CONVICTED SEX OFFENDERS:
NEW RESPONSIBILITIES FOR LONG TERM CARE FACILITIES

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As a result of legislation passed by the Virginia General Assembly during its 2007 session, effective July 1, 2007, licensed nursing facilities and assisted living facilities ("Long Term Care Facilities" or the "Facility") have new, important responsibilities that impact the admissions process and Facility operations. Namely, House Bills 2345 and 2346 require Long Term Care Facilities to register to receive information regarding convicted sex offenders living in or near the Facility, to determine whether potential residents are registered sex offenders, to inform Facility residents of the existence and use of the Virginia Sex Offender Registry (the "Registry") and to assist residents in accessing the Registry.

Background

Federal law requires state law enforcement agencies to enact sex offender registration and notification laws in order to receive federal funding for state and local law enforcement programs. States have broad discretion regarding how to implement sex offender registration and notification. The Virginia State Police has maintained a publicly available Sex Offender Registry (the "Registry") since 1994, but until now, Assisted Living Facilities were not authorized to register to receive electronic notification of sex offender registration or re-registration. Further, while nursing facilities could previously voluntarily register to receive notification, as of July 1, 2007, all Long Term Care Facilities *must* register to receive notification as more specifically described below.

In August of 2004, as a result of cited incidents of registered sex offenders living in nursing facilities and allegations of abuse, Congress asked the Government Accountability Office ("GAO") to evaluate the prevalence of sex offenders in Long Term Care Facilities. A Report issued by the GAO in March of 2006 identified approximately 700 registered sex offenders living in nursing homes or Intermediate Care Facilities for people with mental retardation.[1] About three percent of nursing homes housed at least 1 identified sex offender.[2]

The GAO Report did not indicate that residents with prior convictions are more likely than other residents to commit abuse. Administrators interviewed by the GAO more frequently expressed concerns about the behavior and potential for abuse by cognitively impaired and mentally ill residents than by sex offenders who have not demonstrated behavioral issues while in the Facility. Furthermore, the GAO Report concluded that a focus on prior convictions alone may be futile given that some sex offenders may have physical impairments and therefore pose no risk to other residents.

The GAO Report also disclosed that in January 2005 there were only seven registered sex offenders living in nursing homes in Virginia.[3] In response to the GAO Report, an independent study by the Virginia Crime Commission revealed that as of December 2006, three registered sex offenders were living in a Virginia nursing home, and 16 were living in a Virginia assisted living facility. The State Police also identified 13 registered sex offenders who were living in the same zip code as a Virginia nursing facility. Ultimately, the Virginia Crime Commission found that there are very few

registered sex offenders living in Long Term Care Facilities in Virginia. Even so, Attorney General Robert F. McDonnell is "determined to put Virginia in the national lead in the battle against sex offenders,"[4] and in 2007 the General Assembly passed legislation making Virginia one of the few states to have imposed specific requirements concerning sex offenders in the long term care setting.[5]

Automatic Notice and Preadmission Screening – House Bill 2345

In its 2007 legislative session, House Bill 2345 amended and reenacted Virginia Code §§9.1-914, 32.1-127, and 63.2-1732. Effective July 1, 2007, Long Term Care Facilities are required to:

(1) register with the Virginia State Police to receive automatic notification if a sex offender registers or re-registers with the Sex Offender Registry and the sex offender's home address or work address is within the same or a contiguous zip code as the Facility; and

(2) determine prior to admission, whether potential residents are registered sex offenders if the Facility anticipates that the individual will stay longer than three days or if a resident does in fact stay longer than 3 days.

Sex Offender Registry Information and Assistance - House Bill 2346

Likewise, House Bill 2346 amended and reenacted Virginia Code §§32.1-138 and 63.2-1808. Effective July 1, 2007 every Long Term Care Facility must:

(1) ensure that every resident or prospective resident of the Facility (or his legal representative) is fully informed, *prior to admission and during the resident's stay*, how to access the Sex Offender Registry and that "he should exercise whatever due diligence he deems necessary with respect to information on any sexual offenders registered;"

(2) obtain a signed acknowledgement from each resident, that the Resident has received this notification; and

(3) if requested, assist residents in accessing the Registry, assist residents in locating the desired information, and provide residents with copies of the information accessed.

