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Providing Long Term Care for Sex Offenders: Liabilities and Responsibilities

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A B S T R A C T

The high risk for recidivism among sex offenders who need long term care (LTC) raises serious issues when they are cared for alongside frail, vulnerable adults. LTC providers must balance offenders' right to access care with other residents' right to be free from abuse and must assess and manage the risks associated with admitting offenders. This article identifies sources of legal liability that derive from sex offender management and discusses the need for the LTC community to develop reasonable, balanced guidance on how best to mitigate the risks associated with sex offenders, protect the rights of all residents, and reduce provider liabilities.

Like the rest of the population, sex offenders age, acquire disabilities, and need long term care (LTC). When offenders turn to LTC facilities for support, facilities must balance their duty to provide them with high-quality care against their duty to provide a safe environment for other residents. This article examines the liability risk that nursing homes assume on admitting sex offenders and discusses facilities' legal and regulatory responsibilities toward them. While this article focuses specifically on sex offenders, the principles discussed here have implications for other populations whose presence raises questions regarding resident safety and residents' rights, including people with dementia, psychological disorders, substance abuse problems, and criminal or correctional histories.

Admitting sex offenders to LTC facilities (LTCFs) is a cause for concern, given their risk of recidivism. It is well established that older people can and do commit sexual crimes with victims of all demographics.[1–3] While research to determine sex offender recidivism rates has shown varied results, no one disputes that elements of this population do re-offend and that rapists are among the highest recidivists.[4] The 2 main risk factors for elderly sex offending are the presence of a vulnerable victim and inadequate supervision[2]; thus, for example, even 1 resident with a prior rape conviction would pose a threat in a LTCF.

The prevalence of residents with sexual assault histories is hard to determine, as many LTCFs are unaware of their residents' sex offender status. Consequently, surveys routinely under-report prevalence. For example, a 2006 report from the Government Accountability Office estimated that 3% of nursing homes housed at least 1 identified sex offender during 2005.[5] A more detailed 2010 survey of Ohio nursing homes (which likewise likely under-reported prevalence), found that 7% of respondents said that they housed at least 1 resident with a known sex or violent offender background, and 28% said they were unsure whether such offenders resided in their facilities.[6] Nationwide, although 265,000 sex offenders live under the supervision of corrections agencies, roughly three-quarters of a million registered sex offenders live in the community[7] and fluctuating correctional system policies mean that a further 10,000 to 20,000 sex offenders are released into the community each year.[8] These figures highlight the fact that many LTCFs will likely have to deal with the complicated legal and moral issues associated with sex offenders.

Moreover, it is reasonable to fear that placing sex offenders in LTCFs with frail, vulnerable adults exposes those adults to a higher risk of sexual abuse than they would otherwise face, raising many further concerns: care providers worry about potential liability and negative publicity arising out of adverse events; current and potential residents and their loved ones are concerned about increased risks for assault; and convicted offenders and their advocates worry that they may be denied access to care, or that they might not receive it in a dignified and supportive setting. Thus, LTCF administrators and care providers need to understand the legal and regulatory issues raised by admitting such individuals.

Legal Liability for Abuse Perpetrated by Sex Offenders

Because so many levels of regulation pertain to LTCFs, we will discuss the primary sources of legal risk in turn. First, we discuss regulatory obligations conferred at the federal level, from the Medicare and Medicaid programs. Then, we discuss civil liabilities for LTC

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companies and potential implications for LTC staff. Lastly, we discuss a further source of liability: medical malpractice laws.

Liability Under Federal Legislation

Nursing homes that participate in the Medicare and Medicaid programs are regulated under the Code of Federal Regulations (C.F.R.) Title 42, part 483, subpart B: *Requirements for States and Long-Term Care Facilities*.[9] Compliance with part 483 is critical to maintaining Centers for Medicare and Medicaid Services (CMS) certification and is monitored by state surveyors, who are increasingly focusing on facilities' ability to protect residents from abuse by other residents.[10] Facilities that do not comply face survey citations, financial penalties, and, as a last, rarely exercised resort, exclusion from CMS programs. In addition, negative publicity acts as a form of punishment for facilities; noncompliance is now made public via the Nursing Home Compare website, which may affect a facility's ability to attract residents. Thus, admitting residents with offender backgrounds may impact a facility's survey performance, liability risk, and reputation.

Several requirements of part 483 particularly apply to nursing homes' responsibilities regarding sex offenders. These include their duties to protect residents from abuse, develop written policies and procedures that prohibit and prevent abuse of residents, and perform comprehensive resident assessments.

