

The opinions expressed in this document, which includes two appendices, are those of the Board on Aging and Long Term Care – Ombudsman Program.

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Recommendations for Addressing Resident Relationships

This document provides guidance to facilities suggesting what might be included in a Resident Relationships Policy that addresses intimacy and sexuality issues. It does not in any way constitute a regulation, mandate or requirement. Facilities are encouraged to write their own policies related to these issues.

POLICY OBJECTIVE

The purpose of a resident relationships policy is to affirm and respect the rights of all residents to engage in consensual relationships, whether professional, platonic, married, non-married, intimate or sexual in nature. The policy should uphold the belief that healthy consensual relationships are central to quality of life, and promote an environment that allows individuality, autonomy, dignity and respect to thrive. A facility should welcome and respect all residents, whether lesbian, gay, bisexual, transgendered or heterosexual. A policy should address the right of the resident to engage in any consensual relationship even if the relationship creates challenges to religious, doctrinal, family or societal beliefs, including pertinent privacy and confidentiality issues. At the same time, a facility should acknowledge its responsibility to protect residents who may not be able to consent to sexual relationships. A policy provides guidance to the multi-disciplinary care team to carry out this balance of rights and protection in all relationships.

RESIDENT RIGHTS

Resident rights are the foundation for all decisions in long-term care organizations. Clearly, all resident relationships, including those of a consensual intimate and sexual nature, should be respected, protected and embraced by all. Educating residents, family members, Power of Attorney for Health Care agents and guardians regarding the inherent rights of every resident is imperative to assure all rights are respected, protected and promoted, while also balancing that with the need to protect vulnerable residents.

The facility needs to recognize the resident has the right:

- To be offered choices and to make choices about aspects of their life in the facility that are significant to the resident
- To be valued as an individual, to maintain and enhance self- worth
- To be treated with courtesy, respect and dignity
- To be free from humiliation or harassment
- To be free from physical, sexual, mental, verbal or financial abuse
- To live in an environment where personal privacy and confidentiality are respected
- To private and unrestricted visits with any person of choice
- To participate in planning of care and services
- To choose how to arrange personal time, and engage in what is important to her/him
- To share a room with any person of choice, as long as both agree to the arrangement
- To reasonable accommodation of individual needs and preferences

In addition to having rights, every resident has a responsibility to not infringe on the rights of other residents. In cases where resident rights are in conflict, the facility along with the residents must strive to find a balance of rights.

This list is not all inclusive and other rights may apply to this policy. All residents shall receive a copy of the complete resident rights upon admission. Resident Rights shall also be posted in the facility where residents may access them at any time.

DEFINITIONS & DISCUSSION of TERMS

Intimacy—generally, humans desire to feel that they are important to others, that they belong, that they feel valued and that they are cared for by another person, or a group of people. Intimacy, and what classifies as intimacy, is unique to each individual and is not necessarily intended as sexual. An intimate relationship can be two residents of the same or different genders that feel affection, closeness or tenderness for one another. Intimate expression may include holding hands, hugging, cuddling or kissing in an attempt to provide each person with a sense of belonging and emotional support. Intimacy should be distinguished from sexual contact in a resident relationships policy.

Sexual Contact—the meaning of sexual contact for this policy is derived from the Wisconsin Sexual Assault Statute. A facility's regulatory obligation to protect vulnerable residents from any form of abuse and the legal implications related to ability to consent are paramount when discussing sexual relationships. Paraphrased from WI statute section 940.225(5)(b), sexual contact includes intentional touching of intimate body parts, either directly or through clothing by the use of any body part or object, for the purpose of sexual arousal, gratification, degradation or humiliation.

Consent—there are no definitions in Wisconsin statutes that address the issue of consent as it relates to sexual contact in anything other than the context of criminal activity. Consent, as used in the Sexual Assault section in the Wisconsin Statutes, means “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual

contact.” The statute goes on to say “the following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence:

- a person suffering from a mental illness or defect which impairs capacity to appraise personal conduct
- a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.”

