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## MEMORANDUM

TO: LeadingAge New York

FROM: Hinman Straub PC

RE: Guidance for the Admission and Care of Registered Sex Offenders in Nursing Homes in New York State

DATE: September 18, 2017

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This memorandum has been prepared in response to questions regarding the admission and care of registered sex offenders in nursing homes in New York. It specifically addresses questions regarding the ability to admit or deny admission of sex offenders to a facility, notification requirements for the facility in relation to other residents/staff, and requirements for the supervision of registered sex offenders in facilities. It is important to note that this guidance applies to all nursing homes in New York outside of Suffolk County. As described in Section 2 (b) below, the Suffolk County Administrative Code has established specific requirements for nursing home operators located in the County in relation to registered sex offenders.

### **I. Overview**

Federal statutes and regulations governing the operation of long-term care (LTC) facilities do not address the issue of registered sex offenders residing in LTC facilities. In the absence of federal requirements, state laws governing this issue vary. In response to a 2006 Government Accountability Office (GAO) report on sex offenders living in long-term care facilities, a number of states have enacted legislation establishing various requirements for nursing homes in relation to registered sex offenders over the last decade. These state laws have focused on establishing notification requirements, ranging from mandating that facilities provide notice of a resident's status as a registered sex offender to other residents and staff to requiring facilities to advise residents that they can search the sex offender registry to determine if a sex offender resides in their facility.

In New York, the issue has not been addressed in statute or regulation at this time. However, as required by federal law, New York has adopted the Sex Offender Registration Act (“SORA”), which requires sex offenders to register with the State and provides information to the public about certain sex offenders living in their communities.<sup>1</sup> SORA requires the registration of individuals convicted in New York State of certain sex offenses as well as the registration of those individuals convicted in another jurisdiction if the offense is equivalent to a New York State registerable sex offense. Sex offenders are classified as either low risk (Level 1), moderate risk (Level 2) or high risk (Level 3). SORA requires the Division of Criminal Justice Services (DCJS) to maintain a public directory on the internet, which includes Level 2 and Level 3 sex offenders.

Generally, federal guidance has established that nursing homes should not accept any individual where the nursing home determines that it cannot appropriately meet that individual’s needs and simultaneously protect the health, safety, and rights of other individuals (other residents, staff, and visitors).<sup>2</sup> In relation to the admission of registered sex offenders, an industry standard has developed for how nursing homes should address the admission process for registered sex offenders and for how nursing homes should care for registered sex offenders residing in their facilities in relation to the potential risks that the individual poses to other residents, staff and visitors to the facility.

Under federal and state regulations, nursing homes are required to develop an admission policy and procedure that does not unlawfully discriminate against applicants, and provides discretion on making admission decisions by not requiring nursing homes to admit every applicant.<sup>3</sup> This standard provides nursing homes with the latitude to decide to admit or not to admit registered sex offenders into their facility. The decision to admit or not to admit must be based on a number of factors, including whether the facility can meet the needs of the individual and whether the facility can ensure the protection of other residents, staff and visitors.

## **II. Specific Issues**

### **a. Admission of Prospective Residents that are Registered Sex Offenders**

Under current federal and state regulations, nursing homes are provided with latitude to admit or not admit registered sex offenders that apply for admission to their facility. While there are no federal or state regulations expressly providing that nursing homes may admit, or not admit, registered sex offenders that apply for admission, there are no federal or state prohibitions on nursing homes making admission decisions based on a prospective resident’s sex offender status or from refusing to admit prospective residents based solely on this designation. Rather, federal and state regulations prohibit nursing homes from denying admission based on unlawful discrimination (race, color, national origin, disability, age, sex (gender), or religion) or by failing to administer an admission policy on a consistent basis.<sup>4</sup>

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<sup>1</sup> NYS Correction Law Article 6-C.

<sup>2</sup> “Updated Guidance to Surveyors on Federal Requirements for Providing Services to Justice Involved Individuals”, CMS Survey and Certification Letter 16-21-ALL (December 23, 2016), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-21.pdf>

<sup>3</sup> 42 C.F.R. § 483.15 (1).

<sup>4</sup> 42 C.F.R. § 483.15 (1); 10 NYCRR § 415.3(b)(5); 10 NYCRR 415.26 (I)(1)(ix).

