or part payment of the cost of medical care or
82 services available under said article.

83 Any waiver by a resident or his or her legal
84 representative of the right to commence an action under
85 this section, whether oral or in writing, shall be null and
86 void as contrary to public policy.

87 (d) The penalties and remedies provided in this
88 section are cumulative and shall be in addition to all other
89 penalties and remedies provided by law.

§16-5C-16. Availability of reports and records.

1 The director shall make available for public
2 inspection and at a nominal cost provide copies of all
3 inspections and other reports of nursing homes filed with
4 or issued by the director. Nothing contained in this
5 section may be construed or deemed to allow the public
6 disclosure of confidential medical, social, personal or
7 financial records of any resident. The director shall adopt

8 such rules as may be necessary to give effect to the
9 provisions of this section and to preserve the
10 confidentiality of medical, social, personal or financial
11 records of residents.

§16-5C-17. Licenses and rules in force.

1 All licenses for nursing homes which are in force on
2 the first day of July, one thousand nine hundred ninety-
3 five, shall continue in full force and effect during the
4 period for which issued unless sooner revoked as provided
5 in this article.

6 All rules in effect on the first day of July, one
7 thousand nine hundred ninety-five, which were adopted
8 by the director relating to licensing nursing homes shall
9 remain in full force and effect until altered, amended or
10 repealed by the director.

**§16-5C-18. Separate accounts for residents' personal funds;
consent for use; records; penalties.**

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

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

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

18 (d) Any person or corporation who violates any
19 subsection of this section is guilty of a misdemeanor and,
20 upon conviction thereof, shall be fined not more than one

21 thousand dollars, or imprisoned in jail not more than one
22 year, or both fined and imprisoned.

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

ARTICLE 5D. PERSONAL CARE HOMES.

§16-5D-1. Purpose.

1 It is the policy of this state to encourage and promote
2 the development and utilization of resources to ensure the
3 effective care and treatment of persons who are dependent
4 upon the services of others by reason of physical or
5 mental impairment who may require limited and
6 intermittent nursing care, including those individuals who
7 qualify for and are receiving services coordinated by a
8 licensed hospice. Such care and treatment requires a
9 living environment for such persons which, to the extent
10 practicable, will approximate a normal home environment.
11 To this end, the guiding principle for administration of the
12 laws of the state is that such persons shall be encouraged
13 and assisted in securing necessary care and treatment in
14 noninstitutional surroundings. In recognition that for
15 many such persons effective care and treatment can only
16 be secured from proprietary, voluntary and governmental
17 personal care homes it is the policy of this state to
18 encourage, promote and require the maintenance of
19 personal care homes so as to ensure protection of the
20 rights and dignity of those using the services of personal
21 care homes.

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

§16-5D-2. Definitions.

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

- 3 (a) “Deficiency” means a statement of the rule and
4 the fact that compliance has not been established and the
5 reasons therefor;
- 6 (b) “Department” means the state department of
7 health and human resources;
- 8 (c) “Director” means the secretary of the
9 department of health and human resources or his or her
10 designee;
- 11 (d) “Division” means the bureau for public health
12 of the state department of health and human resources;
- 13 (e) “Limited and intermittent nursing care” means
14 direct hands on nursing care of an individual who needs
15 no more than two hours of nursing care per day for a
16 period of time no longer than ninety consecutive days per
17 episode. This care may only be provided when the need
18 for such care meets these factors: (1) The resident
19 requests to remain in the personal care home; (2) the
20 resident is advised of the availability of other specialized
21 health care facilities to treat his or her condition; and (3)
22 the need for such care is the result of a medical pathology
23 or a result of the normal aging process. Limited and
24 intermittent nursing care may only be provided by or
25 under the supervision of a registered professional nurse
26 and in accordance with rules proposed by the secretary for
27 legislative approval in accordance with the provisions of
28 article three, chapter twenty-nine-a of this code;
- 29 (f) “Nursing care” means those procedures
30 commonly employed in providing for the physical,
31 emotional and rehabilitational needs of the ill or otherwise
32 incapacitated which require technical skills and knowledge
33 beyond that which the untrained person possesses,
34 including, but not limited to, such procedures as:
35 Irrigations, catheterization, special procedures contributing
36 to rehabilitation and administration of medication by any
37 method which involves a level of complexity and skill in
38 administration not possessed by the untrained person;
- 39 (g) “Person” means an individual and every form of
40 organization, whether incorporated or unincorporated,

41 including any partnership, corporation, trust, association
42 or political subdivision of the state;

43 (h) "Personal assistance" means personal services,
44 including, but not limited to, the following: Help in
45 walking, bathing, dressing, feeding or getting in or out of
46 bed, or supervision required because of the age or mental
47 impairment of the resident;

48 (i) "Personal care home" means any institution,
49 residence or place, or any part or unit thereof, however
50 named, in this state which is advertised, offered,
51 maintained or operated by the ownership or management,
52 whether for a consideration or not, for the express or
53 implied purpose of providing accommodations and
54 personal assistance and supervision, for a period of more
55 than twenty-four hours, to four or more persons who are
56 dependent upon the services of others by reason of
57 physical or mental impairment who may require limited
58 and intermittent nursing care, including those individuals
59 who qualify for and are receiving services coordinated by
60 a licensed hospice: *Provided*, That services utilizing
61 equipment which requires auxiliary electrical power in the
62 event of a power failure may not be used unless the
63 personal care home has a backup power generator:
64 *Provided, however*, That the care or treatment in a
65 household, whether for compensation or not, of any
66 person related by blood or marriage, within the degree of
67 consanguinity of second cousin to the head of the
68 household, or his or her spouse, may not be deemed to
69 constitute a personal care home within the meaning of this
70 article. Nothing contained in this article applies to
71 hospitals, as defined under section one, article five-b of
72 this chapter; or state institutions, as defined under section
73 three, article one, chapter twenty-five of this code or
74 section six, article one, chapter twenty-seven of this code;
75 or personal care homes operated by the federal
76 government or the state; or institutions operated for the
77 treatment and care of alcoholic patients; or offices of
78 physicians; or hotels, boarding homes or other similar
79 places that furnish to their guests only room and board; or
80 to homes or asylums operated by fraternal orders pursuant
81 to article three, chapter thirty-five of this code;

82 (j) "Resident" means an individual living in a
83 personal care home for the purpose of receiving personal
84 assistance or limited and intermittent nursing services from
85 the home;

86 (k) "Secretary" means the secretary of the state
87 department of health and human resources or his or her
88 designee; and

89 (l) "Substantial compliance" means a level of
90 compliance with the rules such that identified deficiencies
91 pose no greater risk to resident health or safety than the
92 potential for causing minimal harm.

93 The secretary may define in rules any term used
94 herein which is not expressly defined.

§16-5D-3. Powers, duties and rights of director.

1 In the administration of this article, the director has
2 the following powers, duties and rights:

3 (a) To enforce rules and standards for personal care
4 homes; which are adopted, promulgated, amended or
5 modified by the secretary;

6 (b) To exercise as sole authority all powers relating
7 to the issuance, suspension and revocation of licenses of
8 personal care homes;

9 (c) To enforce rules adopted, promulgated, amended
10 or modified by the secretary governing the qualification
11 of applicants for personal care home licenses, including,
12 but not limited to, educational requirements, financial
13 requirements, personal and ethical requirements;

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

18 (e) To receive and disburse for authorized purposes
19 any moneys appropriated for the division by the
20 Legislature;

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

26 (g) To make contracts, and to execute all instruments
27 necessary or convenient in carrying out the director's
28 functions and duties; and all such contracts, agreements
29 and instruments shall be executed by the director;

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

32 (i) To offer and sponsor educational and training
33 programs for personal care homes' administrative,
34 management and operational personnel;

35 (j) To undertake survey, research and planning
36 projects and programs relating to administration and
37 operation of personal care homes and to the health, care,
38 treatment and service in general of residents of such
39 homes;

40 (k) To assess civil penalties for violations of personal
41 care home standards, in accordance with section ten of this
42 article;

43 (l) To inspect any personal care home and any
44 records maintained therein, subject to the provisions of
45 section ten of this article;

46 (m) To establish and implement procedures,
47 including informal conferences, investigations and
48 hearings, subject to applicable provisions of article three,
49 chapter twenty-nine-a of this code, and to enforce
50 compliance with the provisions of this article and with
51 rules issued hereunder, by the secretary;

52 (n) To subpoena witnesses and documents,
53 administer oaths and affirmations, and to examine
54 witnesses under oath for the conduct of any investigation
55 or hearing. Upon failure of a person without lawful
56 excuse to obey a subpoena to give testimony and upon
57 reasonable notice to all persons affected thereby, the

58 director may apply to the circuit court of the county in
59 which the hearing is to be held or to the circuit court of
60 Kanawha County for an order compelling compliance;

61 (o) To make complaint or cause proceedings to be
62 instituted against any person for the violation of the
63 provisions of this article or of rules issued hereunder, by
64 the secretary. Such action may be taken by the director
65 without the sanction of the prosecuting attorney of the
66 county in which proceedings are instituted, if the
67 prosecuting attorney fails or refuses to discharge his or
68 her duty. The circuit court of Kanawha County or the
69 circuit court of the county in which the conduct has
70 occurred shall have jurisdiction in all civil enforcement
71 actions brought under this article and may order equitable
72 relief without bond. In no such case may the director or
73 any person acting under the director's direction be
74 required to give security for costs;

75 (p) To delegate authority to the director's employees
76 and agents to perform all functions of the director except
77 the making of final decisions in adjudications; and

78 (q) To submit an annual report to the governor, the
79 Legislature and the public. The report shall describe the
80 personal care home licensing and investigatory activities
81 of the division during the year, and the nature and status
82 of other activities of the division, and may include
83 comment on the acts, policies, practices or procedures of
84 any public or private agency that affect the rights, health
85 or welfare of residents of personal care homes. The
86 annual report shall include a list of all personal care
87 homes in the state and such of the following information
88 as the director determines to apply: Whether the homes
89 are proprietary or nonproprietary; the classification of
90 each home; the name of the owner or owners; the total
91 number of beds; the number of private and semi-private
92 rooms; the costs per diem for private residents; the
93 number of full-time employees and their professions;
94 recreational programs; services and programs available as
95 well as the costs thereof; and whether or not those personal
96 care homes listed accept medicare and medicaid residents.
97 The report shall also contain the division's

98 recommendations as to changes in law or policy which it
 99 deems necessary or appropriate for the protection of the
 100 rights, health or welfare of residents of personal care
 101 homes in the state.

§16-5D-4. Administrative and inspection staff.

1 The director may, as he or she determines necessary,
 2 employ administrative employees, inspectors or other
 3 persons as may be necessary to properly carry out the
 4 provisions of this article. All employees of the division
 5 shall be members of the state civil service system. Such
 6 inspectors and other employees as may be duly designated
 7 by the director shall act as the director's representatives
 8 and, under the direction of the director, shall enforce the
 9 provisions of this article and all duly promulgated rules of
 10 the secretary and, in the discharge of official duties, shall
 11 have the right of entry into any place maintained as a
 12 personal care home at any time.

§16-5D-5. Rules; minimum standards for personal care homes.

1 (a) All rules shall be approved by the secretary and
 2 proposed in the manner provided by the provisions of
 3 article three, chapter twenty-nine-a of this code. The
 4 secretary shall adopt, amend or repeal such rules as may
 5 be necessary or proper to carry out the purposes and
 6 intent of this article and to enable the director to exercise
 7 the powers and perform the duties conferred upon the
 8 director by this article.

9 (b) The secretary shall propose rules establishing
 10 minimum standards of operation of personal care homes
 11 including, but not limited to, the following:

12 (1) Administrative policies, including: (A) An
 13 affirmative statement of the right of access to personal
 14 care homes by members of recognized community
 15 organizations and community legal services programs
 16 whose purposes include rendering assistance without
 17 charge to residents, consistent with the right of residents to
 18 privacy; and (B) a statement of the rights and
 19 responsibilities of residents;

20 (2) Minimum numbers and qualifications of
21 personnel, including management, medical and nursing,
22 aides, orderlies and support personnel, according to the
23 size and classification of the personal care home;

24 (3) Safety requirements;

25 (4) Sanitation requirements;

26 (5) Protective and personal services to be provided;

27 (6) Dietary services to be provided;

28 (7) Maintenance of health records;

29 (8) Social and recreational activities to be made
30 available;

31 (9) Physical facilities;

32 (10) Requirements related to provision of limited and
33 intermittent nursing; and

34 (11) Such other categories as the secretary
35 determines to be appropriate to ensure resident's health,
36 safety and welfare.