The difficulty is that neither WI Statute nor case law defines “capacity to appraise personal conduct.” However, the discussion in an opinion filed on November 6, 1997, Wisconsin Court of Appeals case State v. Smith, provides clear guidance to the meaning of this phrase. It indicates that the common sense meanings of the words chosen by the legislature permit a person of ordinary intelligence to determine if someone has capacity to appraise her/his own actions. The phrase simply means “the ability to evaluate the significance of.” The discussion further indicates Wisconsin would probably require a relatively high degree of capacity and knowledge to be able to consent to sexual contact.

In Guardianship of Adults, DHS 2011 (<http://www.dhs.wisconsin.gov/publications/P2/p20460.pdf>), Attorney Roy Froemming’s analysis of State v. Smith was used to suggest four guidelines on which to base an assessment to determine a person’s ability to consent to sexual contact. The four guidelines are:

- the individual must understand the distinctively sexual nature of the conduct
- the individual recognizes her/his body is private and that s/he has the right to refuse to engage in sexual activity
- the individual recognizes the sexual contact may create possible health risks and physical consequences
- the individual needs to understand there may be negative social or societal response to the sexual behavior

A resident relationships policy should include procedures on how to assess for consent to sexual contact. These four guidelines, from case law, are recommended as the basis for an assessment.

EDUCATION

Education should be provided to residents at the time of admission, at resident council meetings and individually as needed, to ensure that they are aware of their right to maintain and develop all mutually consensual relationships, including those which are intimate or sexual in nature.

Education should be provided to all employees upon orientation and annually regarding intimate and sexual relationships in the long-term care setting. Education provides staff with the knowledge and tools needed to address situations appropriately and with sensitivity. It allows for open discussion about the topic, which for some people is embarrassing. It also helps build teamwork skills and

promotes interdisciplinary approaches. Education gives staff confidence, and leads to acceptance and appreciation for the aging individual and her or his right to self-determination. Education also helps staff to respect resident rights. The facility should consider the following topics for training: Intimacy & Sexuality including consent guidelines, Resident Rights, Abuse/Neglect/Misappropriation, Alzheimer's Disease & Related Dementias, Ethics & Boundaries, Domestic Violence/Sexual Assault and Legal Decision Making. Staff education is important and provides a mechanism for assisting staff in not allowing their own personal beliefs or opinions to influence or get in the way of resident relationships.

Education regarding resident rights, including rights to meaningful relationships, should take place with the resident's family and/or responsible party at the time of admission. The orientation process of this facility shall educate the family or responsible party of its general policy regarding resident intimate or sexual relationships.

Education should be provided to families, health care agents and guardians in relation to their perceived power or control in directing resident relationships. Family members or legal decision makers do not have the authority to restrict intimate or sexual relationships when the resident is assessed to be a consenting adult.

Agents under an activated Power of Attorney are responsible to make *health care decisions* based on the preferences of the principal. A decision regarding intimacy or a sexual relationship by a consenting adult will often not involve a health care decision. Guardian's powers and authorities are dependent upon the terms of the order provided by the court. This may or may not include authority related to intimacy and sexuality. A finding of incapacity or incompetence does not automatically preclude a resident from making all decisions, and depending on ongoing assessment a resident may maintain the ability to provide consent to an intimate or sexual relationship.

Determination of a resident's ability to provide consent is critical; only the resident can consent to intimate or sexual relationships. Guardians, health care agents or family members are not legally permitted to provide an individual's consent for someone that is determined to not have the capacity to consent.

Given the complexity associated with residents having sufficient capacity to consent it is imperative that there be open dialog with health care agents, guardians and family members. All shall have their roles and limitations in the decision process explained including education addressing how to appropriately interact with the resident regarding choices to engage in intimate or sexual relationships. This process acknowledges that most sexual relationships in long term care settings happen over time and with observable behaviors initiated by those participating. This assumes that those who have good rapport with residents, staff and family alike, may have periodic conversations with participating residents as part of the formal and informal assessment process so that decisions about whether the relationship is consensual are made over time and are resident-driven.

