WEST VIRGINIA LEGISLATURE
FIRST REGULAR SESSION, 2011

ENROLLED

COMMITTEE SUBSTITUTE FOR
House Bill No. 2522

(By Delegates Williams, Moye, Perdue, Cann, Border and Hamilton)

Passed March 8, 2011

In Effect Ninety Days From Passage
ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 2522

(BY DELEGATES WILLIAMS, MOYE, PERDUE, CANN, BORDER AND HAMILTON)

[Passed March 8, 2011; in effect ninety days from passage.]

AN ACT to amend and reenact §16-5C-8, §16-5C-10 and §16-5C-12 of the Code of West Virginia, 1931, as amended; and to amend said code by adding a new section, designated §16-5C-12a, all relating to nursing home administrative appeals; complaint hearing procedures; establishing an independent disputes resolution process for nursing homes; clarifying the informal and formal review process; and clarifying the judicial review process.

Be it enacted by the Legislature of West Virginia:

That §16-5C-8, §16-5C-10 and §16-5C-12 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that
said code be amended by adding thereto a new section, designated §16-5C-12a, all to read as follows:

ARTICLE 5C. NURSING HOMES.

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

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

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

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

(2) No later than twenty working days following the last day of a complaint investigation, the director shall transmit to the nursing home a statement of deficiencies committed by the facility. Notification of the availability of the independent informal dispute resolution process and an explanation of the independent informal dispute resolution process shall be included in the transmittal.
(c) No nursing home may discharge or in any manner discriminate against any resident, legal representative or employee for the reason that the resident, legal representative or employee has filed a complaint or participated in any proceeding specified in this article. Violation of this prohibition by any nursing home constitutes ground for the suspension or revocation of the license of the nursing home as provided in section eleven of this article. Any type of discriminatory treatment of a resident, legal representative or employee by whom, or upon whose behalf, a complaint has been submitted to the director, or any proceeding instituted under this article, within one hundred twenty days of the filing of the complaint or the institution of such action, shall raise a rebuttable presumption that such action was taken by the nursing home in retaliation for such complaint or action.

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

(a) Reports of all inspections made pursuant to section nine of this article shall be in writing and filed with the director, and shall list all deficiencies in the nursing home's compliance with the provisions of this article and the rules adopted hereunder.

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

(2) Additionally, notification of the availability of the independent informal dispute resolution process and an explanation of the independent informal dispute resolution process shall be included in the transmittal.
(3) A nursing home adversely affected by an order or
citation of a deficient practice issued pursuant to this section
may request the independent informal dispute resolution
process contained in section twelve-a of this article.

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

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

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

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

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

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

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

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

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

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

(5) Any additional factors that may be relevant.

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

(1) For a deficiency which presents immediate jeopardy
to the health, safety or welfare of one or more residents, the
director may impose a civil penalty of not less than three
thousand nor more than eight thousand dollars;

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

(3) For a deficiency which has the potential to harm one
or more residents, the director may impose a civil penalty of
not less than fifty nor more than one thousand dollars;
(4) For a repeated deficiency, the director may impose a civil penalty of up to one hundred fifty percent of the penalties provided in subdivisions (1), (2) and (3) of this subsection; and

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

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

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

(i) If the director assesses a penalty under this section, the director shall cause delivery of notice of such penalty by personal service or by certified mail. Said notice shall state the amount of the penalty, the action or circumstance for which the penalty is assessed, the requirement that the action or circumstance violates, and the basis upon which the director assessed the penalty and selected the amount of the penalty.
(j) The director shall, in a civil judicial proceeding, recover any unpaid assessment which has not been contested under section twelve of this article within thirty days of receipt of notice of such assessment, or which has been affirmed under the provisions of that section and not appealed within thirty days of receipt of the director's final order, or which has been affirmed on judicial review, as provided in section thirteen of this article. All money collected by assessments of civil penalties or interest shall be paid into a special resident benefit account and shall be applied by the director for: (1) The protection of the health or property of facility residents; (2) long-term care educational activities; (3) the costs arising from the relocation of residents to other nursing homes when no other funds are available; and (4) in an emergency situation in which there are no other funds available, the operation of a facility pending correction of deficiencies or closure.

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

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

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

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

The director may impose the following prior to or during
the pendency of an informal hearing, an independent
informal dispute resolution process or of a formal hearing:

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

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

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

(c) If the applicant or licensee requested a formal hearing
only, the director and the licensee shall proceed in
accordance with the provisions of the Department of Health
and Human Resources rules of procedure for contested case
hearings and declaratory rulings. If the applicant or licensee
also requested an informal hearing or the independent
informal dispute resolution process contained in section
twelve-a of this article, and if the order is not favorable to the
applicant or licensee, the director shall notify the
administrative hearing examiner of the request for an appeal
within five business days of issuing the order.
§16-5C-12a. Independent informal dispute resolution.

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

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

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

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

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

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

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

(5) The facility may not be accompanied by counsel during the independent informal dispute resolution conference. The manner in which the independent informal dispute resolution conference is held is at the discretion of the facility, but is limited to:

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

(B) A telephonic conference; or

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

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

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

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

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

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

(11) Within ten calendar days of receipt of the director’s
order and the revised statement of deficiencies, the facility
shall submit a revised plan to correct any remaining
deficiencies to the director.
(e) A facility has ten calendar days after receipt of the director's order to request a formal hearing for any deficient practice cited under this article. If the facility requests a formal hearing, the director and the facility shall proceed in accordance with the provisions of article five, chapter twenty-nine-a of this code.

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

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

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

(g) The Director shall report to the Legislative Oversight Commission on Health and Human Resources Accountability during the July interim meetings in 2013 on the informal dispute resolution process. This report shall at a minimum include the number of times the informal dispute resolution process is requested, the result of the process, and the number of times the director does not agree and changes the determination of the independent review organization.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

To take effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

Acting President of the Senate

The within is approved this the 18th day of March, 2011.

Governor
PRESENTED TO THE GOVERNOR

MAR 15 2011

Time [Signature]