

Sexual Abuse in Long Term Care: Ethical and Legal Approaches

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Sexual Activity, Residents' Rights, and Resident Safety

Situations fall within a broad spectrum.

For example:

Sexual Activity, Residents' Rights, and Resident Safety

Two residents married to one another or otherwise known to be emotionally committed, both cognitively intact (BIMS=16).

But what if consent by one partner is not clear?

Sexual Activity, Residents' Rights, and Resident Safety

Married couple, one mostly cognitively intact, the other mild to moderately impaired (or same couple not married but known history of living together).

Sexual Activity, Residents' Rights, and Resident Safety

Mildly to moderately cognitively impaired resident, married to someone other than sexual partner. *What if spouse is sponsor? POA?*

Sexual Activity, Residents' Rights, and Resident Safety

Mild to moderately cognitively impaired resident, no living spouse, adult children or other relatives object to sexual activity based on resident's strong religious or moral beliefs prior to onset of dementia?

What if resident is former clergyperson? Nun?

Sexual Activity, Residents' Rights, and Resident Safety

Mild to moderately cognitively impaired resident in his or her 80s, sexual partner is mentally ill court placement in his or her 40s.

Sexual Activity, Residents' Rights, and Resident Safety

Sexual partners are both in their 20s and intellectually or developmentally disabled, and parents of either or both object.

Sexual Activity, Residents' Rights, and Resident Safety

One sexual partner is elderly, with mild to moderate dementia, and other partner is mentally ill, has history of aggressive sexual behavior toward residents.

Sexual Activity, Residents' Rights, and Resident Safety

Can we develop a framework that will allow us to deal with each of these situations, as well as others unimagined here, in a consistent way?

Sexual Activity, Residents' Rights, and Resident Safety

What are our primary considerations
i.e., what do we want to make sure we account for?

Sexual Activity, Residents' Rights, and Resident Safety

Discussion

Sexual Activity, Residents' Rights, and Resident Safety

1. Resident safety
2. Resident rights
3. Activity must be consensual

But are we sure we know what these mean?

Sexual Activity, Residents' Rights, and Resident Safety

Generic definition of safety, useful for our purposes here—

Residents should be protected from harm.

Sexual Activity, Residents' Rights, and Resident Safety

But what do we mean by "HARM"?

Sexual Activity, Residents' Rights, and Resident Safety

But what do we mean by "HARM"?

Certainly, physical injury, but what else?

Sexual Activity, Residents' Rights, and Resident Safety

We know that resident rights are an important part of this issue, but how far do those rights go?

For example--

Sexual Activity, Residents' Rights, and Resident Safety

Does a resident have a right to be free from unwanted touching of any kind by other residents?

OR--

Sexual Activity, Residents' Rights, and Resident Safety

Do residents have the right to attempt to initiate physical affection with other residents in ways that would not be considered inappropriate in many settings outside of a facility— hand on a shoulder, holding a wrist, side to side hug, for example?

Sexual Activity, Residents' Rights, and Resident Safety

Is the fact that a resident has initiated inappropriate sexual contact with other residents sufficient to conclude the resident is a danger to others and must be discharged?

Sexual Activity, Residents' Rights, and Resident Safety

Do residents have the right to engage in potentially psychologically harmful activities, and, if so, are there any limits to this right?



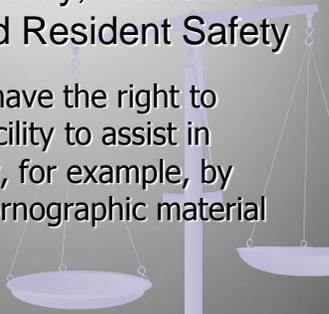
Sexual Activity, Residents' Rights, and Resident Safety

As the cognitive impairment of a resident progresses, does the resident lose all rights to engage in sexual activity with another?



Sexual Activity, Residents' Rights, and Resident Safety

Do residents have the right to require the facility to assist in sexual activity, for example, by purchasing pornographic material for them?



