




NAPSA WEBINAR:
Addressing Capacity to
Consent to Sex for those with
Intellectual & Developmental
Disabilities
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Consent to Sex




- When is consent questioned?
- When should consent be questioned?
- Who is qualified to assess for consent ?
- What determines consent?
- What are the pitfalls of an erroneous conclusion?

CONSENT IS GENERALLY QUESTIONED WHEN

- There is a suspicion of abuse/exploitation by a parent, family member or other caregiver when they learn of a plan (or history) to engage in sexual activity involving their (adult) child who has a developmental or intellectual disability, and the caregiver believes that the individual cannot give consent.
- Family members or carers do not approve of the individual's chosen sex partner
- When there is a suspicion of undue influence of the sex partner over the individual with a disability, particularly when the partner does not have a disability.
- Care must be used...can the individual learn through experience or is this relationship "plainly" exploitative. Who has never made an error in choice of partner and learned from it?



CONSENT IS GENERALLY QUESTIONED WHEN

- When a petition for guardianship or conservatorship has been filed, and the right to make choices about sexual activity is being evaluated.
 - This is distinct from sexual assault, where the victim reveals that they have experienced a traumatic event of sexual contact/assault.
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Developmental disabilities



Federal definition of Developmental Disability

The Developmental Disabilities Assistance and Bill of Rights Act of 2000 defines a developmental disability as a severe chronic disability of an individual that:

- Is attributable to a mental or physical impairment or combination of mental and physical impairments.
- Is manifested before the individual attains age 22
- Is likely to continue indefinitely
- Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living and economic self sufficiency
- Reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that are lifelong or extended duration and are individually planned and coordinated
- Includes infants and young children from birth to age nine who have substantial delay or specific congenital or acquired conditions and may be considered to have a developmental disability without limitations in meeting three or more of the areas of major life activity with a high probability of resulting in DD later in life if services are not provided.

In California, a developmental disability is defined...

- A "developmental disability" is a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or other handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.
- Developmental Disability, according to the California Code of Regulations, Title 17, Â§54000, originates before the age of eighteen, continues indefinitely (i.e., for a lifetime),
- and constitutes a substantial disability for the individual.
- Developmental Disability does not include handicapping conditions that are solely psychiatric or solely due to learning disabilities.
- Developmental Disability does not include physical disorders which are not associated with neurological impairment that results in a need for treatment similar to that required for mental retardation.* (UPDATED to replace "mental retardation" with "intellectual disability," consistent with federal law.)

INFORMATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES

Definition of Intellectual Disability BY AAIDD (American Association on Intellectual and Developmental Disabilities)

- ▶ *Intellectual disability* is a disability characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many everyday social and practical skills. This disability originates **before the age of 18**.
- ▶ **Intellectual Functioning**
- ▶ *Intellectual functioning*—also called intelligence—refers to general mental capacity, such as learning, reasoning, problem solving, and so on.
- ▶ One way to measure intellectual functioning is an IQ test. Generally, an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning.
- ▶ **Adaptive Behavior**
- ▶ *Adaptive behavior* is the collection of conceptual, social, and practical skills that are learned and performed by people in their everyday lives.
- ▶ Conceptual skills—language and literacy; money, time, and number concepts; and self-direction.
- ▶ Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), social problem solving, and the ability to follow rules/obey laws and to avoid being victimized.
- ▶ Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone.
- ▶ Standardized tests can also determine limitations in adaptive behavior.
- ▶ **Age of Onset**
- ▶ This condition is one of several developmental disabilities—that is, there is evidence of the disability during the developmental period, which in the US is operationalized as before the age of 18.



WHAT ARE INDICATORS OF INTELLECTUAL ABILITY ?

- WHAT IS THE DIAGNOSIS OF THE INDIVIDUAL AND
- WHAT ACTIVITIES OF DAILY LIVING DOES THE INDIVIDUAL CARRY OUT INDEPENDENTLY AND/OR WITH SUPPORT?
- WHAT ARE THE LIVING SKILLS CONDUCTED INDEPENDENTLY AND WITH SUPPORT?

ADDITIONAL INDICATORS OF ABILITY:

DOES THE INDIVIDUAL MAKE INDEPENDENT DECISIONS ABOUT THEIR FINANCES?

DOES THE INDIVIDUAL MAKE INDEPENDENT DECISIONS AT THEIR JOB?

DOES SOMEONE HAVE A POWER OF ATTORNEY FOR THE INDIVIDUAL?

COMMUNICATION

- While most individuals are verbal and hearing, some are non-verbal
- Ability to speak is not related to intellectual disability
- Use of AAC – **Adaptive and Alternative Communication** methods (there are assisted technology methods such as computers used independently.)
- **Assisted communication** requires the support of a trained professional or the parent of the individual who has been trained to support the person in order for them to communicate. If possible it is best not to use a parent as the support person during this assessment. The ADA supports the individual's right to be able to communicate in their usual manner (same rules for interpreters for people who are Deaf or Hard of Hearing).

