

Long-Term Care Survey Alert

Risk Management: Prepare Now For An Emerging Liability Dilemma--Residents Who Are Sexual Predators

Background checks and risk assessments may become accepted standard.

Do you know if any of your residents have a documented history of sexual crimes? If the answer is "now that you think of it, no," keep in mind that facilities that don't take steps to identify residents who may be on the prowl for victims could be opening the door to new survey and civil liability.

Case in point: Police arrested and charged a 68-year old registered sex offender who was a resident in a nursing facility near Boston with raping his 90-year old male roommate, according to media reports. The nursing facility reportedly knew the resident had a criminal history but didn't inform other residents due to privacy concerns.

The problem: As baby boomers age, nursing homes are caring for more elderly people who have sex-related crimes on the books. And the heat is on as states and surveyors focus more attention on the growing social problem--one that your nursing home may find itself battling alone if it admits a sex offender who assaults someone in the facility.

Adding to the quandary, "we know that recidivism for people with a history of pedophilia or sexual assault is very high, and you can't predict with any certainty how they will act," says **Marsha Greenfield**, senior legislative counsel with the **American Association of Homes & Services for the Aging**.

Take the Proactive Road

So what should a nursing home do to risk manage the potential for a resident who may intentionally prey on other residents? Start by checking your state laws to see if a nursing home can refuse to admit someone based on his criminal history [even if] the state otherwise imposes a "first come-first served" admission requirement, advises **Howard Sollins**, an attorney with **Ober/Kaler** in Baltimore.

Revisit your admissions forms to see if they ask residents/families to disclose an applicant's criminal background. Also train admissions staff to ensure prospective residents or their legal representatives answer the question during the application process. Sometimes admissions staff who don't think of elderly people as potentially having that kind of history don't insist the person answer that question, says Sollins.

Go in the back door: Of course, people may choose not to reveal their dark past. So as part of the preadmission process, ask the person to list their residences and jobs over the past years, advises **Francis Battisti**, a clinical social worker and nursing home consultant in Binghamton, NY. "Look for an unaccounted for block of time in the person's history," he advises.

Consider Running Background Checks at Admission

"A facility can run a simple criminal background check for as little as \$30 to \$50," says Battisti, who was consulting for a facility four years ago where an elderly male resident assaulted a female resident. "The resident was, at age 83, deemed competent and prosecuted--and the state initiated sanctions against the facility," Battisti reports.

But turning around a background check for hospital patients seeking admission within 24 to 48 hours can be difficult--"and the data aren't that reliable," cautions attorney **Joseph Bianculli** in Arlington, VA. Even so, making a good faith effort to uncover a resident's past may head off liability. Bianculli represented a facility a few years back where a CNA raped a resident while he was out on bail for an alleged rape in another long-term care setting. "The facility had checked

the nurse aide registry and did a criminal background check that didn't pick up the arrest--and for that reason, the facility didn't get a deficiency," Bianculli reports.

Keep an Eye on State Legislation

Some states are plowing ahead with legislation requiring facilities to screen new admissions for a criminal history. "An Illinois law passed last summer requires facilities to do criminal background checks [on new admissions]" for the same felony offenses that would prevent a facility from hiring a healthcare worker, says **Kathleen Pankau, RN, JD**, staff counsel for the Illinois Hospital Association. "That includes kidnapping, rape, murder, theft and drug violations," she says. And the state has no rules requiring facilities to accept people who don't pass the background check, she adds. "If the facility does accept the person with a criminal background, it has to perform a risk assessment of the [resident] and implement safeguards accordingly, such as providing increased supervision," adds Pankau.

"The risk assessment would include whether the person has access to other residents and visitors, his ability to ambulate--and any history in the facility of complaints of inappropriate touching, acting out, and so forth," says Pankau.

Be Prepared to Act on Risk Assessment

In all cases, surveyors will expect a facility to address any basis for concern about a resident's behavior, says Sollins.

Facilities that do knowingly accept residents with a criminal background should have appropriate resources and support, he adds. "For example, the physical plant might be designed to allow clinical staff to observe residents more closely on a 24/7 basis," he says. "The facility might also offer more comprehensive activities program to keep people occupied, and stronger psychosocial interventions" and extra training for staff, Sollins adds.

"If a resident's conduct poses a present danger to other residents, the facility can discharge the person on an emergency basis," Sollins notes. "Under federal discharge and transfer laws, a facility can discharge someone as soon as practicable" under such circumstances, although some state laws are more stringent. But the facility may have a problem finding a safe discharge destination, Sollins says.

Enlist Law Enforcement as Allies

Federal laws don't prohibit facilities from calling the police when a resident commits a crime, Sollins notes. But facilities may find themselves stranded when police refuse to arrest a resident due to fear of the public relations fallout--and because many jails aren't equipped to care for people with nursing and medical needs.

Example: Sollins encountered one situation where an elderly nursing home resident assaulted a child visitor touring the facility as part of a community activity. The resident was charged with the assault but the authorities wouldn't take him into custody, Sollins relayed at this year's **American Health Lawyers'** "Long-Term Care and the Law" conference in San Diego. The facility had no recourse at the time but to house the man in the locked dementia unit, said Sollins.

Solution: Team up with other local nursing homes and your state trade associations to educate local law enforcement that elderly and disabled people in nursing homes can commit crimes. "Police need to be prepared to take them into custody to protect others," Sollins says.