

Mini Review

Capacity to Consent to Sexual Behavior and Adults with Intellectual Disabilities

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Individuals with intellectual disabilities are people with sexual feelings, needs and identities. People with intellectual disabilities have fundamental rights to have healthy relationships with others, including romantic relationships. In the United States, at age 18, individuals are legally presumed to have the freedom, ability and right to make all choices related to their person and property; this includes marriage or any other contract. However, the risk of being a victim of crime, especially a victim of sexual assault, is 4 to 10 times higher for an individual with an intellectual disability [1,2]. As such, the process of protecting individual rights while protecting individuals from harm requires thoughtful discussion.

In the United States, intimate relationships between individuals with intellectual disabilities are not illegal. Likewise, intimate relationships between someone who does not have an intellectual disability and someone who does are not illegal. Legality is only relevant if the person is under the legal age of consent of the state or has been determined to not have the capacity to consent. Capacity to consent in this context is a person's ability to consent to sexual activity. There are unique aspects of sexual consent capacity that differentiate it from other forms of consent capacity. For example, a medical treatment decision can be made with opportunities to discuss the information with others and obtain advice from one's physician and significant others. There may be many opportunities to weigh the risks and benefits of the medical decision with other individuals. In contrast, decisions regarding sexual activity are done alone without the opportunity and most likely without the desire, to consult with others and in a situation that often requires an expeditious response.

Any analysis of sexual consent capacity must balance respecting an individual's sexual rights with the possibility of sexual abuse [3]. Assessment of sexual consent capacity should occur when there is concern the individual may lack capacity, not as a general test for any adult with an intellectual disability who engages in or expresses a desire for sexual activity.

Capacity to consent to sexual behavior is a dynamic concept and can change over time. Capacity can be described as a state not a trait. There are no universally accepted criteria regarding capacity to consent to sexual behavior [4]. Each state defines

rules around capacity. The law typically looks to factors such as knowledge and social understanding.

However, there are three main areas to consider when understanding capacity to consent to sexual behavior. These include rationality, knowledge, and voluntariness (see Capacity to Consent to Sexual Behavior Assessment).

Rationality refers to the ability to critically evaluate, to weigh the pros and cons and make knowledgeable decisions. This includes:

- Is the individual oriented to person, time, and place
- Does the individual know the difference between fantasy and reality
- Does the individual know the difference between truth and lies
- Is the individual able to accurately respond to questions regarding consequences of sexual behavior
- Is the individual able to describe the process for making choices

Knowledge refers to the knowledge of sexual behaviors, choosing to accept or reject sexual behavior, understanding illegality and unpleasant consequences of various sexual behaviors, pregnancy and sexually transmitted infection prevention, social and legal constraints on time, place and context, and the physical, legal and ethical responsibilities associated with pregnancy and parenting. This includes:

- Does the individual have basic knowledge of sexual activities and behaviors
- Does the individual have basic knowledge of the difference between private vs. public
- Does the individual have the basic knowledge of birth control
- Does the individual have the basic knowledge of sexually transmitted infections and avoidance

Voluntariness refers to the ability to take self-protective measures against unwanted intrusions, abuse and exploitation. Included in voluntariness is unwillingness, inability or ambivalence with regard to expressing a choice. There should not be exploitation. A person should not be taken advantage of or used by another (e.g., someone with power or higher status) in a way that is inconsistent with voluntariness. Voluntariness includes:

- Does the individual have the ability to take self-protective measures against unwanted intrusions, abuse and exploitation
- Does the individual understand that they have a right to say “No”
- Does the individual understand that they can refuse to have sex
- Does the individual understand that “No” means stop
- Does the individual understand imbalance of power

Compared with the general population, people with intellectual disabilities often have the belief that someone other than themselves should decide whether they should have intimate relationships [5]. This lack of knowledge and understanding of their rights can increase their vulnerability and risk to sexual abuse. From 2017 - 2019, the rate of rape/sexual assault for individuals with disabilities was more than four times than that for individuals without disabilities [1].

Studies also show that people with intellectual disabilities have a relatively low level of knowledge about sexuality, have less experience with dating, intimacy and sexual interaction, and have fewer opportunities to learn about sexuality. The lack of sexual knowledge, relationship experience, and protection skills may increase the risk of abuse and impair the ability to recognize an experience as abusive [5]. Similarly, according to Murphy and O’Callaghan [6], Adults with intellectual disabilities were significantly less knowledgeable about almost all aspects of sex and appeared significantly more vulnerable to abuse, having difficulty at times distinguishing abusive from consenting relationships

While studies have long established that individuals with disabilities are disproportionately criminally victimized [1], sexuality remains a highly sensitive and frequently neglected issue [7]. Given the complexities associated with sexuality and individuals with intellectual disabilities, it is incumbent upon professionals in the field to articulate a clearly defined philosophy on healthy and meaningful relationships to provide guidance for family members, provider agencies and persons with intellectual disabilities.

It should be expected that individuals with intellectual disabilities are to be treated with respect and dignity as human beings; are supported to make choices and decisions independently; have the same legal rights and responsibilities as any other person unless otherwise limited by law; are free from abuse, neglect and exploitation; have a right to privacy; are able to associate, publicly or privately, with friends, family and others; and have intimate relationships with other people of their own choosing.

Capacity to Consent to Sexual Behavior Assessment

Assessment Process Guidelines

Identify Expert(s)

Review of relevant records including:

Information about reproductive ability

Psychiatric/Psychological

School Records

Any information on previous sexual education and history

Engage in discussions with selected people who know or work with the individual being assessed (e.g., parents, siblings, staff members at a residential provider agency).

Interview with the person which includes evaluating mental status and identifying information about the person’s relevant knowledge, rationality and voluntariness. In the interview, be sure to evoke information about relevant sexual knowledge and history.

Use the following questions as an initial guide:

Knowledge (Information)

Is the individual able to identify various sexual behaviors including intercourse, as well as potential outcomes of sexual activity including STI’s, pregnancy and parenting?

Is the individual able to identify public versus private places?

Is the individual able to identify appropriate places for sexual behaviors?

Is the individual able to identify illegal sexual behavior?

Is the individual able to identify consequences for those behaviors?

Is the individual able to discuss consequences for parenting?

Rationality (Capacity)

Is the individual oriented to person, time, and place?

Is the individual able to describe the difference between fantasy and reality and truth and lies?

Is the individual able to accurately respond to questions regarding consequences of sexual behavior?

Is the individual able to describe process for making choices regarding sexual activity?

Voluntariness (Lack of Coercion)

Does the individual have the ability to say “no”?

Is the individual able to communicate “no” verbally or non-verbally, and are able to remove himself or herself from the situation at hand, indicating a wish to discontinue the interaction?

Is the individual able to describe how they would apply “no” in a physical or sexual context?

Is the individual able to identify what being exploited may mean for them?

Is the individual able to call for help?

***NOTE: The questions presented are a guide. A “yes” answer for all questions does not necessarily indicate capacity. Nor does a single “no” indicate lack of capacity.**

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