Sexual Activity, Residents' Rights, and Resident Safety

What exactly do we mean by consent and how can we assess ability to consent?

Lack of objection? Resident appears to enjoy activity?

Sexual Activity, Residents' Rights, and Resident Safety

What is the role of government-- specifically, regulatory agencies-- in answering these questions?

Are any of these questions better left to private parties (facilities-residents-families) to answer on their own?

Sexual Activity, Residents' Rights, and Resident Safety

We are on our own!

Sexual Activity, Residents' Rights, and Resident Safety

There is virtually no guidance from CMS on these questions.

There is no generally accepted consensus on the answers to these questions, or even on how to approach them.

There are no normed instruments that measure capacity to consent.

Sexual Activity, Residents' Rights, and Resident Safety

PROPOSAL:

These are fundamentally ethical questions.

A Brief Overview of Modern Western Approaches to Ethics

Approach 1: Rules Are Rules

Focuses on duties. People have the duty to always obey moral rules (laws), regardless of any positive outcomes that can come from breaking them.

A Brief Overview of Modern Western Approaches to Ethics

Approach 1: Rules Are Rules

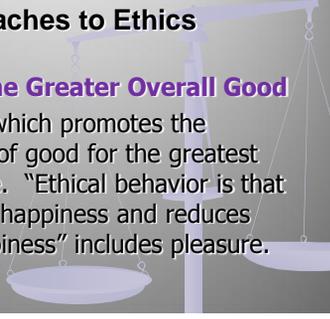
There are many positive aspects to this approach—



A Brief Overview of Modern Western Approaches to Ethics

Approach 2: The Greater Overall Good

Focus is on that which promotes the greatest amount of good for the greatest number of people. "Ethical behavior is that which maximizes happiness and reduces suffering. "Happiness" includes pleasure.



A Brief Overview of Modern Western Approaches to Ethics

Approach 2: The Greater Overall Good

Nevertheless, this approach also has some positive aspects, even if they elevate broad public interests over private ones:

- Government regulatory programs
- National defense
- Civic infrastructure (highways, sewers, *e.g.*)



A Brief Overview of Modern Western Approaches to Ethics

Approach 3: Virtue Ethics

Focus is on the individual person. What is ethical is a course of action that best recognizes the dignity and the character of both the actor and any individual affected by the course of action.

A Brief Overview of Modern Western Approaches to Ethics

Approach 3: Virtue Ethics

Some form of virtue ethics is advocated by nearly all world religions, including Christianity, Judaism, Islam, and many others.

A Brief Overview of Modern Western Approaches to Ethics

Approach 3: Virtue Ethics

"A skilled nursing facility must provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."

A Brief Overview of Modern Western Approaches to Ethics

Adhering to any of these approaches is, by definition, "ethical." Which approach makes sense to us?



TRANSITION from Ethical Considerations to Legal Considerations

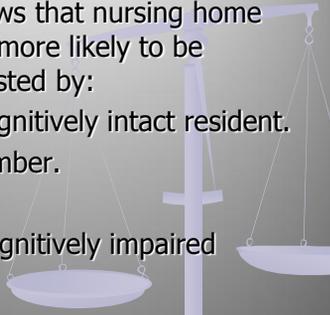






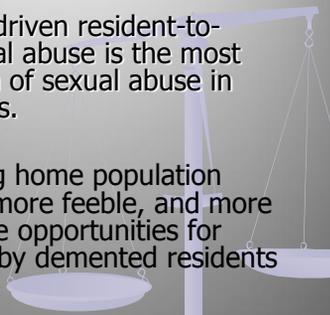
Question

- Research shows that nursing home residents are more likely to be sexually molested by:
 - A. Another cognitively intact resident.
 - B. A staff member.
 - C. A visitor.
 - D. Another cognitively impaired resident.



Prevalence Of The Problem

- D. Dementia-driven resident-to-resident sexual abuse is the most common form of sexual abuse in nursing homes.
- As the nursing home population grows older, more feeble, and more demented, the opportunities for sexual abuse by demented residents increase.