37 (c) The secretary shall include in rules detailed
38 standards for each of the categories of standards
39 established pursuant to subsections (b) and (d) of this
40 section, and shall classify such standards as follows: (1)
41 Class I standards are standards the violation of which, as
42 the secretary determines, would present either an imminent
43 danger to the health, safety or welfare of any resident or a
44 substantial probability that death or serious physical harm
45 would result; (2) Class II standards are standards which the
46 secretary determines have a direct or immediate
47 relationship to the health, safety or welfare of any resident,
48 but which do not create imminent danger; (3) Class III
49 standards are standards which the secretary determines
50 have an indirect or a potential impact on the health, safety
51 or welfare of any resident.

52 (d) A personal care home must attain substantial
53 compliance with standards established pursuant to section

54 five of this article, and such other requirements for a
55 license as may be established by rule under this article.

**§16-5D-6. License required; application; fees; duration;
renewal.**

1 Subject to the provisions of section seventeen of this
2 article, no person may establish, operate, maintain, offer or
3 advertise a personal care home within this state unless and
4 until he or she obtains a valid license therefor as provided
5 in this article, which license remains unsuspended,
6 unrevoked and unexpired. No public official or
7 employee may place any person in, or recommend that
8 any person be placed in, or directly or indirectly cause
9 any person to be placed in, any personal care home, as
10 defined in section two of this article, which is being
11 operated without a valid license from the director. The
12 procedure for obtaining a license shall be as follows:

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

21 (1) The name and address of the applicant;

22 (2) The name, address and principal occupation:
23 (A) Of each person who, as a stockholder or otherwise, has
24 a proprietary interest of ten percent or more in the
25 applicant; (B) of each officer and director of a corporate
26 applicant; (C) of each trustee and beneficiary of an
27 applicant which is a trust; and (D) where a corporation has
28 a proprietary interest of twenty-five percent or more in an
29 applicant, the name, address and principal occupation of
30 each officer and director of the corporation;

31 (3) The name and address of the owner of the
32 premises of the personal care home or proposed personal
33 care home, if he or she is a different person from the
34 applicant, and in such case, the name and address: (A) Of

35 each person who, as a stockholder or otherwise, has a
36 proprietary interest of ten percent or more in the owner;
37 (B) of each officer and director of a corporate applicant;
38 (C) of each trustee and beneficiary of the owner if it is a
39 trust; and (D) where a corporation has a proprietary
40 interest of twenty-five percent or more in the owner, the
41 name and address of each officer and director of the
42 corporation;

43 (4) Where the applicant is the lessee or the assignee
44 of the personal care home or the premises of the proposed
45 personal care home, a signed copy of the lease and any
46 assignment thereof;

47 (5) The name and address of the personal care home
48 or the premises of the proposed personal care home;

49 (6) The proposed bed quota of the personal care
50 home and the proposed bed quota of each unit thereof;

51 (7) (A) An organizational plan for the personal care
52 home indicating the number of persons employed or to be
53 employed, the positions and duties of all employees; (B)
54 the name and address of the individual who is to serve as
55 administrator; and (C) such evidence of compliance with
56 applicable laws and rules governing zoning, buildings,
57 safety, fire prevention and sanitation as the director may
58 require; and

59 (8) Such additional information as the director may
60 require.

61 (b) Upon receipt and review of an application for
62 license made pursuant to subsection (a) of this section, and
63 inspection of the applicant personal care home pursuant to
64 section ten of this article, the director shall issue a license
65 if he or she finds:

66 (1) That an individual applicant, and every partner,
67 trustee, officer, director and controlling person of an
68 applicant which is not an individual, is a person
69 responsible and suitable to operate or to direct or
70 participate in the operation of a personal care home by
71 virtue of financial capacity, appropriate business or
72 professional experience, a record of compliance with

73 lawful orders of the department, if any, and lack of
74 revocation of a license during the previous five years;

75 (2) That the personal care home is under the
76 supervision of an administrator who is qualified by
77 training and experience; or

78 (3) That the personal care home is in substantial
79 compliance with standards established pursuant to section
80 five of this article, and such other requirements for a
81 license as the secretary may establish by rule under this
82 article.

83 The director may deny an initial or renewal license if
84 the information provided in an application or report is
85 known by the applicant to be false, or the applicant fails to
86 report required information, or for any other reason
87 permitted by law or rules promulgated pursuant to this
88 article.

89 Any license granted by the director shall state the
90 maximum bed capacity for which it is granted, the date the
91 license was issued, and the expiration date. Licenses shall
92 be issued for a period not to exceed one year for personal
93 care homes: *Provided*, That any such license in effect for
94 which timely application for renewal, together with
95 payment of the proper fee has been made to the state
96 division of health in conformance with the provisions of
97 this article and the rules issued thereunder, and prior to the
98 expiration date of the license, shall continue in effect until:
99 (A) One year following the expiration date of the license;
100 or (B) the date of the revocation or suspension of the
101 license pursuant to the provisions of this article; or (C) the
102 date of issuance of a new license, whichever date first
103 occurs. Each license shall be issued only for the premises
104 and persons named in the application and is not
105 transferable or assignable: *Provided, however*, That in the
106 case of the transfer of ownership of a personal care home
107 with an unexpired license, the application of the new
108 owner for a license shall have the effect of a license for a
109 period of three months when filed with the director.
110 Every license shall be posted in a conspicuous place in the
111 personal care home for which it is issued so as to be

112 accessible to and in plain view of all residents and visitors
113 of the personal care home.

114 (c) An original license shall be renewable,
115 conditioned upon the licensee filing timely application for
116 the extension of the term of the license accompanied by
117 the fee, and contingent upon evidence of compliance with
118 the provisions of this article and rules promulgated by the
119 secretary hereunder; the application shall be accompanied
120 by the information required in subdivisions (1), (2) and
121 (3) of this subsection.

122 (1) A balance sheet of the personal care home as of
123 the end of its fiscal year, setting forth assets and liabilities
124 at such date, including all capital, surplus, reserve,
125 depreciation and similar accounts;

126 (2) A statement of operations of the personal care
127 home as of the end of its fiscal year, setting forth all
128 revenues, expenses, taxes, extraordinary items and other
129 credits or charges; and

130 (3) A statement of any changes in the name, address,
131 management or ownership information on file with the
132 director.

133 (d) In the case of an application for a renewal license,
134 if all requirements of section five of this article are not
135 met, the director may in his or her discretion issue a
136 provisional license, provided that care given in the
137 personal care home is adequate for resident needs and the
138 personal care home has demonstrated improvement and
139 evidences potential for substantial compliance within the
140 term of the license: *Provided*, That a provisional renewal
141 may not be issued for a period greater than one year, may
142 not be renewed, and may not be issued to any personal
143 care home with uncorrected violations of any Class I
144 standard, as defined in subsection (c), section five of this
145 article.

146 (e) A nonrefundable application fee in the amount of
147 sixty-five dollars for an original personal care home
148 license shall be paid at the time application is made for the
149 license. An average cost of all direct costs for the initial

150 licensure for the preceding ten facilities based on the size
151 of the facility's licensed bed capacity shall be borne by
152 the applicant and shall be received by the director prior to
153 the issuance of an initial or amended license. The license
154 fee for renewal of a license shall be at the rate of six
155 dollars per bed per year for personal care homes, except
156 the annual rate per bed may be assessed for licenses issued
157 for less than one year. The director may annually adjust
158 the licensure fees for inflation based upon the consumer
159 price index. The bed capacity for the holder of each
160 license shall be determined by the director. All license
161 fees shall be due and payable to the director, annually, and
162 in the manner set forth in the rules promulgated by the
163 secretary. The fee and application shall be submitted to
164 the director who shall retain both the application and fee
165 pending final action on the application. All fees received
166 by the director under the provisions of this article shall be
167 deposited in accordance with section thirteen, article one
168 of this chapter.

§16-5D-7. Cost disclosure; surety for residents' funds.

1 (a) Each personal care home shall disclose in writing
2 to all prospective residents a complete and accurate list of
3 all costs which may be incurred by them. Residents are
4 not liable for any cost not so disclosed.

5 (b) If the personal care home handles any money for
6 residents within the personal care home, the licensee or his
7 or her authorized representative shall give a bond in an
8 amount consistent with this subsection and with such
9 surety as the director shall approve. The bond shall be
10 upon condition that the licensee shall hold separately and
11 in trust all residents' funds deposited with the licensee,
12 shall administer the funds on behalf of the resident in the
13 manner directed by the depositor, shall render a true and
14 complete account to the depositor and the director when
15 requested, and at least quarterly to the resident, and upon
16 termination of the deposit, shall account for all funds
17 received, expended, and held on hand. The licensee shall
18 file a bond in a sum to be fixed by the director based
19 upon the magnitude of the operations of the applicant, but

20 which sum may not be less than two thousand five
21 hundred dollars.

22 Every person injured as a result of any improper or
23 unlawful handling of the money of a resident of a
24 personal care home may bring an action in a proper court
25 on the bond required to be posted by the licensee
26 pursuant to this subsection for the amount of damage
27 suffered as a result thereof to the extent covered by the
28 bond. Whenever the director determines that the amount
29 of any bond which is filed pursuant to this subsection is
30 insufficient to adequately protect the money of residents
31 which is being handled, or whenever the amount of any
32 bond is impaired by any recovery against the bond, the
33 director may require the licensee to file an additional
34 bond in such amount as necessary to adequately protect
35 the money of residents being handled.

36 The provisions of this subsection do not apply if the
37 licensee handles less than twenty-five dollars per resident
38 and less than five hundred dollars for all residents in any
39 month.

§16-5D-8. Investigation of complaints.

1 The secretary shall establish by rule procedures for
2 prompt investigation of all complaints of alleged
3 violations by personal care homes of applicable
4 requirements of state law or rules, except for such
5 complaints that the director determines are willfully
6 intended to harass a licensee or are without any reasonable
7 basis. Such procedures shall include provisions for
8 ensuring the confidentiality of the complainant and of any
9 other person so named in the complaint, and for promptly
10 informing the complainant and the personal care home
11 involved of the results of the investigation.

12 If, after its investigation, the director determines that
13 the complaint has merit, the director shall take appropriate
14 disciplinary action and shall advise any injured party of
15 the possibility of a civil remedy under this article.

16 No personal care home may discharge or in any
17 manner discriminate against any resident or employee for

18 the reason that the resident or employee has filed a
19 complaint or participated in any proceeding specified in
20 this article. Violation of this prohibition by any personal
21 care home constitutes ground for the suspension or
22 revocation of the license of the personal care home as
23 provided in section eleven of this article. Any type of
24 discriminatory treatment of a resident or employee by
25 whom, or upon whose behalf, a complaint has been
26 submitted to the director, or any proceeding instituted
27 under this article, within one hundred twenty days of the
28 filing of the complaint or the institution of the action, shall
29 raise a rebuttable presumption that the action was taken by
30 the personal care home in retaliation for the complaint or
31 action.

§16-5D-9. Inspections.

1 The director and any duly designated employee or
2 agent thereof shall have the right to enter upon and into
3 the premises of any personal care home at any time for
4 which a license has been issued, for which an application
5 for license has been filed with the director, or which the
6 director has reason to believe is being operated or
7 maintained as a personal care home without a license. If
8 entry is refused by the owner or person in charge of the
9 personal care home, the director shall apply to the circuit
10 court of the county in which the personal care home is
11 located or the circuit court of Kanawha County for an
12 order authorizing inspection, and the court shall issue an
13 appropriate order if it finds good cause.