These rights must be added to the Resident rights and responsibilities posted conspicuously in a public place in the Facility.[6]

PRACTICAL TIPS

Register for automatic notification

Long Term Care Facilities must first register with the State Police. The electronic registration form is found at http://sex-offender.vsp.virginia.gov/sor/java/register.jsp. A Facility may also mail in its registration by completing a form which may be downloaded from the Registry at http://www.vsp.state.va.us/downloads/sp-285.pdf. or obtained by contacting the Virginia State Police. Once registered, the Facility will be automatically notified by electronic means if a sex offender lives or works in the same or a contiguous zip code where the Facility is located. If a Facility cannot accept electronic notifications, it may receive paper notification but will be charged a fee. Paper notifications are processed within 3 days of receipt and are sent by U.S. mail.

How to access the sex offender registry

The Registry itself is available at http://sex-offender.vsp.virginia.gov/sor/. Sex offenders within the Commonwealth can be searched by zip code, county, city, name, or pinpointed on an area map surrounding a specified address.[7] Effective May 13, 2006 the Registry includes a current photo,[8] full name, aliases, full residential address and work address, date, locality and description of the offense, DNA information, and fingerprints.[9] This information can be obtained either electronically or by mail. To check the status of potential residents, the Facility must perform a search using the individual's last name. A list of the names and addresses accompanied by a recent photo of all sex offenders registered in Virginia with that last name will immediately appear. To access information regarding registered sex offenders living near the Facility, a search using the zip code, county or city will provide a list of the names and addresses accompanied by a recent photo of all registered sex offenders living in the defined area. It is also possible to view a map of a specified area to determine the exact location

of all the registered sex offenders living in the vicinity. Selecting the pinpointed location of a registered sex offender on the map, reveals that specific sex offender's registered information.

What does the Facility do if a potential resident is a sex offender?

Long Term Care Facilities are not prohibited from denying admission based solely on an individual's status as a sex offender. Certainly, denying initial admission is easier than a later transfer or discharge; however, Facilities must be cautious not to violate the Civil Rights Act, Rehabilitation Act, or ADA which prohibit discrimination based on a disability.[10] This issue may arise, for instance, if the Facility denies admission to a prospective resident who has a mental disorder that led to commission of the offense.[11] Administrators should evaluate each potential resident on a case-by-case basis and use their best judgment to determine whether a registered sex offender can appropriately be cared for in their Facility. The administrator should evaluate the potential risk posed by the particular individual and whether the prospective resident suffers from a mental condition or disability. If the administrator determines that the risk is greater than the Facility can manage, the Facility may choose not to admit the potential resident.

What if a current resident is identified as a sex offender?

While the law does not require Long Term Care Facilities to ascertain whether current residents are registered sex offenders, it is recommended that Facilities check all residents against the Registry. The information obtained will permit the Facility to pay particular attention to the behavior of such residents and to effectively evaluate the resident's potential risk. If a Facility determines that a sex offender is already a resident of the Facility, affirmative notice to other residents is <u>not required</u> by law; nor is it advised. But all residents must be informed to "exercise whatever due diligence he deems necessary with respect to information on any sexual offenders registered." Va. Code §32.1-138(A)(16).

Dissemination of a resident sex offender's identity

The applicability of the Health Insurance Portability and Accountability Act ("HIPAA") and/or Virginia's Health Records Privacy statute to registered sex offender information is unclear.[12] As a result, HB 2346 only requires Facilities to advise residents of the existence of the Registry so that residents may search the Registry independently through publicly available information. The Department of Health and Human Services Office for Civil Rights has not published any formal guidance or regulations on the issue of HIPAA applicability other than to state, "to the extent that such information is maintained by Long Term Care Facilities as protected health information under the HIPAA Privacy Rule, such information could be used or disclosed for specifically permitted purposes, such as when necessary to run the health care operations of a Facility or required by another federal or state law," and that the Facility should "make the determination on a case-by-case basis as to whether the information is protected health information, and if so, whether it's intended use or disclosure is permitted by the HIPAA Privacy Rule."[13] If a current resident is identified as a sex offender, the best approach is to seek independent legal counsel so that the specific facts and circumstances of the case can be evaluated with respect to the resident's privacy rights. As a general rule, the Facility should keep information regarding a resident's sex offender status separate from the resident's medical record.

Supervision / Separation

Facilities may subject a resident to supervision or separation based on the resident's prior convictions only if the resident presents a current safety or health concern. The best practice however, is to base supervision and separation decisions on behavioral issues that arise during care, not on prior convictions. Research on sex offender recidivism suggests that the majority of individuals previously convicted of sex offenses do not commit additional sex offenses.[14] But research also indicates that sex offenses are underreported. *Id.* The residents of most likely concern are those with cognitive or mental impairments such as dementia. It is unlikely that a registered sex offender will reside in your Facility based on reported data to date, and even less likely that

the behavior will continue once in a Facility, but if it does, appropriate care planning must occur.

