

**Colorado Department of Public Health and Environment
Health Facilities Division
Revised September, 2004**

Frequently Asked Questions and Answers Related to Resident Sexual Activity

These Questions and Answers are meant to serve as a source of information for facility staff and are not meant as a guarantee of compliance with regulations for Medicare/Medicaid Certified Facilities or Colorado Licensure Regulations. Each facility must develop written policies and procedures, specific to the facility, that provide instruction to staff for their use. It is recommended that the legal counsel for the facility review the policies and procedures prior to implementation.

1. Can a guardian decide whether or not his/her ward can engage in sexual activity with another resident? Does the answer change if one of the resident=s has a sexually transmitted disease?

Generally, a guardian cannot decide whether or not the resident (ward) can engage in sexual activity with another resident without specific orders from the court. However, if one of the residents has a sexually transmitted disease and the resident (ward) is engaging in sexual activity that carries a substantial risk of infection or harm to the resident (ward), and the resident (ward) is not capable of appreciating and assuming the risks, then a guardian can decide to disallow a resident (ward) from engaging in the risky sexual behavior with another resident. If there is any question raised about this the guardian should be instructed to petition the court for specific instructions.

2. If and when should facility staff notify family members (spouse, children, siblings) of a resident=s sexual activity?

Family members/ significant others should only be notified of a resident=s sexual activity if :

- 1). the resident is incompetent (not capable of appreciating and assuming the risks),
AND
- 2) is engaging in sexual activity that carries a substantial risk of harm to the resident,
AND
- 3). the family member has legal authority over the resident, i.e. guardianship or power of attorney.

3. Do issues regarding a resident=s sexual activities ever need be care planned?

The sexual activity of residents is normal behavior and therefore definitely **NOT** care planned unless a problem arises. This could be compared to a resident=s eating and sleeping habits, behavior which is not routinely care planned unless a concern is identified related to the care and well being of the resident.

When an issue related to the sexual activity of a resident develops, e.g., physical harm, medical risk, need for medication, problematic pre or post sexual activity behavior, regular violations of others rights to privacy, or public masturbation, it is appropriate to open a care plan problem for that issue. Notation should also be made in the resident=s record of educational efforts regarding safe sex practices. This could also include information about the ability of the resident to understand and retain the information and any staff efforts at continuing and tailoring the education to the particular resident=s needs. If such an issue is entered into the care plan, make assurances that the resident=s right to the confidentiality of this information is protected at the care conferences and special consideration given to the delicate nature of this information, especially in regards to non staff members, at the conference.

When including family members in care planning, when the portion dealing with sexuality is to be discussed, the family should be advised that the resident is allowed some privacy related to certain issues. If this type of approach regarding privacy and sexual behavior is established in the beginning, it is easier to handle when difficulties arise. Such clarification early on about what information a family does or does not have access to may be helpful.

4. What should I do if one of the residents in the facility is HIV positive, or has another sexually transmitted disease?

You should notify the Colorado Department of Health, STD/HIV Field Services Program at (303) 692-2760. If you know that the resident with a sexually transmitted disease is engaging in sexual activity with another resident follow the guidelines in question #3 above. Also encourage the infected resident to disclose the information to his/her partner(s). Staff should also assist the resident in developing, if possible, the communication skills necessary for disclosure as well as provide the resident with emotional support to follow through with the disclosure.

5. Can a Medical Durable Power of Attorney (MDPOA) make decisions about a resident=s right to engage in sexual activity with another resident?

No, an agent holding a Medical Durable Power of Attorney cannot make decisions about a resident=s right to engage in sexual activity unless the resident is deemed incompetent by his/her physician and the Medical Durable Power of Attorney document gives the agent the specific authority to make this type of decision.

6. Do I as a staff member intervene when a resident engages in consensual sexual activity with someone other than his/her spouse?

No. Residents have the right to engage in mutually consenting relationships, regardless of their marital status or sexual orientation. In the community, individuals have the right to engage in extramarital relationships, in spite of any existing religious, moral or societal norms. There should be no distinction in a long term care facility, provided both residents consent to the relationship.

Given the range of possible emotions and responses from the spouse or other family members to a resident's sexual activity, it is important for staff to respond promptly and with sensitivity to family concerns, while maintaining resident confidentiality.

When discussing these issues, staff should refer to written facility policies and encourage families to attend regularly scheduled educational programs at the facility, e.g. family council or family meetings.

7. How do I assess a resident's ability to consent to sexual activity? How can I tell if the sexual activity is consensual?