14 The director, by the director's authorized employees
15 or agents, shall conduct at least one inspection prior to
16 issuance of a license pursuant to section six of this article,
17 and shall conduct periodic unannounced inspections
18 thereafter, to determine compliance by the personal care
19 home with applicable statutes and rules promulgated
20 thereunder. All personal care homes shall comply with
21 rules of the state fire commission. The state fire marshal,
22 by his or her employees or authorized agents, shall make
23 all fire, safety and like inspections. The director may
24 provide for such other inspections as the director may
25 deem necessary to carry out the intent and purpose of this

26 article. If after investigating a complaint, the director
27 determines that the complaint is substantiated and that an
28 immediate and serious threat to a resident's health or
29 safety exists, the director may invoke any remedies
30 available pursuant to section eleven of this article. Any
31 personal care home aggrieved by a determination or
32 assessment made pursuant to this section shall have the
33 right to an administrative appeal as set forth in section
34 twelve of this article.

**§16-5D-10. Reports of inspections; plans of correction;
assessment of penalties and use of funds derived
therefrom; hearings.**

1 (a) Reports of all inspections made pursuant to
2 section nine of this article shall be in writing and filed with
3 the director, and shall list all deficiencies in the personal
4 care home's compliance with the provisions of this article
5 and the rules adopted by the secretary hereunder. The
6 director shall send a copy of the report to the personal
7 care home by certified mail, return receipt requested, and
8 shall specify a time within which the personal care home
9 shall submit a plan for correction of deficiencies, which
10 plan shall be approved, rejected or modified by the
11 director. The surveyors shall allow audio taping of the
12 exit conference for licensure inspections with all costs
13 directly associated with the taping to be paid by the
14 personal care home provided that an original tape is
15 provided to surveyors at the end of taping.

16 (b) Upon a personal care home's failure to submit a
17 plan of correction which is approved by the director, or to
18 correct any deficiency within the time specified in an
19 approved plan of correction, the director may assess civil
20 penalties as hereinafter provided or may initiate any other
21 legal or disciplinary action as provided by this article.

22 (c) Nothing in this section may be construed to
23 prohibit the director from enforcing a rule,
24 administratively or in court, without first affording formal
25 opportunity to make correction under this section, where,
26 in the opinion of the director, the violation of the rule
27 jeopardizes the health or safety of residents or where the

28 violation of the rule is the second or subsequent violation
29 occurring during a period of twelve full months.

30 (d) Civil penalties assessed against personal care
31 homes shall be classified according to the nature of the
32 violation as defined in subsection (c), section five of this
33 article and rules promulgated thereunder by the secretary,
34 as follows: For each violation of a Class I standard, a civil
35 penalty of not less than fifty nor more than five hundred
36 dollars shall be imposed; for each violation of a Class II
37 standard, a civil penalty of not less than twenty-five nor
38 more than fifty dollars shall be imposed; for each
39 violation of a Class III standard, a civil penalty of not less
40 than ten nor more than twenty-five dollars shall be
41 imposed. Each day a violation continues, after the date of
42 citation, shall constitute a separate violation. The date of
43 citation is the date the facility receives the written
44 statement of deficiencies.

45 (e) The director shall assess a civil penalty not to
46 exceed two thousand dollars against any individual who
47 notifies, or causes to be notified, a personal care home of
48 the time or date on which an inspection is scheduled to be
49 conducted under this article.

50 (f) If the director assesses a penalty under this
51 section, the director shall cause delivery of notice of the
52 penalty by personal service or by certified mail. The
53 notice shall state the amount of the penalty, the action or
54 circumstance for which the penalty is assessed, the
55 requirement that the action or circumstance violates, and
56 the basis upon which the director assessed the penalty and
57 selected the amount of the penalty.

58 (g) The director shall, in a civil judicial proceeding,
59 recover any unpaid assessment which has not been
60 contested under section twelve of this article within thirty
61 days of receipt of notice of the assessment, or which has
62 been affirmed under the provisions of that section and not
63 appealed within thirty days of receipt of the director's final
64 order, or which has been affirmed on judicial review, as
65 provided in section thirteen of this article. All money
66 collected by assessments of civil penalties or interest shall
67 be paid into a special resident benefit account and shall be

68 applied by the director only for the protection of the
69 health or property of residents of personal care homes
70 operated within the state that the director finds to be
71 deficient, including payment for the costs of relocation of
72 residents to other facilities, operation of a personal care
73 home pending correction of deficiencies or closure, and
74 reimbursement of residents for personal funds lost.

75 (h) The opportunity for a hearing on an action taken
76 under this section shall be as provided in section twelve of
77 this article. In addition to any other rights of appeal
78 conferred upon a personal care home pursuant to this
79 section, a personal care home shall have the right to
80 request a hearing and seek judicial review pursuant to
81 sections twelve and thirteen of this article to contest the
82 citing by the director of a deficiency on an inspection
83 report, irrespective of whether the deficiency results in the
84 imposition of a civil penalty.

§16-5D-11. License limitation, suspension, revocation; ban on admissions; continuation of disciplinary proceedings; closure, transfer of residents, appointment of temporary management; assessment of interest; collection of assessments; hearings.

1 (a) The director shall by order, impose a ban on the
2 admission of residents or reduce the bed quota of the
3 personal care home, or any combination thereof, where he
4 or she finds upon inspection of the personal care home
5 that the licensee is not providing adequate care under the
6 personal care home's existing bed quota, and that
7 reduction in quota or imposition of a ban on admissions,
8 or any combination thereof, would place the licensee in a
9 position to render adequate care. Any notice to a licensee
10 of reduction in quota or ban on new admissions shall
11 include the terms of the order, the reasons therefor, and
12 the date set for compliance.

13 (b) The director may suspend or revoke a license
14 issued under this article if he or she finds upon inspection
15 that there has been a substantial failure to comply with the
16 provisions of this article or the standards or rules
17 promulgated pursuant hereto.

18 (c) Whenever a license is limited, suspended or
19 revoked pursuant to this section, the director shall file an
20 administrative complaint stating facts constituting a
21 ground or grounds for the limitation, suspension or
22 revocation. Upon the filing of the administrative
23 complaint, the director shall notify the licensee in writing
24 of the filing of the administrative complaint, enclosing a
25 copy of the complaint, and shall advise the licensee of the
26 availability of a hearing pursuant to section twelve of this
27 article. The notice and copy of the administrative
28 complaint shall be served on the licensee by certified mail,
29 return receipt requested.

30 (d) The suspension, expiration, forfeiture or
31 cancellation by operation of law or order of the director
32 of a license issued by the director, or the withdrawal of an
33 application for a license after it has been filed with the
34 director, may not deprive the director of the director's
35 authority to institute or continue a disciplinary
36 proceeding, or a proceeding for the denial of a license
37 application, against the licensee or applicant upon any
38 ground provided by law or to enter an order denying the
39 license application or suspending or revoking the license
40 or otherwise taking disciplinary action on any such
41 ground.

42 (e) In addition to other remedies provided in this
43 article, upon petition from the director, the circuit court of
44 the county in which the conduct has occurred or is
45 occurring, or the circuit court of Kanawha County, may
46 determine that a personal care home's deficiencies under
47 this article constitute an emergency immediately
48 jeopardizing the health, safety, welfare, or rights of its
49 residents, and issue an order to:

50 (1) Close the personal care home;

51 (2) Transfer residents in the personal care home to
52 other facilities; or

53 (3) Appoint temporary management to oversee the
54 operation of the personal care home and to assure the
55 health, safety, welfare and rights of the personal care

56 home's residents, where there is a need for temporary
57 management while:

58 (A) There is an orderly closure of the personal care
59 home; or

60 (B) Improvements are made in order to bring the
61 personal care home into compliance with all the applicable
62 requirements of this article.

63 If the director petitions a circuit court for the closure
64 of a personal care home, the transfer of residents, or the
65 appointment of a temporary management, the circuit court
66 shall hold a hearing no later than seven days thereafter, at
67 which time the director and the licensee or operator of the
68 personal care home may participate and present evidence.

69 A circuit court may divest the licensee or operator of
70 possession and control of a personal care home in favor of
71 temporary management. The temporary management
72 shall be responsible to the court and shall have such
73 powers and duties as the court may grant to direct all acts
74 necessary or appropriate to conserve the property and
75 promote the health, safety, welfare and rights of the
76 residents of the personal care home, including, but not
77 limited to, the replacement of management and staff, the
78 hiring of consultants, the making of any necessary
79 expenditures to close the personal care home or to repair
80 or improve the personal care home so as to return it to
81 compliance with applicable requirements, and the power to
82 receive, conserve and expend funds, including payments
83 on behalf of the licensee or operator of the personal care
84 home. Priority shall be given to expenditures for current
85 direct resident care or the transfer of residents.

86 The person charged with temporary management:
87 (i) Shall be an officer of the court; (ii) shall be paid by the
88 licensee; (iii) is not liable for conditions at the personal
89 care home which existed or originated prior to his or her
90 or her appointment; (iv) is not personally liable, except for
91 his or her or her own gross negligence and intentional acts
92 which result in injuries to persons or damage to property
93 at the personal care home during his or her temporary
94 management.

95 No person may impede the operation of temporary
96 management. There shall be an automatic stay for a
97 ninety-day period subsequent to the establishment of
98 temporary management of any action that would interfere
99 with the functioning of the personal care home, including,
100 but not limited to, cancellation of insurance policies,
101 termination of utility services, attachments to working
102 capital accounts, foreclosures, evictions and repossessions
103 of equipment used in the personal care home.

104 A temporary management established for the
105 purpose of making improvements in order to bring a
106 personal care home into compliance with applicable
107 requirements may not be terminated until the court has
108 determined that the personal care home has the
109 management capability to ensure continued compliance
110 with all applicable requirements, except if the court has
111 not made such determination within six months of the
112 establishment of the temporary management, the
113 temporary management terminates by operation of law at
114 that time, and the personal care home shall be closed.
115 After the termination of the temporary management, the
116 person who was responsible for the temporary
117 management shall make an accounting to the court, and
118 after deducting from receipts the costs of the temporary
119 management, expenditures and civil penalties and interest
120 no longer subject to appeal, in that order, any excess shall
121 be paid to the licensee or operator of the personal care
122 home.

123 (f) The assessments for penalties and for costs of
124 actions taken under this article shall have interest assessed
125 at five percent per annum beginning thirty days after
126 receipt of notice of the assessment or thirty days after
127 receipt of the director's final order following a hearing,
128 whichever is later. All assessments against a personal care
129 home that are unpaid shall be added to the personal care
130 home's licensure fee and may be filed as a lien against the
131 property of the licensee or operator of the personal care
132 home. Funds received from assessments shall be
133 deposited as funds received as provided in section ten of
134 this article.

135 (g) The secretary shall have the power to promulgate
136 emergency rules that expand the power of the director in
137 excess of that provided in this article to the extent required
138 to comply with federal requirements, but any such rules
139 shall expand the power of the director to the minimum
140 extent required by federal requirements. The rules are
141 subject to the provisions of article three, chapter
142 twenty-nine-a of this code.

143 (h) The opportunity for a hearing on an action by
144 the director taken under this section shall be as provided
145 in section twelve of this article.

**§16-5D-12. Administrative appeals for civil assessments,
license limitation, suspension or revocation.**

1 (a) Any licensee or applicant aggrieved by an order
2 issued pursuant to sections five, six, ten or eleven of this
3 article shall, upon timely written request, have the
4 opportunity for a hearing by the director at which he or
5 she may contest the order as contrary to law or
6 unwarranted by the facts or both. All of the pertinent
7 provisions of article five, chapter twenty-nine-a of this
8 code shall apply to and govern the hearing and the
9 administrative procedures in connection with the hearing.
10 The licensee or applicant may also request an informal
11 meeting with the director before the hearing.

12 Following the hearing the director shall make and
13 enter a written order either dismissing the complaint or
14 taking such action as is authorized in this article. The
15 written order of the director shall be accompanied by
16 findings of fact and conclusions of law as specified in
17 section three, article five, chapter twenty-nine-a of this
18 code, and a copy of the order and accompanying findings
19 and conclusions shall be served upon the licensee and his
20 or her attorney of record, if any, by certified mail, return
21 receipt requested. If the director suspends a personal care
22 home's license, it shall also specify the conditions giving
23 rise to the suspension, to be corrected by the licensee
24 during the period of suspension in order to entitle the
25 licensee to reinstatement of the license. If the director
26 revokes a license, the director may stay the effective date
27 of revocation by not more than ninety days upon a

28 showing that the delay is necessary to assure appropriate
29 placement of residents. The order of the director shall be
30 final unless vacated or modified upon judicial review
31 thereof in accordance with the provisions of section
32 thirteen of this article.

