

## MDS Alert

### Industry Updates: Illinois Appellate Court Rules Nursing Facilities Cannot Determine Sexual Consent

**Cognitively impaired residents cannot consent; learn from this facility's "immediate jeopardy" citation.**

Sexual consent in nursing facilities is often a taboo subject for everyone - for residents, for resident families, for staff, and for anyone who has a stake in facility liability. Though the subject was already taboo, a recent ruling by an Illinois Appellate Court, which sided with the Centers for Medicare and Medicaid Services (CMS) in its belief that the facility's residents were in "immediate jeopardy," upheld CMS's citation and \$83,000 fine, adding another layer of significance and urgency to conversations about consent in long-term care facilities.

The facility, Neighbors Rehabilitation Center LLC, initially challenged the citation and fine. The court decided there was enough evidence to support CMS's findings, arguing that the skilled nursing facility knew about the sexual interactions between the three residents, who all suffered some degree of dementia or Alzheimer's disease, but didn't do anything to protect the residents from what could only be nonconsensual sexual contact.

The Illinois Department of Health (IDPH) "found that Neighbors allowed residents to have consensual sexual interactions and that supervisors told Neighbors' staff that they were not to intervene or report sexual interactions unless a participant showed outward signs of nonconsent," according to the decision by the U.S. Court of Appeals Seventh Circuit Neighbors Rehabilitation Center LLC v. U.S. Department of Health and Human Services, Departmental Appeals Board, and Centers for Medicare and Medicaid Services.

"One of Neighbors' staff members stated that, per Neighbors' policy, she was taught to 'just separate, if no one resisting, then it is OK.' Another staff member advised that she was 'taught to provide privacy and intervene if there is protesting by one of the residents,'" the decision says.

The Neighbors facility challenged the citation and fine, arguing that "residents, even those with cognitive impairments, have the right to engage in consensual intimate relationships," the decision says. The facility says that staff knew about relationships between residents and "monitored them as necessary."

"The [administrative law judge] ALJ concluded that Neighbors' policy of intervening only when outward signs of non-consent were displayed was insufficient to determine consent, 'especially where, as here, the victim has significant cognitive defects.' The failure to determine whether the interaction was consensual resulted in a second interaction between [two of the residents]," the decision says.

#### **Figure Out Policy Before Faced with Incident**

While the court found issue with Neighbors' official policy, the reality is that most facilities don't have anything on the books. Staff may be confused about what behavior they should permit and in which situations they should intervene, especially if the facility does not have an official policy or schedule any kind of formal training.

Unfortunately, issues of consent between residents and sexual abuse within the elder community are vastly understudied, leaving facilities with relatively little to work with when crafting policies to protect residents while also ensuring their privacy and dignity.

"There is little research available on the subject of elder sexual abuse and those who perpetrate the abuse. The studies are complicated by the mere fact that many victims of elder sexual abuse cannot communicate well enough to identify what happened or who their perpetrator was," says **Christine Traxler, MD**, with the **Nursing Home Abuse Center**.

However, the court's recent decision underscores the more general societal consensus that a person who is not lucid cannot consent to sexual activity. Facilities need to do their utmost to protect residents who cannot consent to sexual activity from being subjected to sexual activity - from other residents, who may or may not know what they're doing, as well as from staff or visitors.

"The bottom line is that nursing home residents with dementia are inherently unable to appropriately demonstrate consent. For a nursing home to abide by a policy that relies on staff members' personal opinions as to whether or not residents want sexual contact is putting residents at serious risk for sexual abuse," say **Levin and Perconti Attorneys at Law**, a firm based in Chicago, on their blog.

**Resource:** You can read the court opinion in full here:

<https://law.justia.com/cases/federal/appellate-courts/ca7/18-2147/18-2147-2018-12-07.html>.