Transfer / Discharge

Under federal and state law, a nursing facility cannot involuntarily transfer or discharge a resident unless 1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the Facility or 2) the individual currently poses a safety and/or health risk to other individuals in the Facility.[15] Unless the transfer or discharge of a convicted sex offender meets these criteria, he cannot be discharged without 30-day notice.[16]

Conclusion

The above statutory changes require Long Term Care Facilities to modify existing policies and procedures.. Neither regulations nor guidelines have been issued by the Virginia Office of Licensure and Certification or Department of Social Services, as of this date. An update to this article will be provided once formal guidance is issued and the VHCA Annual Meeting will include a related educational session. In the mean time, Long Term Care Facilities should take immediate action to address these new laws, as suggested below.

IMMEDIATE STEPS

(1) CEO or Administrator must register with the Sex Offender Registry to receive automatic notification.

(2) Familiarize Admissions Staff with the Registry through in-service education, for purposes of checking potential and existing residents.

(3) Review and revise Admissions policies and procedures to require checking Registry for sex offender status of all potential residents.

(4) Develop a Resident Information Sheet or Poster to advise existing residents of the Registry and how to access. Facility should consider making a computer available for resident use for this purpose.

(5) Check sex offender status of current residents.

(6) File results of Registry check with completed Admissions Packet (not in medical record).

(7) Revise Admissions paperwork to advise potential residents of the Sex Offender Registry and how to access the same.

(8) Prepare written acknowledgment to be signed by all current Residents regarding the availability of Registry, including Resident's duty to exercise due diligence and obtain signature of all current Residents.

(9) Revise posted Notice of Resident's Rights to include right to be advised of the Registry, to receive help accessing the Registry, and to receive copies of desired information.

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[1] The majority of these sex offenders are male and under the age of 65. This may be a result of the limited period that sex offender registries have been in existence rather than an accurate reflection of the age distribution. Elderly sex offenders may not be registered if their convictions predated the implementation of their state's registry.

[2] The estimates found in the GAO report are underestimated due to significant data limitations. Investigation into state reporting revealed that the Federal Bureau of Investigations National Sex Offender Registry (NSOR) only included approximately 57% of sex offenders registered in the states evaluated. While the NSOR is a national database that compiles information about registered sex offenders submitted by all 50 states and the District of Columbia, it does not include all registered sex offenders, as states have varying degrees of difficulty submitting their records to the NSOR.

[3] GAO Report at Appendix II: Registered Sex Offenders Living in Nursing Homes and ICFs-MR

[4] Virginia State Police News Release, June 12, 2006, State Police, Attorney General Unveil Enhanced Virginia Sex Offender Registry: User-Friendly Additions Allow for Easy Access to Vital Information, http:sex-offnder.vsp.state.va.us/newsrelease/2006/news 2006-21.htm.

[5] For example, California, Illinois, Minnesota, Oklahoma have sex offender notification laws.

[6] Va. Code §§32.1-138 (B) and 63.2-1808(C).

[7] http://sex-offender.vsp.virignia.gov/sor/html/search.htm.

[8] Photographs must be updated every two years.

[9] Va. Code §9.1-913 (2007).

[10] See American's with Disabilities Act of 1990 ("ADA"), which prohibits discrimination against persons with a disability in a place of accommodation. 42 U.S.C. §12182(a). See Rehabilitation Act of 1973, which protects "otherwise qualified individuals" with a handicap from being excluded from participation in, denied the benefits of, or subject to discrimination under any program or activity receiving federal funding based solely on his or her disability. 29 U.S. C. §794; 42 C.F.R. §36.104.

[11] For further discussion on the applicability of the ADA or Rehabilitation Act, see Cynthia A. Alcantara and Nicholas J. Lynn, Convicted Sex Offenders: Ramifications for Long Term Care, Health Lawyers News, January 2007.

[12] The issue of uncertainty regarding the applicability of HIPAA was brought to the attention of the Department of Health and Human Services by the GAO, but as of this date, no definitive ruling has been issued.

[13] GAO Report at 24.

[14] GAO Report at 10.

[15] 42 U.S.C. §§1395i-3(c)(2) and 1396r(c)(2)(A); 42 C.F.R. §483.12(a)(2); Va. Code §32.1-138 (nursing facilities); Va. Code §63.2-1808 (The Virginia standards for involuntary discharge of a resident from an assisted living facility are more lenient. The resident may be discharged upon reasonable advance notice when provided with a statement of the reasons for his discharge, or for nonpayment.)

[16] 42 U.S.C. 1395i-3(c)(2)(B)(ii) and 1396r(c)(2)(B)(ii); See also Va. Code §32.1-138.1