Similar Problems In ALFs

- Reports from WI ALFs include Residents who are repeatedly physically and sexually abusive to other residents; including exposing genitals in common areas.

Research on Sexually Inappropriate Behavior

- Hugh Series & Pilar Dégano, *Hypersexuality in Dementia*, 11 ADVANCES IN PSYCHIATRIC TREATMENT 424, 424-25 (2005).
 - Studies of the prevalence of sexually disinhibited behaviour in people with dementia report rates of 2–17%.

Disinhibition v. Intimacy Seeking

- Kate de Medeiros et al., *Improper Sexual Behaviors in Elders with Dementia Living in Residential Care*, 26 DEMENTIA & GERIATRIC COGNITIVE DISORDERS 370, 371 (2008).
 - 7.9% of residents in facility with all long term demented exhibited sexually inappropriate behavior
 - 3.6% were disinhibited/aggressive. Rest (4.3%) were intimacy-seeking.
 - Disinhibition includes masturbation in public, propositioning others, groping, sexual assault.
 - ½ of the disinhibited had MILD dementia.

Assessing Capacity to Consent

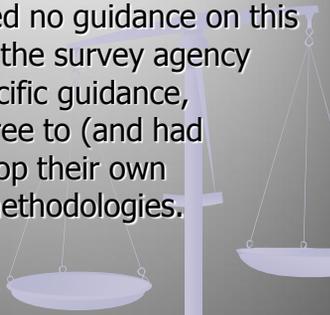
No normed instruments available.

This does not, however, relieve the facility of the responsibility to assess capacity to consent.



Assessing Capacity to Consent

CMS has issued no guidance on this topic. Unless the survey agency has given specific guidance, facilities are free to (and had better!) develop their own assessment methodologies.



Assessing Capacity to Consent

Lichtenberg, 1997

MMSE > 14?

YES – Continue Assessment

NO– Unable to consent



Assessing Capacity to Consent

Lichtenberg, 1997

Resident able to avoid exploitation?

YES – Continue Assessment

NO– Unable to consent



Assessing Capacity to Consent

Lichtenberg, 1997

Resident aware of the relationship?

YES – Continue Assessment

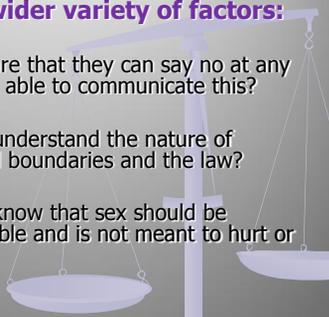
NO– Unable to consent



Assessing Capacity to Consent

Considering a wider variety of factors:

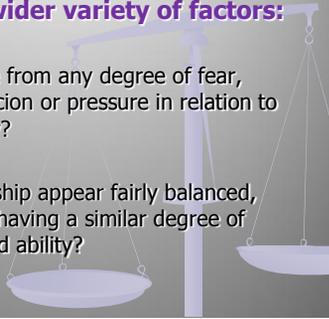
- Is the person aware that they can say no at any time and are they able to communicate this?
- Does the person understand the nature of sexual acts, moral boundaries and the law?
- Does the person know that sex should be mutually pleasurable and is not meant to hurt or degrade?



Assessing Capacity to Consent

Considering a wider variety of factors:

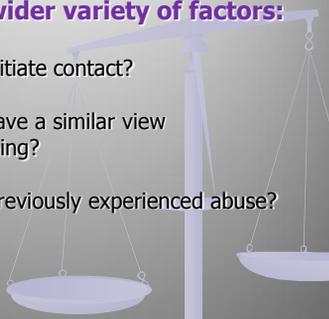
- Is the person free from any degree of fear, intimidation, coercion or pressure in relation to the sexual activity?
- Does the relationship appear fairly balanced, with both people having a similar degree of power, control and ability?