The requirements regarding abuse are found in 42 C.F.R. 483.13(b) and are further elaborated in F-tag 224.[11] It states that facilities are responsible for the

> "identification of residents whose personal histories render them at risk for abusing other residents, and development of intervention strategies to prevent occurrences, monitoring for changes that would trigger abusive behavior, and reassessment of the interventions on a regular basis."

This section clearly holds LTCFs responsible for identifying an applicant's or resident's sex offender status and history since that status can put them at increased risk for abusing other residents. Once a facility learns of a resident's personal history of sexual assault, the regulation indicates that facilities must take positive actions to prevent assault. Without codified, enforced policies outlining actions to prevent abuse, including instructions for investigating residents' and applicants' backgrounds for potential risks and developing appropriate intervention strategies, facilities risk being in regulatory noncompliance. Furthermore, Section 483.13(c) of 42 C.F.R. indicates that these policies must be *written*.

Identification of such residents could appropriately take place during the comprehensive assessment (required under 42 C.F.R. §483.20(b)) upon admission, but facilities cannot rely on the federally mandated tool, the Resident Assessment Instrument (RAI), to do so. The RAI lacks items that would elicit information on sex offender status; facilities would need to make other efforts (which have liability implications beyond the scope of this article) to determine the offender status of a prospective resident and assess the associated risks. Moreover, they might be held liable should they fail to do so because the language of the regulation has been interpreted to go beyond what is specifically itemized in the RAI. For example, in its ruling for *Emerald Park Health Care Center v. CMS*,[12] the Department of Health and Human Services' (DHHS) Departmental Appeals Board wrote:

> "The resident assessment regulation is not an itemized laundry list of what a facility must do to assess the needs of a resident… The plain meaning of the term "comprehensive assessment" is that a facility must research whatever is necessary about a resident's condition and history to assure that the facility is able to meet the resident's needs and to protect other residents…"

The ruling also noted that regulations §483.20 (vii-viii) require facilities to assess the resident's mood and behavior patterns and psychosocial well-being, which the court concluded would be difficult without researching the criminal history of any resident whom facility staff suspected might have one.

The need to assess such individuals accurately may mean that facilities must consult with specialized staff. CMS regulation 42 C.F.R. §483.20 (k)(2)(ii) requires that an interdisciplinary team, including "appropriate staff in disciplines as determined by the resident's need," create a comprehensive care plan for each resident. For residents who have been convicted of sexual assault, this implies that assessment teams may need to include professionals with law enforcement, corrections, mental health, or other relevant backgrounds, who are competent to assess and develop appropriate care plans for these individuals.

Liability Under Civil Courts

Facilities also risk costly and time-consuming lawsuits if they fail to proactively address the risks that sex offenders pose in their facilities. Courts consider LTCFs to be custodial caregivers, responsible for protecting residents from foreseeable assault. When a facility is aware of the presence of sex offenders, courts recognize that the facility has a duty to take reasonable steps to assess and mitigate the risk that they might re-offend. Residents with a history of such behavior are considered to be at higher risk for perpetrating future abuse; the difficult task, of course, is to determine which offenders pose a meaningful risk and the appropriate steps to take regarding them. These might include locked doors or posted signs, but could also include specialized staff training or extra supervision for higher risk residents such as those with a history of sexual assault.[13]

The risk of a civil suit is not just theoretical; LTCFs have been found liable as third parties in resident-on-resident assault lawsuits. Cases have centered on claims that the facility knew or should have known that a particular resident posed a high risk for assault and did not take appropriate actions to mitigate that risk. For example, in *Associated Health Systems Inc. v. Jones*,[14] Associated Health was found liable for the assault of Jones by another resident with a history of physical violence. The Georgia Court of Appeals upheld the jury's finding that the care facility knew or should have known about the risk that the assaulting resident posed and that the facility had a dual responsibility not to subject its residents to unreasonable risk of harm and to supervise and manage a resident whom they knew posed a risk to others. Similarly, in *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc*,[15] the Supreme Court of Arkansas found that the facility had a duty to care for its residents that included protecting them from sexual predators, whether those predators were employees, strangers, visitors, or other residents. In *Bryson v. Banner Health System*,[16] the court opined that a treatment facility with awareness of a patient's sex offender history had a reasonable duty to protect other patients from the risks he posed. Clearly, courts take seriously the responsibility of LTCFs to actively manage the risks posed by sex offender residents.

Liability Under Malpractice Laws

Medical malpractice laws constitute another source of liability risk. To differentiate a malpractice claim from ordinary negligence, a court determines whether medical expertise is required to prove the cause of legal action.[17] Because risk management and assessment decisions regarding sex offenders in LTC are beyond the scope of most laymen's medical knowledge, some courts have considered relevant cases under malpractice laws. Lack of supervision is one of the main risk factors for sexual assault; if a resident is assaulted, medical staff may be held