33 (b) In addition to all other powers granted by this
34 chapter, the director may hold the case under advisement
35 and make a recommendation as to requirements to be met
36 by the licensee in order to avoid either suspension or
37 revocation. In such a case, the director shall enter an
38 order accordingly and so notify the licensee and his or her
39 attorney of record, if any, by certified mail, return receipt
40 requested. If the licensee meets the requirements of the
41 order, the director shall enter an order showing
42 satisfactory compliance and dismissing the complaint and
43 shall so notify the licensee and the licensee's attorney of
44 record, if any, by certified mail, return receipt requested.

§16-5D-13. Judicial review.

1 Any licensee adversely affected by an order of the
2 director rendered after a hearing held in accordance with
3 the provisions of section twelve of this article is entitled to
4 judicial review thereof. All of the pertinent provisions of
5 section four, article five, chapter twenty-nine-a of this code
6 shall apply to and govern with like effect as if the
7 provisions of said section four were set forth in extenso in
8 this section.

9 The judgment of the circuit court shall be final
10 unless reversed, vacated or modified on appeal to the
11 supreme court of appeals in accordance with the
12 provisions of section one, article six, chapter twenty-nine-a
13 of this code.

§16-5D-14. Legal counsel and services for the director.

1 (a) Legal counsel and services for the director in all
2 administrative hearings and all proceedings in any circuit
3 court and the supreme court of appeals shall be provided
4 by the attorney general, his or her assistants, or an attorney
5 employed by the director, in proceedings in any circuit

6 court by the prosecuting attorney of the county as well, all
7 without additional compensation.

8 (b) The governor may appoint counsel for the
9 director, who shall perform such legal services in
10 representing the interests of residents in personal care
11 homes in matters under the jurisdiction of the director as
12 the governor shall direct. It shall be the duty of such
13 counsel to appear for the residents in all cases where they
14 are not represented by counsel. The compensation of such
15 counsel shall be fixed by the governor.

**§16-5D-15. Unlawful acts; penalties; injunctions; private right
of action.**

1 (a) Whoever advertises, announces, establishes or
2 maintains, or is engaged in establishing or maintaining a
3 personal care home without a license granted under
4 section six of this article, or who prevents, interferes with
5 or impedes in any way the lawful enforcement of this
6 article shall be guilty of a misdemeanor and, upon
7 conviction thereof, shall be punished for the first offense
8 by a fine of not more than one hundred dollars, or by
9 imprisonment in jail for a period of not more than ninety
10 days, or by both such fine and imprisonment, at the
11 discretion of the court. For each subsequent offense, the
12 fine may be increased to not more than two hundred fifty
13 dollars, with imprisonment in jail for a period of not more
14 than ninety days, or both such fine and imprisonment at
15 the discretion of the court. Each day of a continuing
16 violation after conviction shall be considered a separate
17 offense.

18 (b) The director may in his or her discretion bring an
19 action to enforce compliance with this article or any rule,
20 or order hereunder, whenever it appears to the director
21 that any person has engaged in, or is engaging in, an act
22 or practice in violation of this article or any rule or order
23 hereunder, or whenever it appears to the director that any
24 person has aided, abetted or caused, or is aiding, abetting
25 or causing such an act or practice. Upon application by
26 the director, the circuit court of the county in which the
27 conduct has occurred or is occurring shall have

28 jurisdiction to grant without bond a permanent or
29 temporary injunction, decree or restraining order.

30 Whenever the director refuses to grant or renew a
31 license, or revokes a license required by law to operate or
32 conduct a personal care home, or orders a person to
33 refrain from conduct violating the rules of the secretary,
34 and the person deeming himself aggrieved by the refusal,
35 revocation or order appeals the action of the director, the
36 court may, during pendency of the appeal, issue a
37 restraining order or injunction upon proof that the
38 operation of the personal care home or its failure to
39 comply with the order of the director adversely affects the
40 well-being or safety of the residents of the personal care
41 home. Should a person who is refused a license or the
42 renewal of a license to operate or conduct a personal care
43 home or whose license to operate is revoked or who has
44 been ordered to refrain from conduct or activity which
45 violates the rules of the secretary, fail to appeal or should
46 such appeal be decided favorably to the director, then the
47 court shall issue a permanent injunction upon proof that
48 the person is operating or conducting a personal care
49 home without a license as required by law, or has
50 continued to violate the rules of the secretary.

51 (c) Any personal care home that deprives a resident
52 of any right or benefit created or established for the well-
53 being of the resident by the terms of any contract, by any
54 state statute or rule, or by any applicable federal statute or
55 regulation, shall be liable to the resident for injuries
56 suffered as a result of the deprivation. Upon a finding
57 that a resident has been deprived of such a right or benefit,
58 and that the resident has been injured as a result of the
59 deprivation, and unless there is a finding that the personal
60 care home exercised all care reasonably necessary to
61 prevent and limit the deprivation and injury to the
62 resident, compensatory damages shall be assessed in an
63 amount sufficient to compensate the resident for the
64 injury. In addition, where the deprivation of any right or
65 benefit is found to have been willful or in reckless
66 disregard of the lawful rights of the resident, punitive
67 damages may be assessed. A resident may also maintain
68 an action pursuant to this section for any other type of

69 relief, including injunctive and declaratory relief,
70 permitted by law. Exhaustion of any available
71 administrative remedies may not be required prior to
72 commencement of suit hereunder.

73 The amount of damages recovered by a resident, in
74 an action brought pursuant to this section, are exempt for
75 purposes of determining initial or continuing eligibility
76 for medical assistance under article four, chapter nine of
77 this code, and may neither be taken into consideration nor
78 required to be applied toward the payment or part
79 payment of the cost of medical care or services available
80 under said article.

81 Any waiver by a resident or his or her legal
82 representative of the right to commence an action under
83 this section, whether oral or in writing, shall be null and
84 void as contrary to public policy.

85 (d) The penalties and remedies provided in this
86 section are cumulative and shall be in addition to all other
87 penalties and remedies provided by law.

§16-5D-16. Availability of reports and records.

1 The director shall make available for public
2 inspection and at a nominal cost provide copies of all
3 inspections and other reports of personal care homes filed
4 with or issued by the director. Nothing contained in this
5 section may be construed or deemed to allow the public
6 disclosure of confidential medical, social, personal or
7 financial records of any resident. The secretary shall
8 propose rules for legislative approval in accordance with
9 the provisions of article three, chapter twenty-nine-a of
10 this code as may be necessary to give effect to the
11 provisions of this section and to preserve the
12 confidentiality of medical, social, personal or financial
13 records of residents.

§16-5D-17. Licenses and rules in force.

1 (a) All licenses for personal care homes which are in
2 force on the first day of July, one thousand nine hundred
3 ninety-seven, shall continue in full force and effect during

4 the period for which issued unless sooner revoked as
5 provided in this article.

6 (b) All rules in effect on the first day of July, one
7 thousand nine hundred ninety-seven, which were adopted
8 by the secretary relating to licensing personal care homes,
9 shall remain in full force and effect until altered, amended
10 or repealed by the secretary.

**§16-5D-18. Separate accounts for residents' personal funds;
consent for use; records; penalties.**

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

5 (b) No person may use or cause to be used for any
6 purpose the personal funds of any resident admitted to
7 any personal care home unless consent for the use thereof
8 has been obtained from the resident or from a committee
9 or guardian or relative.

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

18 (d) Any person or corporation who violates any
19 provision of this section is guilty of a misdemeanor and,
20 upon conviction thereof, shall be fined not more than one
21 thousand dollars, or imprisoned in jail not more than one
22 year, or both fined and imprisoned.

**ARTICLE 5E. REGISTRATION AND INSPECTION OF SERVICE
PROVIDERS IN LEGALLY UNLICENSED
HEALTH CARE HOMES.**

§16-5E-1. Purpose.

1 It is the policy of this state to encourage the
2 availability of appropriate noninstitutional surroundings

3 for the elderly and for the care of persons in need limited
4 and intermittent of nursing care or personal assistance.
5 The registration of providers of services to such residents
6 in unlicensed homes will help to identify where the
7 services are available and to ensure that individuals in
8 unlicensed homes are receiving care appropriate to their
9 needs.

§16-5E-1a. Powers, rights and duties of the director.

1 In the administration of this article, the director shall
2 have the following powers, duties and rights:

3 (a) To promulgate and enforce rules governing
4 complaint investigations within the homes of legally
5 unlicensed health care providers registered under this
6 article. Such rules shall include the minimum health,
7 safety and welfare standards in the following areas:

8 (1) Physical environment;

9 (2) Nutrition;

10 (3) Requirements related to limited and intermittent
11 nursing care;

12 (4) Medication administration;

13 (5) Protective and personal services to be provided;

14 (6) Treatment;

15 (7) Such other categories as the director determines
16 to be appropriate to ensure residents' health, safety and
17 welfare.

18 (b) To exercise as sole authority all powers relating
19 to issuance, suspension and revocation of registration of
20 legally unlicensed homes providing health care;

21 (c) To issue directed plans of correction for
22 deficiencies identified during complaint investigations;

23 (d) To order closure of any home for failure to
24 comply with a directed plan of corrections;

25 (e) To take all actions required under the provisions
26 of sections three, four, five, and six of this article; and

27 (f) To deny registration to any operator of a legally
28 unlicensed home who is listed on the state abuse registry.

§16-5E-2. Definitions.

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

3 (a) "Director" means the secretary of the de-
4 partment of health and human resources or his or her
5 designee.

6 (b) "Limited and intermittent nursing care" means
7 direct hands on nursing care of an individual who needs
8 no more than two hours of nursing care per day for a
9 period of no longer than ninety consecutive days per
10 episode, which may only be provided when the need for
11 such care meets the following factors: (1) The resident
12 requests to remain in the home; (2) the resident is advised
13 of the availability of other specialized health care facilities
14 to treat his or her condition; and (3) the need for such
15 care is the result of a medical pathology or a result of
16 normal aging process. Limited and intermittent nursing
17 care shall be provided under the supervision of a
18 registered professional nurse and in accordance with rules
19 promulgated by the director.

20 (c) "Nursing care" means those procedures com-
21 monly employed in providing for the physical, emotional
22 and rehabilitational needs of the ill or otherwise in-
23 capacitated which require technical skills and knowledge
24 beyond that which the untrained person possesses,
25 including, but not limited to, such procedures as:
26 Irrigations; catheterization; special procedures contribut-
27 ing to rehabilitation; and administration of medication by
28 any method prescribed by a physician which involves a
29 level of complexity and skill in administration not
30 possessed by the untrained person.

31 (d) "Personal assistance" means personal services,
32 including, but not limited to, the following: Help in
33 walking, bathing, dressing, feeding or getting in or out of
34 bed, or supervision required because of the age or
35 physical or mental impairment of the resident.

36 (e) "Resident" means an individual who is provided
37 services, whether or not for a fee, by a service provider, but
38 resident does not include a person receiving services
39 provided by another who is related to him or her or the
40 spouse thereof by blood or marriage, within the degree of
41 consanguinity of the second cousin. Residents, who are
42 incapable of self-preservation, shall be housed only on a
43 ground floor level of the home with direct egress to the
44 outside. A registered unlicensed health care home shall:
45 (1) Provide residents at the time of admission with the
46 name, address and telephone number of the offices of
47 health facility licensure and certification, the state long-
48 term care ombudsman, and adult protective services, all
49 within the department of health and human resources; and
50 (2) advise residents both orally and in writing of their
51 right to file a complaint with the aforementioned entities.

52 (f) "Self-preservation" means that a person is at
53 least capable of removing him or her self from situations
54 involving imminent danger, such as fire.

