QUESTION:

When are facilities required to report potential incidents of resident on resident abuse?

ANSWER:

In determining whether to report cases of resident on resident abuse, a facility must determine whether the potentially abusive act was willful. This will in all cases involve an assessment of the perpetrating resident and the circumstances of the incident. If the act was willful, then the incident must be handled as a case of abuse, reported to the State Survey Agency within 24 hours, and thoroughly investigated by the facility within five days.

In addition, if the potentially abusive act was sexual in nature, the facility must also determine whether the residents involved in the incident had the cognitive capacity to consent to sexual relations or sexual contact and that in fact both parties did consent to sexual activity. If the incident was consensual by both residents involved, then the incident need not be reported.

If, however, either or both residents are incapable of consenting to sexual contact or sexual relations, then steps must be taken to protect the non-consenting resident or residents from further sexual contact. If one resident is capable of consent and the other resident is incapable of consent, and the facility determines the act is willful, then the incident must be treated as a case of abuse and handled accordingly.

DETERMINING WILLFULNESS:

If the perpetrating resident is known to the facility to be fully intact cognitively then an abusive act by that resident was willful and the facility must report the resident to resident incident to the state agency.

If the perpetrating resident is known to have some degree of cognitive impairment, or if the cognitive status of the perpetrating resident is not known or uncertain, then the facility must take steps to determine whether the act was willful.
Such steps include:

- A review of the resident’s record, including any diagnoses, the most recent resident assessment (minimum data set and resident assessment protocols), nurses notes, physician progress notes, and other relevant information about the resident’s cognitive status and previous incidents (if any).

- An interview of the perpetrating resident, including:

  Asking the resident general orientation questions (Where is he or she? What is his or her name? What is the date? What is the season?)

  Does the resident remember the incident?

  What does the resident say occurred?

  What does the resident say that he or she did?

  Can the resident give a reason for his or her actions?

  Did the resident intend to scare or hurt the other resident?

- Interviews with knowledgeable direct care staff (CNAs, nurses and others who frequently interact with the resident) about the cognitive status of the resident. Issues that may be fruitfully explored during these interviews include:

  Is the resident generally oriented to person, place and time?

  Does the resident’s cognitive status vary over the course of the day?

  If so, how does it vary?

  Had there been a noticeable change in cognitive status before the incident?
Have there been medication changes or illnesses that could affect the resident’s cognitive status?

- Interviews with potential witnesses to the incident to determine precipitating events, if any; what they saw and what they heard.

At the conclusion of its investigation, the facility must make a determination if the resident had willful intent to abuse the other resident. Regardless of cognitive status, if the resident remembers the incident and expressed an intention to injure or scare the other resident, the act was a willful one and should be reported, even if the perpetrating resident was delusional. If the resident is unable due to cognitive status to have intended to injure or frighten the other resident, the incident should be treated as an accident and would not be reported. In either case, the facility must have facts to support its determination.

**DETERMINING ABILITY TO CONSENT TO SEXUAL CONTACT:**

Residents who cannot appreciate the nature and gravity of sexual behavior or the consequences of sexual behavior because of dementia, mental retardation, mental illness, or a drug regimen are not capable of consent.

Residents who are restricted from freely exiting the facility out of concern for their safety are presumptively unable to consent.

Do not assume that a resident who does not complain or does not “seem to mind” sexual activity was therefore a willing participant.

If the resident is not fully cognitively intact or if there is any reason to believe the resident may be incapable of consent, he or she may be evaluated by a physician and the physician should give an opinion whether the resident can consent to sexual activity. Alternatively, the resident may be assessed by the facility as to the ability to consent using methodology presented during the 2009 conference on sexuality and dementia presented by the Alabama Nursing Home Association. The Association can provide copies of this methodology to facilities upon request.
**STEPS FACILITIES MUST TAKE AFTER AN INCIDENT OF POTENTIAL RESIDENT ON RESIDENT ABUSE:**

Within 24 hours immediately following the incident the facility must report the incident to the State Agency if the facility determines the alleged perpetrator had willful intent. The facility’s assessment and conclusions leading to the determination of willful intent must be thoroughly documented and available to surveyors upon request.

If the facility is unable to reach a determination prior to the expiration of the 24 hour period, the facility must report the incident to the State Agency.

If within 24 hours the facility has determined the perpetrating resident did not have willful intent, the incident should be treated as an accident. The facility does not need to report the incident to the State Agency. The facility’s assessment and conclusions must be thoroughly documented and available to surveyors upon request.

Whether the incident is treated as resident on resident abuse or treated as an accident, the facility must conduct an investigation, take steps to prevent further, similar incidents, keep its investigation, conclusions, and documentation of any preventive steps on file, and produce all of these documents when requested during a survey.

In the case of potential sexual abuse, if the facility determines that the incident involved only consensual contact between the residents and that the residents involved were capable of consent, the facility’s assessment leading to the determination of consent must be thoroughly documented and available to surveyors upon request. If the facility determines that either or both residents were incapable of consent, or that consent was not given, the incident needs to be treated as any other case of abuse and steps must be taken to protect the resident or residents involved from further sexual contact.
REGULATORY REFERENCES:

488.301 and the interpretative guidelines for 483.13 (b) or F223 state:

“Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.”

F225 – 483.12(c)(2) states:

“Facilities must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).”

The interpretative guidelines for F323 -483.25 (h) (1) and (2) state:

“Resident to Resident Altercations

NOTE: An incident involving a resident who willfully inflicts injury upon another resident should be reviewed as abuse under the guidance for 42 C.F.R. 483.13 (b) at F223. “Willful” means that the individual intended the action itself that he/she knew or should have known could cause physical harm, pain, or mental anguish. Even though a resident may have a cognitive impairment, he/she could still commit a willful act. However, there are instances when a resident’s willful intent cannot be determined. In those cases, a resident-to-resident altercation should be reviewed under this tag, F323.”