Assessing Capacity to Consent

Considering a wider variety of factors:

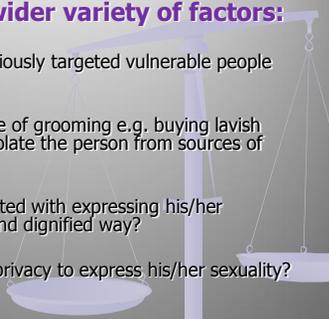
- Do both people initiate contact?
- Do both people have a similar view of what is happening?
- Has one person previously experienced abuse?



Assessing Capacity to Consent

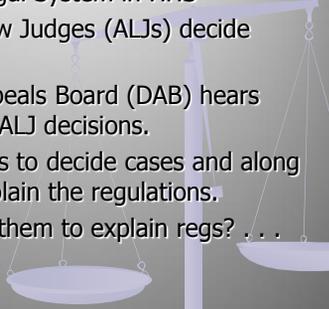
Considering a wider variety of factors:

- Has one person previously targeted vulnerable people for sexual activity?
- Is there any evidence of grooming e.g. buying lavish gifts or seeking to isolate the person from sources of support?
- Is the person supported with expressing his/her sexuality in a safe, and dignified way?
- Is the person given privacy to express his/her sexuality?



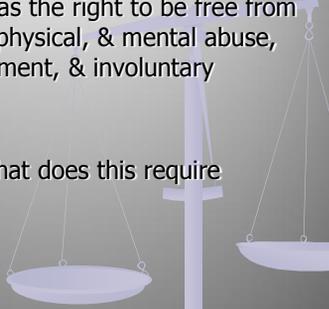


■ UNDERSTANDING ABUSE UNDER THE FEDERAL REGULATIONS: LESSONS FROM THE DAB.



What is the DAB?

- Administrative Legal System in HHS
- Administrative Law Judges (ALJs) decide appealed cases.
- Departmental Appeals Board (DAB) hears appeals from the ALJ decisions.
- Job of ALJs/DAB is to decide cases and along the way, they explain the regulations.
- Why do we need them to explain regs? . . .



Text of F223 – Abuse Tag

- “The resident has the right to be free from verbal, sexual, physical, & mental abuse, corporal punishment, & involuntary seclusion.”
- QUESTION: What does this require facilities to do?

Case 1

- A CNA caught with his pants partially down in a female resident's room; the CNA had a wet spot on his pants. He claims he did not do anything. The resident is too cognitively impaired to interview. She exhibited no signs of distress. The CNA wasn't terminated, just monitored. Is this an F223 violation?
- "The resident has the right to be free from verbal, sexual, physical, & mental abuse, corporal punishment, & involuntary seclusion."

CEDAR VIEW GOOD SAMARITAN v. CMS

- F223 IS VIOLATED AT IJ LEVEL BECAUSE: (1) The facility knew or should have known the staff member posed a risk of abuse to residents and (2) The facility does not take reasonable steps to protect residents from this threat.
- STATE DOES NOT HAVE TO PROVE ABUSE ACTUALLY OCCURRED FOR F223 TO BE VIOLATED.

Case 2

- Mr. Smith is an aggressive demented resident. He has been at the facility for 3 days and has punched a CNA in the face, pushed a nurse down to the ground and shoved the med cart into another aide. The only interventions have been to redirect him. Is this an F223 violation?
- "The resident has the right to be free from verbal, sexual, physical, & mental abuse, corporal punishment, & involuntary seclusion."

Holy Cross Village at Notre Dame v. CMS
DAB No. 2291(2009)

- F223 IS VIOLATED AT IJ LEVEL BECAUSE:
 - (1) The facility knew or should have known the resident posed a risk of serious injury to residents and (2) The facility does not take reasonable steps to protect residents from this threat.
- F223 VIOLATED EVEN THOUGH WE KNOW ABUSE HAS NOT OCCURRED YET

Consistently Implementing Policies & Culture

- Important to have sex abuse policies
- Do they comport with practice?
 - If not – easy way to get cited
- Are they consistently implemented?
- Does management take this seriously?
- Do employees understand their responsibilities?