If there are concerns that a resident's sexual activity is not consensual, trained staff should first discuss the matter with the resident. At this time, it may be helpful to seek assistance from mental health professionals, masters level social workers, psychologists, or psychiatrists in making the assessment as to a resident's ability to give **informed** consent to sexual activity. This conversation must be pursued with discretion, dignity and respect. Possible questions could include **A**: I notice that you are spending a lot of time with . . . ,**A** You seem . . . **A** (angry, anxious, upset, sad. Whatever you have observed), **A** Is there anyone or anything here that makes you feel uncomfortable?**A** Additional approaches can be found in the Investigative Guidelines for Resident Intimacy and Sexual Behavior. These can be obtained from the Health Facilities Division web site, **<http://www.state.co.us> or by calling 303-692-2800.**

If you still have concerns, it is important to assess/monitor reactions (e.g., fear/comfort, anxiety/calm), interactions between partners and others, changes in mood and affect, emotions displayed, any positive and/or negative signs and symptoms, physical/medical changes/symptoms (e.g., bruising, UTI), and changes in routine(e.g., eating, activity level, socialization, sleep).

An individual's needs and behaviors normally change over a lifetime. Thus, current sexual activity may not be consistent with prior lifestyle, preferences, relationship patterns and beliefs.

8. What about the privacy and rights of the roommate of a resident who is sexually active?

Residents/roommates have the right to privacy and to not be imposed upon by being exposed to others' sexual activity and related private, personal behavior.

Facilities are required to provide accommodations for privacy to ensure that residents have a safe, comfortable private environment for intimate expressions of affection and sexual activity.

It can also be appropriate to explore and discuss options with roommates to mutually agree on some private time for each resident in the room or other reasonable arrangements.

9. When should a resident's physician be notified of sexual activity of a resident and what role does the physician play in decisions about the safety/continuation of/ ability to consent to sexual activity of the resident?

Physician notification about a resident's sexual activity would not be appropriate or necessary, in the absence of medical complications or considerations related to the resident's physical condition. Physicians do not have the authority to mandate treatment, abridge rights, or determine a resident's activities or relationships. Physicians prescribe treatments, make recommendations, coordinate with care providers, monitor, assess and educate. A physician's role can include discussion with residents under their care regarding the risks and benefits of any activity or treatment, including sexual behavior and consultation with the facility staff related to the medical considerations for a particular resident's sexual activity.

10. What are the rights and responsibilities of the guardian?

A guardian has the responsibility to assure that the resident (ward) maintains the greatest degree of independence possible, and to encourage the resident to make as many decisions as possible. Therefore, a resident with a court appointed guardian would generally retain the right to make decisions about his/her daily life, e.g., food, schedule, activity and clothing choices. The resident also retains the right to vote and marry if they choose. The involvement of the guardian would only be necessary when the decision/behavior in question raises questions that may affect the health or safety of the resident. Sexual activity would generally fall into the category of normal adult behavior over which a resident retains the right to make his/her own decisions, barring significant medical considerations. Significant medical considerations could include STD's, HIV and Hepatitis B&C.

It is important to remember that a guardian does not have financial responsibility for the expenses incurred by the resident, even though the guardian may be making financial decisions for the resident, and the guardian is not legally liable or personally responsible for the behavior of the resident.

11. What rights does a resident with a guardian retain about his/her life and care? In what circumstances does the resident's decision prevail over that of the guardian?

The first question to ask is always, what is the nature of the guardianship? All guardianships are not the same; they can be limited to only certain types of authority or decision-making for the ward(resident). Check the terms of the guardianship to see if the guardian's authority is limited in any way.

Also, it is important to understand that guardianship law in Colorado and around the country is continuing to provide greater and greater protection for the retention of decision making power in the ward (resident).

Under Colorado law, the Court is to encourage the maximum self-reliance **and** independence of the incapacitated person and make orders only to the extent necessitated by the incapacitated person's mental and adaptive limitations. C.R.S 15-14-304.

The 1997 Uniform Guardianship and Protective Proceedings Act provides that limited guardianships should be used whenever possible and the guardian should always consider the expressed desires and personal values of the ward to the extent known, when making decisions. .

It is important for a guardian to recognize and then suspend his/her personal spiritual and moral beliefs when called upon to make decisions relative to the ward's sexual behavior. It would be the unusual situation where the guardian's decision would be called for regarding sexual activity of a resident, i.e., when that activity directly affects the health and safety of the resident (ward). In today's rapidly changing world, sexual activity can have significant health risks and this should be evaluated on a case by case basis.