OTHER CONSIDERATIONS

Environment—the typical long term care environment (no locks on doors, twin beds, lack of private space) is a reality, and may be a challenge for facilities when trying to provide appropriate space for residents engaged in intimate or sexual relationships. Although these barriers exist, they should not inhibit resident choices about their relationships. Internal policies should be distinct to each facility based on the amenities available. Use of do not disturb signs on doors when residents request privacy is acceptable. An assessment of resident wishes, and engaging them in approaches to accomplish their intimate and sexual desires is expected. Facilities may need to re-evaluate their approaches to design and function related to changing resident expectations and needs.

Sexual Identity—Special considerations may arise when serving residents who are lesbian, gay, bi-sexual, or transgender (LGBT). Many LGBT persons have experienced discrimination at some point in their lives and may worry that service providers will respond negatively to their LGBT identity. Now in need of long term care—and the vulnerability that comes with it—LGBT persons have unique concerns. Some individuals revert to a false identity that does not allow for their true expression of self. Facilities need to recognize reluctance to reveal LGBT identity for fear of abuse, mistreatment or disrespect. Family ties might be severed and a life partner/spouse may be introduced in a manner that does not reveal nor honor the true relationship. LGBT elders may die alone. The facility must honor all resident rights, all relationships and strive to make all residents comfortable regardless of sexual identity so that all residents live their days with dignity and respect.

INTIMATE OR SEXUAL EXPRESSION

The facility needs to recognize that there are many ways for a person to express their sexuality. The following table illustrates four ways of sexual expression and the appropriate facility responses. This is not a progressive table; residents may or may not start with the first expression listed. It is staff's responsibility to recognize an intimate or sexual expression. Based on observation, history and interaction with residents, staff shall provide the appropriate response.

Intimate or Sexual Expression	Response by staff
Self-stimulating expression <ul style="list-style-type: none"> • Masturbating • Exposing oneself • Cross-dressing • Or other self-stimulating expression 	<ul style="list-style-type: none"> • Based on ongoing observation, history and interactions, staff should know and understand the resident's motivation behind the behavior. • Find out if the expression is sexual in nature or if the resident is communicating another unmet need (have to go bathroom, pain, itching, etc.).

	<ul style="list-style-type: none"> • Staff must respect resident rights. Make sure staff responses are respectful and dignified, setting their personal beliefs aside. • Assure privacy and confidentiality • Accommodate resident needs. This may include assisting resident in acquiring sexually explicit material, condoms, vibrators, etc. • If not already completed, staff should complete an “Intimacy & Sexuality History” (Appendix 1) with the resident. • Ensure care plans are updated to reflect current observations, assessments and interventions. • To ensure best outcomes, assessment, care planning and education with residents, responsible parties and staff will be ongoing, as appropriate.
<p>Verbal Sexual Talk</p> <ul style="list-style-type: none"> • Suggestive language, flirting, sexual jokes 	<ul style="list-style-type: none"> • Based on ongoing observation, history and interactions, staff should know and understand the resident’s motivation behind the behavior. • If not already completed, staff should complete an “Intimacy & Sexuality History” (Appendix 1) with the resident. • Identify possible triggers for verbal sexual language. • If the sexual language is directed at staff, residents or visitors: <ul style="list-style-type: none"> o Staff should redirect the resident to a more appropriate topic or area of the facility. • Private conversation should be held with the resident about socially acceptable interactions. Staff will assist resident with defining parameters for that outcome.