55 (g) "Service provider" means the individual ad-
56 ministratively responsible for providing to consumers for
57 a period of more than twenty-four hours, whether for
58 compensation or not, services of personal assistance for
59 one to three residents and who may require limited and
60 intermittent nursing care, including those individuals who
61 qualify for and are receiving services coordinated by a
62 licensed hospice: *Provided*, That services utilizing
63 equipment which requires auxiliary electrical power in the
64 event of a power failure may not be used unless the home
65 has a backup power generator.

**§16-5E-3. Registration of service providers required; form of
registration; information to be provided.**

1 (a) Service providers shall register with the director.
2 No fee may be charged for registration. Registration
3 information shall be provided on a registration form or
4 may be verbally communicated to the director for
5 placement by the director on the form, but no provision of
6 information may be deemed to meet the registration
7 requirement until the signature of the service provider is
8 recorded on the registration form.

9 (b) Information required for registration shall
10 include the following:

11 (1) Name, address and telephone number of the
12 service provider;

13 (2) Address and telephone numbers where services
14 are provided to residents and the number of residents
15 provided service;

16 (3) The services, such as nursing care or personal
17 assistance, provided to residents; and

18 (4) Other information required by rules promulgated
19 by the director.

20 (c) The director may deny registration if the
21 information provided in an application is known by the
22 applicant to be false or the applicant fails to report
23 required information.

24 (d) A legally unlicensed provider may operate no
25 more than one legally unlicensed home.

§16-5E-5. Inspections; right of entry.

1 The director may employ inspectors to enforce the
2 provisions of this article. These inspectors shall have the
3 right of entry into any place where services are provided
4 by a service provider, to determine the number of
5 residents therein and the adequacy of services being
6 provided to them. The director may obtain a search
7 warrant to inspect those premises that the director has
8 reason to believe are being used to provide services. The
9 inspectors shall have access to all parts of the home and
10 grounds, including, but not limited to, all areas of all
11 buildings on the grounds of a home, food supplies,
12 resident medications and resident medical records.
13 Inspectors shall also be permitted to conduct private
14 interviews with all residents and staff of a home.

15 If after investigating a complaint, the director
16 determines that the complaint is substantiated and that an
17 immediate and serious threat to a resident's health or
18 safety exists, the director may petition the circuit court for
19 an injunction, order of abatement or other appropriate

20 action or proceeding to: (1) Close the home; (2) transfer
21 residents in the home to other facilities; or (3) appoint
22 temporary management to oversee the operation of the
23 home to assure the health, safety, welfare and rights of the
24 home's residents where there is a need for temporary
25 management to ensure compliance with the court's order.
26 Any home aggrieved by a determination or assessment
27 made pursuant to this section shall have the right to an
28 administrative appeal as set forth in section twelve, article
29 five-c of this chapter.

§16-5E-6. Enforcement; criminal penalties.

1 (a) Any service provider who fails to register with the
2 director shall be guilty of a misdemeanor and, upon
3 conviction thereof, shall be fined not less than five
4 hundred dollars or more than twenty-five hundred dollars
5 or imprisoned in jail not less than ten days, or more than
6 thirty days after notice by certified mail by the director to
7 such service provider of the requirements of this article.

8 (b) Any person who interferes with or impedes in
9 any way the lawful enforcement of the provisions of this
10 article is guilty of a misdemeanor and, upon conviction
11 thereof, shall be fined not less than five hundred dollars or
12 more than twenty-five hundred dollars or imprisoned in
13 the jail not less than ten days, or more than thirty:
14 *Provided*, That prior to the first day of July, one thousand
15 nine hundred eighty-nine, no such penalty may be
16 imposed upon a service provider until thirty days after
17 notice by certified mail by the director to the service
18 provider at the requirements of this article.

19 (c) If after investigating a complaint, the director
20 determines that the home is housing more than three
21 residents, the director shall assess a civil penalty of fifty
22 dollars per day per the number of residents exceeding
23 three. Each day the violation continues, after the date of
24 citation shall constitute a separate violation. The date of
25 citation is the date the facility receives the written
26 statement of deficiencies.

27 (d) The director may in his or her discretion bring an
28 action to enforce compliance with the provisions of this
29 article.

30 (e) The circuit court of Kanawha County or the
31 circuit court of the county in which the conduct occurred
32 shall have jurisdiction in all civil enforcement actions
33 brought under this article and may order equitable relief
34 without bond.

ARTICLE 5H. RESIDENTIAL BOARD AND CARE HOMES.

§16-5H-1. Purpose.

1 It is the policy of this state to encourage and promote
2 the development and utilization of resources to ensure the
3 effective care and treatment of persons who are dependent
4 upon the services of others by reason of physical or
5 mental impairment or who may require limited and
6 intermittent nursing care but who are capable of self-
7 preservation and are not bedfast, including those
8 individuals who qualify for and are receiving services
9 coordinated by a licensed hospice. Such care and
10 treatment requires a living environment for such persons
11 which, to the extent practicable, will approximate a normal
12 home environment. To this end, the guiding principle for
13 administration of the laws of the state is that such persons
14 shall be encouraged and assisted in securing necessary
15 care and treatment in noninstitutional surroundings. In
16 recognition that for many such persons effective care and
17 treatment can only be secured from proprietary and
18 voluntary residential board and care homes it is the policy
19 of this state to encourage, promote and require the
20 maintenance of residential board and care homes so as to
21 ensure protection of the rights and dignity of those using
22 the services of such residential board and care homes.

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

§16-5H-2. Definitions.

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

3 (a) “Deficiency” means a statement of the rule and
4 the fact that compliance has not been established and the
5 reasons therefor;

6 (b) “Department” means the state department of
7 health and human resources;

8 (c) “Director” means the secretary of the
9 department of health and human resources or his or her
10 designee;

11 (d) “Division” means the division of health of the
12 state department of health and human resources;

13 (e) “Limited and intermittent nursing care” means
14 direct hands on nursing care of an individual who needs
15 no more than two hours of nursing care per day for a
16 period of time no longer than ninety consecutive days per
17 episode which may only be provided when the need for
18 such care meets these factors: (1) The resident requests to
19 remain in the residential board and care home; (2) the
20 resident is advised of the availability of other specialized
21 health care facilities to treat his or her condition; and (3)
22 the need for such care is the result of a medical pathology
23 or a result of the normal aging process. Limited and
24 intermittent nursing care may only be provided by or
25 under the supervision of a registered professional nurse
26 and in accordance with rules promulgated by the
27 secretary;

28 (f) “Nursing care” means those procedures
29 commonly employed in providing for the physical,
30 emotional and rehabilitational needs of the ill or otherwise
31 incapacitated which require technical skills and knowledge
32 beyond that which the untrained person possesses,
33 including, but not limited to, such procedures as:
34 Irrigations, catheterization, special procedures contributing
35 to rehabilitation and administration of medication by any
36 method which involves a level of complexity and skill in
37 administration not possessed by the untrained person;

38 (g) “Person” means an individual and every form of
39 organization, whether incorporated or unincorporated,

40 including any partnership, corporation, trust, association
41 or political subdivision of the state;

42 (h) "Personal assistance" means personal services,
43 including, but not limited to, the following: Help in
44 walking, bathing, dressing, feeding or getting in or out of
45 bed, or supervision required because of the age or mental
46 impairment of the resident;

47 (i) "Resident" means an individual living in a
48 residential board and care home for the purpose of
49 receiving personal assistance or limited and intermittent
50 nursing services from the home;

51 (j) "Residential board and care home" means any
52 residence or place or any part or unit thereof, however
53 named, in this state which is advertised, offered,
54 maintained or operated by the ownership or management,
55 whether for a consideration or not, for the express or
56 implied purpose of providing accommodations, personal
57 assistance and supervision, for a period of more than
58 twenty-four hours, to four or more persons who are
59 dependent upon the services of others by reason of
60 physical or mental impairment or who may require limited
61 and intermittent nursing care but who are capable of, as
62 certified in consultation with a licensed health care
63 professional, and are not bedfast, including those
64 individuals who qualify for and are receiving services
65 coordinated by a licensed hospice: *Provided, That*
66 *services utilizing equipment which requires auxiliary*
67 *electrical power in the event of a power failure may not be*
68 *used unless the residential board and care home has a*
69 *backup power generator: Provided, however, That the*
70 *care or treatment in a household, whether for*
71 *compensation or not, of any person related by blood or*
72 *marriage, within the degree of consanguinity of second*
73 *cousin to the head of the household, or his or her spouse,*
74 *may not be deemed to constitute a residential board and*
75 *care home within the meaning of this article. Nothing*
76 *contained in this article applies to hospitals, as defined*
77 *under section one, article five-b of this chapter; or state*
78 *institutions, as defined under section three, article one,*
79 *chapter twenty-five of this code or section six, article one,*

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80 chapter twenty-seven of this code; or residential board and
81 care homes operated by the federal government or the
82 state; or institutions operated for the treatment and care of
83 alcoholic patients; or offices of physicians; or hotels,
84 boarding homes or other similar places that furnish to
85 their guests only room and board; or to homes or asylums
86 operated by fraternal orders pursuant to article three,
87 chapter thirty-five of this code;

88 (k) "Secretary" means the secretary of the state
89 department of health and human resources or his or her
90 designee;

91 (l) "Self-preservation" means that a person is, at
92 least, capable of removing his or her physical self from
93 situations involving imminent danger, such as fire; and

94 (m) "Substantial compliance" means a level of
95 compliance with the rules such that identified deficiencies
96 pose no greater risk to resident health or safety than the
97 potential for causing minimal harm.

98 The secretary may define in rules any term used
99 herein which is not expressly defined.

§16-5H-3. Powers, duties and rights of director.

1 In the administration of this article, the director shall
2 have the following powers, duties and rights:

3 (a) To enforce rules and standards for residential
4 board and care homes which are adopted, promulgated,
5 amended or modified by the secretary;

6 (b) To exercise as sole authority all powers relating
7 to the issuance, suspension and revocation of licenses of
8 residential board and care homes;

9 (c) To enforce rules adopted, promulgated, amended
10 or modified by the secretary governing the qualification
11 of applicants for residential board and care home licenses,
12 including, but not limited to, educational requirements,
13 financial requirements, personal and ethical requirements;

14 (d) To receive and disburse federal funds and to take
15 whatever action not contrary to law as may be proper and

16 necessary to comply with the requirements and conditions
17 for the receipt of federal funds;

18 (e) To receive and disburse for authorized purposes
19 any moneys appropriated for the division by the
20 Legislature;

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

26 (g) To make contracts, and to execute all instruments
27 necessary or convenient in carrying out the director's
28 functions and duties; and all contracts, agreements and
29 instruments shall be executed by the director;

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

32 (i) To offer and sponsor educational and training
33 programs for residential board and care homes'
34 administrative, management and operational personnel;

35 (j) To undertake survey, research and planning
36 projects and programs relating to administration and
37 operation of residential board and care homes and to the
38 health, care, treatment and service in general of residents
39 of such homes;

40 (k) To assess civil penalties for violations of
41 residential board and care home standards, in accordance
42 with section ten of this article;

43 (l) To inspect any residential board and care home
44 and any records maintained therein, subject to the
45 provisions of section ten of this article;

46 (m) To establish and implement procedures,
47 including informal conferences, investigations and
48 hearings, subject to applicable provisions of article three,
49 chapter twenty-nine-a of this code, and to enforce
50 compliance with the provisions of this article and with
51 rules issued hereunder, by the secretary;

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

61 (o) To make complaint or cause proceedings to be
62 instituted against any person or persons for the violation
63 of the provisions of this article or of rules issued
64 hereunder, by the secretary. Such action may be taken by
65 the director without the sanction of the prosecuting
66 attorney of the county in which proceedings are instituted,
67 if the officer fails or refuses to discharge his or her duty.
68 The circuit court of Kanawha County or the circuit court
69 of the county in which the conduct has occurred shall
70 have jurisdiction in all civil enforcement actions brought
71 under this article and may order equitable relief without
72 bond. In no such case may the director or any person
73 acting under the director's direction be required to give
74 security for costs;

75 (p) To delegate authority to the director's employees
76 and agents to perform all functions of the director except
77 the making of final decisions in adjudications; and

78 (q) To submit a report to the governor, the
79 Legislature and the public, on or before the first day of
80 December, one thousand nine hundred ninety-seven, and
81 annually thereafter. The report shall describe the
82 residential board and care home licensing and
83 investigatory activities of the division during the year, and
84 the nature and status of other activities of the division, and
85 may include comment on the acts, policies, practices or
86 procedures of any public or private agency that affect the
87 rights, health or welfare of residents of residential board
88 and care homes. The annual report shall include a list of
89 all residential board and care homes in the state and such
90 of the following information as the director determines to
91 apply: Whether the homes are proprietary or

92 nonproprietary, the classification of each home; the name
93 of the owner or owners; the total number of beds; the
94 number of private and semiprivate rooms; the costs per
95 diem for private residents; the number of full-time
96 employees and their professions; recreational programs;
97 services and programs available as well as the costs thereof,
98 and whether or not those residential board and care homes
99 listed accept medicare and medicaid residents. The report
100 shall also contain the division's recommendations as to
101 changes in law or policy which it deems necessary or
102 appropriate for the protection of the rights, health or
103 welfare of residents of residential board and care homes in
104 the state.