12. What should be staff response to sexual activity between residents of the same sex?

Staff response to resident to resident sexual activity should be the same whether or not the partners are of the same or a different sex. The same considerations of privacy and confidentiality, safe sex practices, safety, and consent apply. It is important for staff to separate their personal views of the sexual behavior from their professional responsibility to the residents to provide for their expression of affection and intimacy with another resident in the facility which is their home.

13. How should staff respond to residents who engage in sexual activity in public places, in view of other residents or staff?

Public displays of sexual activity, including masturbation, that go beyond hand-holding and hugs and kisses are generally more appropriate in a private setting, i.e., a resident's room. However, for some residents their disease process has altered the part of their brain that regulates these cultural norms and thereby reduces, for some residents, their inhibitions. Therefore, they fail to recognize what is and is not

appropriate relative to the proper place to engage in sexual behavior. Staff are responsible for ensuring that the needs of all residents are met, both for privacy to engage in sexual activity and freedom for others to not be exposed to the private acts of other residents.

Staff should ensure that they know in advance how they will handle the situation. For residents for whom sexual activity in public places is an on going issue, the issue should be addressed in their care plan so that all staff will know how to respond appropriately. An appropriate staff response would be to quietly and tactfully redirect residents to a private space, never embarrass, tease or ridicule the behavior, and generally treat the behavior as normal. Redirect as you would someone who engaged in other acts that are normal but generally considered private behavior that may be offensive to those around them, e.g., undressing in public. Staff should be trained regarding these issues and have the opportunity to discuss what an appropriate response would be prior to such an event occurring.

14. How and when should residents receive information about birth control if appropriate, safe sex practices and sexually transmitted diseases?

During the admission and adjustment period for a resident, staff should observe and assess a resident's interest and/or participation in sexual issues and activity. If you determine that a resident is or may become sexually active, the resident should be offered information and the opportunity for education on safe sex practices. Offer age and medically appropriate information regarding birth control. Involve the primary care physician in the decision making process for medically appropriate birth control. Residents should have several sources through which to access this information, e.g., their case managers, facility social services staff, nursing personnel, and outside agencies.

15. How should staff respond to a sexually active resident who chooses multiple partners?

The choice to engage in sexual activity with multiple partners is the right of the resident. Due to the delicate and complicated factors that arise when multiple relationships occur within the same facility, the psycho social needs and safety of each individual involved must be considered and monitored. It is expected that residents' physical and emotional needs will be identified, regularly evaluated and addressed as appropriate and that risk reduction education efforts be instituted.

It should be emphasized that staff should be pro-active in their efforts to educate residents and increase the efforts when residents may be at risk. Please refer to the answers to questions #3,#6.

16. What is the role/responsibility of facility staff to sexually active residents who regularly go out on a pass from the facility?

It is generally expected that residents will be evaluated upon admission to determine if it is safe and

appropriate for them to have such pass privileges. Once this has been done, staff should be sure that the resident has been offered education in safe sex practices and free, confidential access to items needed, e.g., condoms. The facility is responsible for ongoing education based upon the changes in the resident's social, psychological and medical circumstances. This would include continued efforts to educate residents about safe sex practices and reinforcement for less risky behaviors. These types of educational programs have been conducted with developmentally disabled adults and technical assistance from community center boards throughout the state may be helpful in developing specific steps staff could take to support risk reduction behavior.

If the resident is at risk for being abused or victimized, their pass privilege should be regularly assessed and evaluated for the continued safety of the resident. Observe and evaluate the resident upon return to the building, if appropriate.

17. Is there a duty to warn residents who are or may be a partner in sexual activity with a resident who has a sexually transmitted disease?

Although state law provides for strict protection of the confidentiality of HIV infected individuals as well as others, this does not necessarily mean there is no duty to warn. Up until now, there has not been sufficient case law or legal precedence to determine whether or not there is a duty to warn in the case of an HIV infected person placing another at risk.

Staff should consider referrals to appropriate STD/HIV prevention services such as HIV prevention case management provided by CDPHE as well as several local community based organizations. Physicians should also be contacted to ensure testing and treatment of partner(s), if they live in the facility. It is permissible to tell a resident that "you have been exposed to (a sexually transmitted disease) from a sexual partner". You cannot disclose the name of the infected party, but can encourage the resident to ask their sexual partner(s) about STDs and also encourage the exposed resident to have the medical tests necessary to determine if they are infected and require treatment

Facility staff have the same responsibility to protect resident confidentiality related to any diagnosis, including that of a sexually transmitted disease. This does not however, relieve the facility of its obligation to offer education and direct residents toward appropriate safer sex practices and to continue to make condoms and other appropriate materials readily available. It is advisable to direct your efforts at educating both the infected and uninfected resident.

**Prepared by the Resident Intimacy and Sexuality Task Force
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