	<ul style="list-style-type: none"> • Caregiver approaches: <ul style="list-style-type: none"> ○ Staff should watch their body language – hug carefully; consider shaking hands instead of giving hugs ○ Watch how staff provide cares ○ Staff should watch what they wear ○ Staff should be aware of their own language and conversations they are having with coworkers, visitors and residents ○ Staff should explain their role upon entering the room and address the resident formally ○ Maintain their professionalism ○ Work as a team – go in the room in 2's, start a CNA support group • Ensure care plans are updated to reflect current observations, assessments and interventions. • To ensure best outcomes, assessment, care planning and education with residents, responsible parties and staff will be ongoing, as appropriate.
<p>Intimacy/Courtship</p> <ul style="list-style-type: none"> • Hugging, handholding, cuddling, kissing 	<ul style="list-style-type: none"> • Based on ongoing observation, history and interactions, staff should know and understand the resident's motivation behind the behavior. • If not already completed, staff should complete an "Intimacy & Sexuality History" (Appendix 1) with the resident. • No one person can make the decision for another person to have intimate relationships. Not a staff member, family member, not a Power of Attorney and not a legal guardian. Intimacy is a personal decision. • Staff needs to be aware of when 2 residents are expressing themselves intimately, early identification of intimacy is important. • Intimacy is not sexual contact. • The intimate relationship needs to be mutual and respectful.

	<ul style="list-style-type: none"> • When intimacy is identified, staff should begin a consent assessment (Appendix 2) in the event the intimacy leads to sexual contact. • Ensure care plans are updated to reflect current observations, assessments and interventions. • To ensure best outcomes, assessment, care planning and education with residents, responsible parties and staff will be ongoing, as appropriate.
<p>Physical Sexual Expression/Sexual Contact</p> <ul style="list-style-type: none"> • Fondling of breasts or genitals • Sexual Intercourse • Oral Sex • Anal Sex • Or other physical sexual expression 	<ul style="list-style-type: none"> • Based on ongoing observation, history and interactions, staff should know and understand the resident’s motivation behind the behavior. • If not already completed, staff should complete an “Intimacy & Sexuality History” (Appendix 1) with the resident. • Consent assessment (Appendix 2) should be completed. <p>If both residents have been assessed to be consenting:</p> <ul style="list-style-type: none"> • Allow the relationship to continue. • Respect rights of the residents. • Regardless of deemed capacity/activated POA/guardianship, the resident is in command of his or her choice to engage in a sexual relationship. Sharing of information, or reporting of activity of a consenting adult, may be considered a breach of rights if residents do not want the parties noted involved. • No one person can make the decision for another person to have sexual relationships. Not a family member, not a Power of Attorney and not a legal guardian. Sexuality is a personal decision – every person must be capable of deciding this for her or himself.

If one or more residents are non-consenting:

- Care planning needs to take place to balance the rights of residents (intimate relationship) while protecting them from abuse/exploitation (sexual relationship).
- Consult facility policy for possible abuse investigation if sexual contact occurs without consent.
- Ensure care plans are updated to reflect current observations, assessments and interventions.
- To ensure best outcomes, assessment, care planning and education with residents, responsible parties and staff will be ongoing, as appropriate.

These recommendations try to address instances of intimacy and sexuality in long term care in an understandable manner. If you have further questions or specific situations regarding intimacy and sexuality in long term care, please contact the Wisconsin Board on Aging and Long Term Care – Ombudsman Program at:

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Bibliography

1. Wisconsin Statutes, including Chapters 50, 51 and 940
2. Court of Appeals of Wisconsin, State v. Smith
<http://www.wicourts.gov/ca/opinions/96/pdf/96-2961.pdf>
3. "Guardianship of Adults," manual updated June 2011,
<http://www.dhs.wisconsin.gov/publications/P2/p20460.pdf>
4. Booklet, "Abuse Against the Elderly and Other Adults at Risk—Potential Legal Remedies," Wisconsin Coalition Against Domestic Violence, 2008, 1-608-255-0539, www.wcadv.org
5. Webster's dictionary
6. Intimacy & Sexuality Practice Guidelines ~ Lanark, Leeds & Grenville LTC Working Group 2012
http://www.rgpc.ca/best/BPC%20-%20Sexuality/SexualityPracticeGuidelinesLLGDraft_17.pdf
7. DVD, "Gen Silent," Directed by Stu Maddux, http://stumaddux.com/GEN_SILENT.html