§16-5H-4. Administrative and inspection staff.

1 The director may, at such time or times as he or she
2 may deem necessary, employ such administrative
3 employees, inspectors, or other persons as may be
4 necessary to properly carry out the provisions of this
5 article. All employees of the division shall be members of
6 the state civil service system. Such inspectors and other
7 employees as may be duly designated by the director shall
8 act as the director's representatives and, under the
9 direction of the director, shall enforce the provisions of
10 this article and all duly promulgated rules of the secretary
11 and, in the discharge of official duties, shall have the right
12 of entry into any place maintained as a residential board
13 and care home.

**§16-5H-5. Rules; minimum standards for residential board
and care homes.**

1 (a) All rules shall be approved by the secretary and
2 promulgated in the manner provided by the provisions of
3 article three, chapter twenty-nine-a of this code. The
4 secretary shall adopt, amend or repeal such rules as may
5 be necessary or proper to carry out the purposes and
6 intent of this article and to enable the director to exercise
7 the powers and perform the duties conferred upon the
8 director by this article.

9 (b) The secretary shall promulgate rules establishing
10 minimum standards of operation of residential board and
11 care homes including, but not limited to, the following:

12 (1) Administrative policies, including: (A) An
13 affirmative statement of the right of access to residential
14 board and care homes by members of recognized
15 community organizations and community legal services
16 programs whose purposes include rendering assistance
17 without charge to residents, consistent with the right of
18 residents to privacy; and (B) a statement of the rights and
19 responsibilities of residents;

20 (2) Minimum numbers and qualifications of
21 personnel, including management, medical and nursing,
22 aides, orderlies and support personnel, according to the
23 size and classification of the residential board and care
24 home;

25 (3) Safety requirements;

26 (4) Sanitation requirements;

27 (5) Protective and personal services to be provided;

28 (6) Dietary services to be provided;

29 (7) Maintenance of health records;

30 (8) Social and recreational activities to be made
31 available;

32 (9) Physical facilities;

33 (10) Requirements related to limited and intermittent
34 nursing care; and

35 (11) Such other categories as the secretary
36 determines to be appropriate to ensure resident's health,
37 safety and welfare.

38 (c) The secretary shall include in rules detailed
39 standards for each of the categories of standards
40 established pursuant to subsections (b) and (d) of this
41 section, and shall classify such standards as follows: Class I
42 standards are standards the violation of which, the
43 secretary determines, would present either an imminent

44 danger to the health, safety or welfare of any resident or a
45 substantial probability that death or serious physical harm
46 would result; Class II standards are standards which the
47 secretary determines have a direct or immediate
48 relationship to the health, safety or welfare of any resident,
49 but which do not create imminent danger; Class III
50 standards are standards which the secretary determines
51 have an indirect or a potential impact on the health, safety
52 or welfare of any resident.

53 (d) A residential board and care home shall attain
54 substantial compliance with standards established pursuant
55 to section five of this article, and such other requirements
56 for a license as may be established by rule under this
57 article.

**§16-5H-6. License required; application; fees; duration;
renewal.**

1 Subject to the provisions of section seventeen of this
2 article, no person may establish, operate, maintain, offer or
3 advertise a residential board and care home within this
4 state unless and until he or she obtains a valid license
5 therefor as hereinafter provided, which license remains
6 unsuspended, unrevoked and unexpired. No public
7 official or employee may place any person in, or
8 recommend that any person be placed in, or directly or
9 indirectly cause any person to be placed in, any residential
10 board and care home, as defined in section two of this
11 article, which is being operated without a valid license
12 from the director. The procedure for obtaining a license
13 shall be as follows:

14 (a) The applicant shall submit an application to the
15 director on a form to be prescribed by the director,
16 containing such information as may be necessary to show
17 that the applicant is in compliance with the standards for
18 residential board and care homes as established by this
19 article and the rules lawfully promulgated by the secretary
20 hereunder. The application and any exhibits thereto shall
21 provide the following information:

22 (1) The name and address of the applicant;

23 (2) The name, address and principal occupation: (A)
24 Of each person who, as a stockholder or otherwise, has a
25 proprietary interest of ten percent or more in the
26 applicant; (B) of each officer and director of a corporate
27 applicant; (C) of each trustee and beneficiary of an
28 applicant which is a trust; and (D) where a corporation has
29 a proprietary interest of twenty-five percent or more in an
30 applicant, the name, address and principal occupation of
31 each officer and director of such corporation;

32 (3) The name and address of the owner of the
33 premises of the residential board and care home or
34 proposed residential board and care home, if he or she is a
35 different person from the applicant, and in such case, the
36 name and address: (A) Of each person who, as a
37 stockholder or otherwise, has a proprietary interest of ten
38 percent or more in such owner; (B) of each officer and
39 director of a corporate applicant; (C) of each trustee and
40 beneficiary of such owner if he or she is a trust; and (D)
41 where a corporation has a proprietary interest of twenty-
42 five percent or more in such owner, the name and address
43 of each officer and director of such corporation;

44 (4) Where the applicant is the lessee or the assignee
45 of the residential board and care home or the premises of
46 the proposed residential board and care home, a signed
47 copy of the lease and any assignment thereof;

48 (5) The name and address of the residential board
49 and care home or the premises of the proposed residential
50 board and care home;

51 (6) The proposed bed quota of the residential board
52 and care home and the proposed bed quota of each unit
53 thereof;

54 (7) (A) An organizational plan for the residential
55 board and care home indicating the number of persons
56 employed or to be employed, the positions and duties of
57 all employees; (B) the name and address of the individual
58 who is to serve as administrator; and (C) such evidence of
59 compliance with applicable laws and rules governing
60 zoning, buildings, safety, fire prevention and sanitation as
61 the director may require; and

62 (8) Such additional information as the director may
63 require.

64 (b) Upon receipt and review of an application for
65 license made pursuant to subsection (a) of this section, and
66 inspection of the applicant residential board and care
67 home pursuant to section ten of this article, the director
68 shall issue a license if he or she finds:

69 (1) That an individual applicant, and any partner,
70 trustee, officer, director and controlling person of an
71 applicant which is not an individual, is a person
72 responsible and suitable to operate or to direct or
73 participate in the operation of a residential board and care
74 home by virtue of financial capacity, appropriate business
75 or professional experience, a record of compliance with
76 lawful orders of the department, if any, and lack of
77 revocation of a license during the previous five years;

78 (2) That the residential board and care home be
79 under the supervision of an administrator who is qualified
80 by training and experience; or

81 (3) That the residential board and care home is in
82 substantial compliance with standards established pursuant
83 to section five of this article, and such other requirements
84 for a license as the secretary may establish by rule under
85 this article.

86 The director may deny an initial or renewal license if
87 the information provided in an application or report is
88 known by the applicant to be false or the applicant fails to
89 report required information.

90 Any license granted by the director shall state the
91 maximum bed capacity for which it is granted, the date the
92 license was issued, and the expiration date. Such licenses
93 shall be issued for a period not to exceed one year for
94 residential board and care homes: *Provided*, That any
95 such license in effect for which timely application for
96 renewal, together with payment of the proper fee has been
97 made to the state division of health in conformance with
98 the provisions of this article and the rules issued
99 thereunder, and prior to the expiration date of such

100 license, shall continue in effect until: (A) One year
101 following the expiration date of such license; or (B) the
102 date of the revocation or suspension of such license
103 pursuant to the provisions of this article; or (C) the date of
104 issuance of a new license, whichever date first occurs.
105 Each license shall be issued only for the premises and
106 persons named in the application and is not transferable or
107 assignable: *Provided, however,* That in the case of the
108 transfer of ownership of a residential board and care home
109 with an unexpired license, the application of the new
110 owner for a license shall have the effect of a license for a
111 period of three months when filed with the director.
112 Every license shall be displayed in a conspicuous place in
113 the residential board and care home for which it is issued
114 so as to be accessible to and in plain view of all residents
115 and visitors of the residential board and care home.

116 (c) An original license shall be renewable,
117 conditioned upon the licensee filing timely application for
118 the extension of the term of the license accompanied by
119 the fee, and contingent upon evidence of compliance with
120 the provisions of this article and rules promulgated by the
121 secretary hereunder. The application shall be
122 accompanied by the information required in subdivisions
123 (1),(2) and (3) of this subsection.

124 (1) A balance sheet of the residential board and care
125 home as of the end of its fiscal year, setting forth assets
126 and liabilities at such date, including all capital, surplus,
127 reserve, depreciation and similar accounts;

128 (2) A statement of operations of the residential board
129 and care home as of the end of its fiscal year, setting forth
130 all revenues, expenses, taxes, extraordinary items and other
131 credits or charges; and

132 (3) A statement of any changes in the name, address,
133 management or ownership information on file with the
134 director.

135 (d) In the case of an application for a renewal license,
136 if all requirements of section five of this article are not
137 met, the director may in his or her discretion issue a
138 provisional license, provided that care given in the

139 residential board and care home is adequate for resident
140 needs and the residential board and care home has
141 demonstrated improvement and evidences potential for
142 substantial compliance within the term of said license:
143 *Provided*, That a provisional renewal may not be issued
144 for a period greater than one year, may not be renewed,
145 and may not be issued to any residential board and care
146 home with uncorrected violations of any Class I standard,
147 as defined in subsection (c), section five of this article.

148 (e) A nonrefundable application fee in the amount of
149 sixty-five dollars for an original residential board and care
150 home license shall be paid at the time application is made
151 for such license. The average cost of all direct costs for
152 the initial licensure inspections of all such homes for the
153 preceding ten facilities shall be borne by the applicant and
154 shall be received by the director prior to the issuance of an
155 initial or amended license. The license fee for renewal of
156 a license shall be at the rate of four dollars per bed per
157 year for residential board and care homes, except the
158 annual rate per bed may be assessed for licenses issued for
159 less than one year. The director may annually adjust the
160 licensure fees for inflation based upon the consumer price
161 index. The bed capacity for the holder of each license
162 shall be determined by the director. All such license fees
163 shall be due and payable to the director, annually, and in
164 such manner set forth in the rules promulgated by the
165 secretary. Such fee and application shall be submitted to
166 the director who shall retain both the application and fee
167 pending final action on the application. All fees received
168 by the director under the provisions of this article shall be
169 deposited in accordance with section thirteen, article one
170 of this chapter.

§16-5H-7. Cost disclosure; surety for residents' funds.

1 (a) Each residential board and care home shall
2 disclose in writing to all prospective residents a complete
3 and accurate list of all costs which may be incurred by
4 them. Residents are not liable for any cost not so
5 disclosed.

6 (b) If the residential board and care home handles
7 any money for residents within the residential board and

8 care home, the licensee or his or her authorized
9 representative shall give a bond in an amount consistent
10 with this subsection and with such surety as the director
11 shall approve. Such bond shall be upon condition that the
12 licensee shall hold separately and in trust all
13 residents' funds deposited with the licensee, shall
14 administer the funds on behalf of the resident in the
15 manner directed by the depositor, shall render a true and
16 complete account to the depositor and the director when
17 requested, and at least quarterly to the resident, and upon
18 termination of the deposit, shall account for all funds
19 received, expended, and held on hand. The licensee shall
20 file a bond in a sum to be fixed by the director based
21 upon the magnitude of the operations of the applicant, but
22 which sum may not be less than two thousand five
23 hundred dollars.