Specifically, nursing homes are not prohibited from denying admission to a registered sex offender based solely on their status as a registered sex offender. As registered sex offender status is not protected class under federal or state law, the denial of admission due to an individual's status as a registered sex offender is not a recognized form of discrimination and currently is permitted.<sup>5</sup>

Federal and state regulations do not require admission policies to address the admission of sex offenders. However, it is recommended that nursing homes develop a policy for reviewing the admission of applicants that are registered sex offenders. Facilities may develop a policy that denies admission solely on an individual's status as a registered sex offender. Facilities may also develop a policy that establishes a process for the facility to consider whether the admission of a registered sex offender is appropriate, by reviewing the level of offense, years since an offense was committed, the nature of the offense, any rehabilitation that the offender received, and the resident's current medical condition. If the risk of admitting someone is too significant, then a facility should decide to deny admission. This policy could also be applied to applicants with a known criminal history.

A secondary issue arises regarding the facility's knowledge of an individual's status as a registered sex offender during the admission process. Facilities are permitted to include questions about a prospective applicant's status as a registered sex offender on their admission applications. Facilities are also permitted to review the names of prospective applicants against New York's Sex Offender Registry, which provides information about registered sex offenders living in New York, as part of their admission policy.<sup>6</sup> A number of other states have enacted laws requiring LTC facilities to review their sex offender registry to determine if the potential resident is a registered sex offender.

It is important to highlight that in order to ensure compliance with federal and state regulations, facilities must develop and apply an admissions policy consistently for all admissions. For example, a facility should not review the names of prospective applicants against New York's Sex Offender Registry for some applicants, but not all applicants. Similarly, a facility should not deny admission based solely on an individual's status as a registered sex offender, and then subsequently admit a resident who is a registered sex offender based on a conclusion that the individual poses a low risk.

#### b. Requirements for Suffolk County Nursing Homes

The Suffolk County Administrative Code has established requirements for nursing home operators in relation to registered sex offenders. Under Suffolk County Administrative Code Chapter 627-3 and 627-4, all nursing home operators in Suffolk County are required to:

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<sup>5</sup> It is important to highlight that a facility may be in violation of applicable federal and state regulations prohibiting discrimination in admission if they apply an admission policy unevenly based on gender. For instance, a facility with a protocol to allow for the admission of female registered sex offenders, but deny admission to male registered sex offenders, or has a protocol to only check sex offender status of male prospective residents, may open itself to a claim for discrimination based on gender.

<sup>6</sup> By law, only Level 2 and Level 3 sex offenders are listed on the public directory. As a result, a facility's review of New York's Sex Offender Registry would not reveal whether a prospective applicant is a Level 1 sex offender.

- Review the New York State Sex Offender Registry to determine whether any current resident appears in the registry;
- Prior to admitting a new resident, review New York State Sex Offender Registry to determine whether the prospective resident appears in the registry; and
- When an operator determines that a resident of the nursing home is registered with the New York State Sex Offender Registry, the operator must notify its employees and residents, and the residents' next of kin, of the resident's sex offender status.

c. Facility Obligations to Notify Residents/Staff of Sex Offender Status

New York does not have any statute or regulation requiring, or prohibiting, nursing homes from notifying employees and other residents of a resident's sex offender status. New York's Sex Offender Registration Act authorizes any entity receiving information on a sex offender to disclose or further disseminate such information at its discretion. When a facility is made aware, either from law enforcement or through their own efforts, of a resident's status as a registered sex offender, the facility is permitted, but not required, to disclose this information to other residents and staff.

It is important to note that the treatment of a resident's status as a registered sex offender under the Health Insurance Portability and Accountability Act (HIPAA) privacy rule is unclear. The U.S. Department of Health and Human Services Office for Civil Rights has stated that to the extent that such information is maintained by LTC Facilities as protected health information (PHI) under the HIPAA privacy rule, such information could be used or disclosed for specifically permitted purposes, such as when necessary to run the facility. In contrast, if a resident's status as a registered sex offender is not maintained in the resident's medical record, the information would likely not be considered PHI protected by the HIPAA privacy rule.

d. Facility Obligations for Supervision

Upon notification of a resident's sex offender status after admission, facilities are required to mitigate the risks that a resident poses to other residents, staff and visitors. The facility should weigh the potential risks that the individual poses to other residents, and visitors to the facility. Best practices recommend where facility staff determines that the individual poses a risk to other residents, the facility should immediately: (1) determine whether it is necessary to transfer/discharge resident due to the danger they pose to other residents; and (2) place the resident in a separate room and institute 1:1 care. Other suggested measures include: watching the resident carefully, placing the resident in a room near a nurse's station, and providing counseling for the sex offender resident.

Please contact us with any questions that you may have.