COMMON NONCOMPLIANCE

- “Boys Will Be Boys” – ALF & NH
- Reliance on Redirection
- Antipsychotics for Sedation
- Not Recognizing Victims – ALF & NH
- Failing to create culture where staff takes fondling, groping, etc. seriously – ALF & NH
 - REMEMBER – THE FACILITY IS EVERY EMPLOYEE

Residents with criminal histories

Duties of Facilities

DAB Cases Concerning Residents With Criminal Histories

- Only Two DAB Decisions Dealing With This Issue
- These Two Cases Give Us Important Information
- Emerald Park Healthcare Center v. CMS, DABCR 1462 (2006)
- Hillcrest Healthcare Center v. CMS, DABCR 1579 (2007)

www.hhs.gov/dab - ALJ / DAB decisions key word search

Emerald Park Healthcare Center v. CMS

- Housed highly aggressive and dangerous individuals, some of whom had criminal records for sexually molesting children, and other serious offenses.
- Policy to conduct criminal background checks of those residents whom it suspected of engaging in criminal activities.

Emerald Park Healthcare Center v. CMS

- State claimed facility "failed to research closely the residents' histories and to assess carefully the impact that such behavior might have on the residents' present condition or on other residents." This caused the facility to let many of these dangerous residents out of the facility on an unrestricted basis.
- Is there a regulatory requirement that says facilities must conduct CRIMINAL background searches on RESIDENTS?

Emerald Park Healthcare Center v. CMS

- There is no regulation that says "facilities must conduct criminal background checks on residents whom they suspect to have committed crimes prior to coming to the facility."
- But, there is a regulation that requires facilities to make "a *comprehensive assessment* of a resident's needs, . . ." [42 C.F.R. § 483.20\(b\)](#) (emphasis added).

Emerald Park Healthcare Center v. CMS

"The regulation does not require a facility to research issues that it does not suspect, or have reason to believe, exist. Petitioner was not required by the regulation to research every new resident's possible criminal history."

BUT FACILITIES MUST

Emerald Park Healthcare Center v. CMS

"Research a resident's criminal history where it had reason to believe that a resident had one, because that history could help define the resident's psychological status and give Petitioner information it needed to protect the safety and well-being of its resident population."

- (1) Reasonable suspicion of criminal history
- (2) Duty to research that history

Hillcrest – ICF - Facts

- A complaint survey was initiated when the state survey agency received two complaints relating to a homicide of a private citizen by several residents of Hillcrest. A subsequent police investigation revealed that two residents of Hillcrest, R4 and R5, committed crimes of home invasion, robbery, and homicide at an apartment complex four miles from Hillcrest. Two other residents were with them but not involved in the crimes.

Hillcrest: Care Planning Concerns

Care Planned For: "Potential For Criminal Behavior"

Not Sufficient Because:

- (1) Some Residents Criminal Histories Were Known, But Facility Didn't Indicate In Care Plan What They Were.
- (2) For Other Residents, Didn't Find Out The Criminal Histories, But Knew They Were On Parole.
- (3) Policy to Wait Until Behaviors Manifested at Facility to Include in Care Plan

Hillcrest: Supervision Concerns

- Inadequate Supervision Because The Facility Allowed Residents Who Had Violent Criminal Histories To:
 - (1) Leave facility unattended for many days with other residents who had suicidal ideations
 - (2) Didn't require them to adhere to substance abuse agreements
 - (3) Didn't enforce "no car at facility" policies
 - (4) Didn't monitor use of day passes

Summary

- Ethical Issues
- Respect Residents' Rights
- Ensuring Resident Safety
- Dementia – Consent
- Dementia-Driven Sexual Aggression
- Common Mistakes – Bad Management
- Sex Offenders more common in LTC
- If you know or should know of risk, must do background check