24 (c) Every person injured as a result of any improper
25 or unlawful handling of the money of a resident of a
26 residential board and care home may bring an action in a
27 proper court on the bond required to be posted by the
28 licensee pursuant to this subsection for the amount of
29 damage suffered as a result thereof to the extent covered
30 by the bond. Whenever the director determines that the
31 amount of any bond which is filed pursuant to this
32 subsection is insufficient to adequately protect the money
33 of residents which is being handled, or whenever the
34 amount of any such bond is impaired by any recovery
35 against the bond, the director may require the licensee to
36 file an additional bond in such amount as necessary to
37 adequately protect the money of residents being handled.

38 (d) The provisions of this subsection do not apply if
39 the licensee handles less than twenty-five dollars per
40 resident and less than five hundred dollars for all residents
41 in any month.

§16-5H-8. Investigation of complaints.

1 The secretary shall establish by rule procedures for
2 prompt investigation of all complaints of alleged
3 violations by residential board and care homes of
4 applicable requirements of state law or rules, except for
5 such complaints that the director determines are willfully

6 intended to harass a licensee or are without any reasonable
7 basis. Such procedures shall include provisions for
8 ensuring the confidentiality of the complainant and of any
9 other person so named in the complaint, and for promptly
10 informing the complainant and the residential board and
11 care home involved of the results of the investigation.

12 If, after its investigation, the director determines that
13 the complaint has merit, the director shall take appropriate
14 disciplinary action and shall advise any injured party of
15 the possibility of a civil remedy under this article.

16 No residential board and care home may discharge
17 or in any manner discriminate against any resident or
18 employee for the reason that such resident or employee
19 has filed a complaint or participated in any proceeding
20 specified in this article. Violation of this prohibition by
21 any residential board and care home constitutes ground
22 for the suspension or revocation of the license of the
23 residential board and care home as provided in section
24 eleven of this article. Any type of discriminatory
25 treatment of a resident by whom, or upon whose behalf, a
26 complaint has been submitted to the director, or any
27 proceeding instituted under this article, within one
28 hundred twenty days of the filing of the complaint or the
29 institution of such action, shall raise a rebuttable
30 presumption that such action was taken by the residential
31 board and care home in retaliation for such complaint or
32 action.

§16-5H-9. Inspections.

1 The director and any duly designated employee or
2 agent thereof shall have the right to enter upon and into
3 the premises of any residential board and care home for
4 which a license has been issued, for which an application
5 for license has been filed with the director, or which the
6 director has reason to believe is being operated or
7 maintained as a residential board and care home without a
8 license. If such entry is refused by the owner or person in
9 charge of any such residential board and care home, the
10 director shall apply to the circuit court of the county in
11 which the residential board and care home is located or
12 the circuit court of Kanawha County for an order

13 authorizing inspection, and such court shall issue an
14 appropriate order if it finds good cause.

15 The director, by the director's authorized employees
16 or agents, shall conduct at least one inspection prior to
17 issuance of a license pursuant to section six of this article,
18 and shall conduct periodic unannounced inspections
19 thereafter, to determine compliance by the residential
20 board and care home with applicable statutes and rules
21 promulgated thereunder. All residential board and care
22 homes shall comply with rules of the state fire
23 commission. The state fire marshal, by his or her
24 employees or authorized agents, shall make all fire, safety
25 and like inspections. The director may provide for such
26 other inspections as the director may deem necessary to
27 carry out the intent and purpose of this article. If after
28 investigating a complaint, the director determines that the
29 complaint is substantiated and that an immediate and
30 serious threat to a consumer's health or safety exists, the
31 director may invoke any remedies available pursuant to
32 section eleven of this article. Any residential board and
33 care home aggrieved by a determination or assessment
34 made pursuant to this section shall have the right to an
35 administrative appeal as set forth in section twelve of this
36 article.

**§16-5H-10. Reports of inspections; plans of correction;
assessment of penalties and use of funds derived
therefrom; hearings.**

1 (a) Reports of all inspections made pursuant to
2 section nine of this article shall be in writing and filed with
3 the director, and shall list all deficiencies in the residential
4 board and care home's compliance with the provisions of
5 this article and the rules adopted by the secretary
6 hereunder. The director shall send a copy of such report
7 to the residential board and care home by certified mail,
8 return receipt requested, and shall specify a time within
9 which the residential board and care home shall submit a
10 plan for correction of such deficiencies, which plan shall
11 be approved, rejected or modified by the director. The
12 surveyors shall allow audio taping of the exit conference
13 for both licensure and certification inspections with all

14 costs directly associated with such taping to be paid by the
15 residential board and care home provided that an original
16 tape is provided to surveyors at the end of taping.

17 (b) Upon a residential board and care home's failure
18 to submit a plan of correction which is approved by the
19 director, or to correct any deficiency within the time
20 specified in an approved plan of correction, the director
21 may assess civil penalties as hereinafter provided or may
22 initiate any other legal or disciplinary action as provided
23 by this article.

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

32 (d) Civil penalties assessed against residential board
33 and care homes shall be classified according to the nature
34 of the violation as defined in subsection (c), section five of
35 this article and rules promulgated thereunder by the
36 secretary, as follows: For each violation of a Class I
37 standard, a civil penalty of not less than fifty nor more
38 than five hundred dollars shall be imposed; for each
39 violation of a Class II standard, a civil penalty of not less
40 than twenty-five nor more than fifty dollars shall be
41 imposed; for each violation of a Class III standard, a civil
42 penalty of not less than ten nor more than twenty-five
43 dollars shall be imposed. Each day a violation continues,
44 after the date of citation, shall constitute a separate
45 violation. The date of citation is the date the facility
46 receives the written statement of deficiencies.

47 (e) The director shall assess a civil penalty not to
48 exceed two thousand dollars against any individual who
49 notifies, or causes to be notified, a residential board and
50 care home of the time or date on which an inspection is
51 scheduled to be conducted under this article.

52 (f) If the director assesses a penalty under this
53 section, the director shall cause delivery of notice of such
54 penalty by personal service or by certified mail. Said
55 notice shall state the amount of the penalty, the action or
56 circumstance for which the penalty is assessed, the
57 requirement that the action or circumstance violates, and
58 the basis upon which the director assessed the penalty and
59 selected the amount of the penalty.

60 (g) The director shall, in a civil judicial proceeding,
61 recover any unpaid assessment which has not been
62 contested under section twelve of this article within thirty
63 days of receipt of notice of such assessment, or which has
64 been affirmed under the provisions of that section and not
65 appealed within thirty days of receipt of the director's
66 final order, or which has been affirmed on judicial review,
67 as provided in section thirteen of this article. All money
68 collected by assessments of civil penalties or interest shall
69 be paid into a special resident benefit account and shall be
70 applied by the director only for the protection of the
71 health or property of residents of residential board and
72 care homes operated within the state that the director finds
73 to be deficient, including payment for the costs of
74 relocation of residents to other facilities, operation of a
75 residential board and care home pending correction of
76 deficiencies or closure, and reimbursement of residents for
77 personal funds lost.

78 (h) The opportunity for a hearing on an action taken
79 under this section shall be as provided in section twelve of
80 this article. In addition to any other rights of appeal
81 conferred upon a residential board and care home
82 pursuant to this section, a residential board and care home
83 shall have the right to request a hearing and seek judicial
84 review pursuant to sections twelve and thirteen of this
85 article to contest the citing by the director of a deficiency
86 on an inspection report, irrespective of whether the
87 deficiency results in the imposition of a civil penalty.

§16-5H-11. License limitation, suspension, revocation; ban on admissions; continuation of disciplinary proceedings; closure, transfer of residents, appoint-

ment of temporary management; assessment of interest; collection of assessments; hearings.

1 (a) The director shall by order, impose a ban on the
2 admission of residents or reduce the bed quota of the
3 residential board and care home, or any combination
4 thereof, where he or she finds upon inspection of the
5 residential board and care home that the licensee is not
6 providing adequate care under the residential board and
7 care home's existing quota, and that, reduction in quota or
8 imposition of a ban on admissions, or any combination
9 thereof, would place the licensee in a position to render
10 adequate care. Any notice to a licensee of reduction in
11 quota or ban on admissions shall include the terms of such
12 order, the reasons therefor, and the date set for
13 compliance.

14 (b) The director may suspend or revoke a license
15 issued under this article if he or she finds upon inspection
16 that there has been a substantial failure to comply with the
17 provisions of this article or the standards or rules
18 promulgated pursuant hereto.

19 (c) Whenever a license is limited, suspended or
20 revoked pursuant to this section, the director shall file an
21 administrative complaint stating facts constituting a
22 ground or grounds for such limitation, suspension or
23 revocation. Upon the filing of the administrative
24 complaint, the director shall notify the licensee in writing
25 of the filing of the administrative complaint, enclosing a
26 copy of the administrative complaint, and shall advise the
27 licensee of the availability of a hearing pursuant to section
28 twelve of this article. Such notice and copy of the
29 complaint shall be served on such licensee by certified
30 mail, return receipt requested.

31 (d) The suspension, expiration, forfeiture or
32 cancellation by operation of law or order of the director
33 of a license issued by the director, or the withdrawal of an
34 application for a license after it has been filed with the
35 director, may not deprive the director of the director's
36 authority to institute or continue a disciplinary
37 proceeding, or a proceeding for the denial of a license
38 application, against the licensee or applicant upon any

39 ground provided by law or to enter an order denying the
40 license application or suspending or revoking the license
41 or otherwise taking disciplinary action on any such
42 ground.

43 (e) In addition to other remedies provided in this
44 article, upon petition from the director, the circuit court of
45 the county in which the conduct has occurred or is
46 occurring, or the circuit court of Kanawha County, may
47 determine that a residential board and care home's
48 deficiencies under this article constitute an emergency
49 immediately jeopardizing the health, safety, welfare, or
50 rights of its residents, and issue an order to:

51 (1) Close the residential board and care home;

52 (2) Transfer residents in the residential board and
53 care home to other facilities; or

54 (3) Appoint temporary management to oversee the
55 operation of the residential board and care home and to
56 assure the health, safety, welfare and rights of the
57 residential board and care home's residents, where there is
58 a need for temporary management while:

59 (A) There is an orderly closure of the residential
60 board and care home; or

61 (B) Improvements are made in order to bring the
62 residential board and care home into compliance with all
63 the applicable requirements of this article.

64 If the director petitions a circuit court for the closure
65 of a residential board and care home, the transfer of
66 residents, or the appointment of temporary management,
67 the circuit court shall hold a hearing no later than seven
68 days thereafter, at which time the director and the licensee
69 or operator of the residential board and care home may
70 participate and present evidence.

71 A circuit court may divest the licensee or operator of
72 possession and control of a residential board and care
73 home in favor of temporary management. The temporary
74 management shall be responsible to the court and shall
75 have such powers and duties as the court may grant to

76 direct all acts necessary or appropriate to conserve the
77 property and promote the health, safety, welfare and rights
78 of the residents of the residential board and care home,
79 including, but not limited to, the replacement of
80 management and staff, the hiring of consultants, the
81 making of any necessary expenditures to close the
82 residential board and care home or to repair or improve
83 the residential board and care home so as to return it to
84 compliance with applicable requirements, and the power to
85 receive, conserve and expend funds, including payments
86 on behalf of the licensee or operator of the residential
87 board and care home. Priority shall be given to
88 expenditures for current direct resident care or the transfer
89 of residents.

90 The person charged with temporary management
91 shall be an officer of the court, shall be paid by the
92 residential board and care home when resources are
93 available, is not liable for conditions at the residential
94 board and care home which existed or originated prior to
95 his or her appointment, and is not personally liable,
96 except for his or her own gross negligence and intentional
97 acts which result in injuries to persons or damage to
98 property at the residential board and care home during his
99 or her temporary management.

100 No person may impede the operation of a temporary
101 management. There shall be an automatic stay for a
102 ninety-day period subsequent to the establishment of a
103 temporary management of any action that would interfere
104 with the functioning of the residential board and care
105 home, including, but not limited to, cancellation of
106 insurance policies, termination of utility services,
107 attachments to working capital accounts, foreclosures,
108 evictions and repossessions of equipment used in the
109 residential board and care home.

110 A temporary management established for the
111 purpose of making improvements in order to bring a
112 residential board and care home into compliance with
113 applicable requirements may not be terminated until the
114 court has determined that the residential board and care
115 home has the management capability to ensure continued

116 compliance with all applicable requirements, except if the
117 court has not made such determination within six months
118 of the establishment of the temporary management, the
119 temporary management terminates by operation of law at
120 that time, and the residential board and care home shall be
121 closed. After the termination of the temporary
122 management, the person who was responsible for the
123 temporary management shall make an accounting to the
124 court, and after deducting from receipts the costs of the
125 temporary management, expenditures and civil penalties
126 and interest no longer subject to appeal, in that order, any
127 excess shall be paid to the licensee or operator of the
128 residential board and care home.

129 (f) The assessments for penalties and for costs of
130 actions taken under this article shall have interest assessed
131 at five percent per annum beginning thirty days after
132 receipt of notice of such assessment or thirty days after
133 receipt of the director's final order following a hearing,
134 whichever is later. All such assessments against a
135 residential board and care home that are unpaid shall be
136 added to the residential board and care home's licensure
137 fee and may be filed as a lien against the property of the
138 licensee or operator of the residential board and care
139 home. Funds received from such assessments shall be
140 deposited as funds received, as provided, in section ten of
141 this article.

142 (g) The secretary shall have the power to promulgate
143 emergency rules that expand the power of the director in
144 excess of that provided in this article to the extent required
145 to comply with federal requirements, but any such rules
146 shall expand the power of the director to the minimum
147 extent required by federal requirements. Such rules are
148 subject to the provisions of article three, chapter
149 twenty-nine-a of this code.

150 (h) The opportunity for a hearing on an action by
151 the director taken under this section shall be as provided
152 in section twelve of this article.

**§16-5H-12. Administrative appeals for civil assessments,
license limitation, suspension or revocation.**

1 (a) Any licensee or applicant aggrieved by an order
2 issued pursuant to sections five, six, ten or eleven of this
3 article shall, upon timely written request, have the
4 opportunity for a hearing by the director at which he or
5 she may contest such order as contrary to law or
6 unwarranted by the facts or both. All of the pertinent
7 provisions of article five, chapter twenty-nine-a of this
8 code shall apply to and govern such hearing and the
9 administrative procedures in connection with such
10 hearing. Such licensee or applicant may also request an
11 informal meeting with the director before such hearing.

12 Following such hearing the director shall make and
13 enter a written order either dismissing the complaint or
14 taking such action as is authorized in this article. The
15 written order of the director shall be accompanied by
16 findings of fact and conclusions of law as specified in
17 section three, article five, chapter twenty-nine-a of this
18 code, and a copy of such order and accompanying
19 findings and conclusions shall be served upon the licensee
20 and his or her attorney of record, if any, by certified mail,
21 return receipt requested. If the director suspends a
22 residential board and care home's license, it shall also
23 specify the conditions giving rise to such suspension, to be
24 corrected by the licensee during the period of suspension
25 in order to entitle the licensee to reinstatement of the
26 license. If the director revokes a license, the director may
27 stay the effective date of revocation by not more than
28 ninety days upon a showing that such delay is necessary to
29 assure appropriate placement of residents. The order of
30 the director shall be final unless vacated or modified upon
31 judicial review thereof in accordance with the provisions
32 of section thirteen of this article.

33 (b) In addition to all other powers granted by this
34 chapter, the director may hold the case under advisement
35 and make a recommendation as to requirements to be met
36 by the licensee in order to avoid either suspension or
37 revocation. In such a case, the director shall enter an
38 order accordingly and so notify the licensee and his or her
39 attorney of record, if any, by certified mail, return receipt
40 requested. If the licensee meets the requirements of such
41 order, the director shall enter an order showing

42 satisfactory compliance and dismissing the complaint and
43 shall so notify the licensee and the licensee's attorney of
44 record, if any, by certified mail, return receipt requested.

§16-5H-13. Judicial review.

1 Any licensee adversely affected by an order of the
2 director rendered after a hearing held in accordance with
3 the provisions of section twelve of this article is entitled to
4 judicial review thereof. All of the pertinent provisions of
5 section four, article five, chapter twenty-nine-a of this code
6 shall apply to and govern with like effect as if the
7 provisions of said section four were set forth in extenso in
8 this section.

9 The judgment of the circuit court shall be final
10 unless reversed, vacated or modified on appeal to the
11 supreme court of appeals in accordance with the
12 provisions of section one, article six, chapter twenty-nine-a
13 of this code.

§16-5H-14. Legal counsel and services for the director.

1 (a) Legal counsel and services for the director in all
2 administrative hearings and all proceedings in any circuit
3 court and the supreme court of appeals shall be provided
4 by the attorney general, his or her assistants or an attorney
5 employed by the director, in proceedings in any circuit
6 court by the prosecuting attorney of the county as well, all
7 without additional compensation.

8 (b) The governor may appoint counsel for the
9 director, who shall perform such legal services in
10 representing the interests of residents in residential board
11 and care homes in matters under the jurisdiction of the
12 director as the governor shall direct. It shall be the duty
13 of such counsel to appear for the residents in all cases
14 where they are not represented by counsel. The
15 compensation of such counsel shall be fixed by the
16 governor.

**§16-5H-15. Unlawful acts; penalties; injunctions; private right
of action.**

1 (a) Whoever advertises, announces, establishes or
2 maintains, or is engaged in establishing or maintaining a
3 residential board and care home without a license granted
4 under section six of this article, or who prevents, interferes
5 with or impedes in any way the lawful enforcement of this
6 article shall be guilty of a misdemeanor and, upon
7 conviction thereof, shall be punished for the first offense
8 by a fine of not more than one hundred dollars, or by
9 imprisonment in jail for a period of not more than ninety
10 days, or by both such fine and imprisonment, at the
11 discretion of the court. For each subsequent offense, the
12 fine may be increased to not more than two hundred fifty
13 dollars, with imprisonment in jail for a period of not more
14 than ninety days, or both such fine and imprisonment at
15 the discretion of the court. Each day of a continuing
16 violation after conviction shall be considered a separate
17 offense.

18 (b) The director may in his or her discretion bring an
19 action to enforce compliance with this article or any rule,
20 or order hereunder, whenever it shall appear to the
21 director that any person has engaged in, or is engaging in,
22 an act or practice in violation of this article or any rule, or
23 order hereunder, or whenever it shall appear to the
24 director that any person has aided, abetted or caused, or is
25 aiding, abetting or causing such an act or practice. Upon
26 application by the director, the circuit court of the county
27 in which the conduct has occurred or is occurring, or if
28 emergency circumstances occur, the circuit court of
29 Kanawha County, shall have jurisdiction to grant without
30 bond a permanent or temporary injunction, decree or
31 restraining order.

32 Whenever the director shall have refused to grant or
33 renew a license, or shall have revoked a license required
34 by law to operate or conduct a residential board and care
35 home, or shall have ordered a person to refrain from
36 conduct violating the rules of the secretary, and the person
37 deeming himself or herself aggrieved by such refusal or
38 revocation or order shall have appealed the action of the
39 director, the court may, during pendency of such appeal,
40 issue a restraining order or injunction upon proof that the
41 operation of the residential board and care home or its

42 failure to comply with the order of the director adversely
43 affects the well-being or safety of the residents of the
44 residential board and care home. Should a person who is
45 refused a license or the renewal of a license to operate or
46 conduct a residential board and care home or whose
47 license to operate is revoked or who has been ordered to
48 refrain from conduct or activity which violates the rules of
49 the secretary, fail to appeal or should such appeal be
50 decided favorably to the director, then the court shall issue
51 a permanent injunction upon proof that the person is
52 operating or conducting a residential board and care
53 home without a license as required by law, or has
54 continued to violate the rules of the secretary.

55 (c) Any residential board and care home that
56 deprives a resident of any right or benefit created or
57 established for the well-being of the resident by the terms
58 of any contract, by any state statute or rule, or by any
59 applicable federal statute or regulation, shall be liable to
60 the resident for injuries suffered as a result of such
61 deprivation. Upon a finding that a resident has been
62 deprived of such a right or benefit, and that the resident
63 has been injured as a result of such deprivation, and unless
64 there is a finding that the residential board and care home
65 exercised all care reasonably necessary to prevent and
66 limit the deprivation and injury to the resident,
67 compensatory damages shall be assessed in an amount
68 sufficient to compensate such resident for such injury. In
69 addition, where the deprivation of any such right or
70 benefit is found to have been willful or in reckless
71 disregard of the lawful rights of the resident, punitive
72 damages may be assessed. A resident may also maintain
73 an action pursuant to this section for any other type of
74 relief, including injunctive and declaratory relief,
75 permitted by law. Exhaustion of any available
76 administrative remedies is not required prior to
77 commencement of suit hereunder.

78 The amount of damages recovered by a resident, in
79 an action brought pursuant to this section, shall be exempt
80 for purposes of determining initial or continuing
81 eligibility for medical assistance under article four, chapter
82 nine of this code, and shall neither be taken into

83 consideration nor required to be applied toward the
84 payment or part payment of the cost of medical care or
85 services available under said article.

86 Any waiver by a resident or his or her legal
87 representative of the right to commence an action under
88 this section, whether oral or in writing, shall be null and
89 void as contrary to public policy.

90 (d) The penalties and remedies provided in this
91 section are cumulative and shall be in addition to all other
92 penalties and remedies provided by law.

§16-5H-16. Availability of reports and records.

1 The director shall make available for public
2 inspection and at a nominal cost provide copies of all
3 inspections and other reports of residential board and care
4 homes filed with or issued by the director. Nothing
5 contained in this section may be construed or deemed to
6 allow the public disclosure of confidential medical, social,
7 personal or financial records of any resident. The
8 secretary shall propose rules for legislative approval in
9 accordance with the provisions of article three, chapter
10 twenty-nine-a of this code as may be necessary to give
11 effect to the provisions of this section and to preserve the
12 confidentiality of medical, social, personal or financial
13 records of residents.

§16-5H-17. Licenses and rules in force.

1 All licenses for residential board and care homes
2 which are in force on the first day of July, one thousand
3 nine hundred ninety-seven, shall continue in full force and
4 effect during the period for which issued unless sooner
5 revoked as provided in this article.

6 All rules in effect on the first day of July, one
7 thousand nine hundred ninety-seven, which were adopted
8 by the secretary relating to licensing residential board and
9 care homes, shall remain in full force and effect until
10 altered, amended or repealed by the secretary.

**§16-5H-18. Separate accounts for residents' personal funds;
consent for use; records; penalties.**

1 (a) Each residential board and care home subject to
2 the provisions of this article shall hold in a separate
3 account and in trust each resident's personal funds
4 deposited with the residential board and care home.

5 (b) No person may use or cause to be used for any
6 purpose the personal funds of any resident admitted to
7 any such residential board and care home unless consent
8 for the use thereof has been obtained from the resident or
9 from a committee or guardian or relative.

10 (c) Each residential board and care home shall
11 maintain a true and complete record of all receipts for any
12 disbursements from the personal funds account of each
13 resident in the residential board and care home, including
14 the purpose and payee of each disbursement, and shall
15 render a true account of such record to the resident or his
16 or her representative upon demand and upon termination
17 of the resident's stay in the residential board and care
18 home.

19 (d) Any person or corporation who violates any
20 subsection of this section is guilty of a misdemeanor and,
21 upon conviction thereof, shall be fined not more than one
22 thousand dollars, or imprisoned in jail not more than one
23 year, or both fined and imprisoned.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Darryl Schouver
Chairman Senate Committee

Mik Fontasia
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Darryl Schouver
Clerk of the Senate

Burgoyne W. King
Clerk of the House of Delegates

Earl Ray Tomblin
President of the Senate

[Signature]
Speaker of the House of Delegates

The within is approved this the 7th
day of May, 1997.

[Signature]
Governor

PRESENTED TO THE

GOVERNOR

Date

5/1/97

Time

3:01 pm