Intellectual Disability

► Ability is measured by a combination of intelligence testing, academic performance and adaptive skills

► Intelligence testing results in scores in these categories:

► Normal	90 – 110	85 +
► Borderline	70 – 89	71 - 84
► Mild	50 – 69 (only 24% have known cause)	50 - 70
► Moderate	40 – 49	35 - 45
► Severe	20- 39	20 - 40
► Profound	<20	<20

► Identifying Intellectual Disability: Guidance for the School Psychologist CASP 2012 October 26, 2012:

(<https://www.csus.edu/indiv/b/broks/Workshops/CASP/Brock.W503.ID.pdf>)

Autism definition

- ▶ Autism spectrum disorder (ASD) is a developmental disability that can cause significant social, communication and behavioral challenges. There is often nothing about how people with ASD look that sets them apart from other people, but people with ASD may communicate, interact, behave, and learn in ways that are different from most other people. The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely challenged. Some people with ASD need a lot of help in their daily lives; others need less.

People with Autism...

- ▶ Might not look at objects when another person points at them
- ▶ might not point at objects to show interest (for example, not point at an airplane flying over)
- ▶ have trouble relating to others or not have/show an interest in other people at all
- ▶ avoid eye contact
- ▶ want to be alone
- ▶ have trouble understanding other people's feelings or talking about their own feelings
- ▶ prefer not to be held or touched
- ▶ may appear to be unaware when people talk to them, but respond to other sounds
- ▶ be very interested in people, but not know how to talk, play, or relate to them
- ▶ may repeat or echo words or phrases said to them, or repeat words or phrases in place of normal language
- ▶ have trouble expressing their needs using typical words or motions
- ▶ not play "pretend" games (for example, not pretend to "feed" a doll)
- ▶ repeat actions over and over again
- ▶ have trouble adapting when a routine changes
- ▶ have unusual reactions to the way things smell, taste, look, feel, or sound
- ▶ lose skills they once had (for example, stop saying words they were using)

Autism – Autism Spectrum Disorders

- Interactional Synchrony (“slight” delay in processing input & designing output)
- Need time to change from one activity to another
- Many are non-verbal and use AAC
 - Augmentative and Alternative Communication (AAC)
 - Communication by tablets, “talkers” letterboards
- Many are verbal
- There are as many differences among those with Autism as any other population
- Some, although without an intellectual disability, are unable to carry out normal Activities of Daily Living without support



Cerebral Palsy

- ▶ A condition marked by impaired muscle coordination (spastic paralysis) and/or other disabilities, typically caused by damage to the brain before or at birth.

The condition primarily affects body movement and muscle coordination.

The individual may or may not have an intellectual disability.

There are several subtypes of cerebral palsy.

The condition may interfere with speech



Epilepsy

- ▶ Epilepsy is the fourth most common neurological disorder and affects people of all ages.
- ▶ Epilepsy means the same thing as "seizure disorders."
- ▶ Epilepsy is characterized by unpredictable seizures and can cause other health problems.
- ▶ Epilepsy is a spectrum condition with a wide range of seizure types and control varying from person-to-person.
- ▶ Public misunderstandings of epilepsy cause challenges that are often worse than the seizures.
- ▶ The condition can begin at any time and severity can vary over time
- ▶ *A seizure can be triggered by stress. (So evaluators should know how to respond if their client has a seizure during the assessment.)*


PEOPLE WITH DEVELOPMENTAL DISABILITIES

➤ CULTURAL ASPECTS

- May have attended segregated special education programs
- May have been raised with behavior modification methods that can interfere with independent thinking and choices, expression of choice
- In general this exposure includes living in a “culture of compliance,” where this compliance is rewarded over independent thinking and self expression
- Often a lack of exposure to sufficient information about sexuality, relationships, dating
- Commonly observing their siblings growing up, developing relationships with others that lead to long-term relationships such as marriage, and living away from parents as the norm...understanding that having a boyfriend/girlfriend is a mark of adulthood.
- Difficulty (lack of experience) saying “no” to “an adult” (without a disability,) as such may not be allowed in their experience....” Their “no” may not have been respected in the past. (Exposure of “behavior modification” methods that demand compliance.)
- Becoming a girlfriend or boyfriend may be understood as a ‘badge of honor.’



Sexual Differences of Individuals with Intellectual and Developmental Disabilities

- Same range of appetite and onset of sexual maturity as others.
 - Some are not fertile because of the disability
 - In some disabilities, sexual appetite identified as heightened or reduced.
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Sexual Differences of Individuals with Disabilities

Most do not receive appropriate or adequate sexuality education on:
sexual anatomy,
sexual system (like nervous system), *social customs* and rules that facilitate dating and sexual conduct,
reproductive system (male and female contributions)
legal restrictions to sexual conduct.

- "Sex" education may be restricted to *reproductive system*, not sexual system,
- May or may not include laws, ethics, morality issues or social customs and proscriptions



Sexual Differences of Individuals with Disabilities

Sexual conduct of children and adults with disabilities ARE VIEWED differently than those without disabilities. Such perception (ignorance) may result in:

Arrest, Incarceration, conviction and or diversion/jail sentence (loss of SSI, housing, work & recreational services)

Accusations of child abuse (patting behind of clothed 3 year old; goodbye kiss upon leaving babysitter's home)

Humiliation, embarrassment, traumatic experience for individual & family.

An evaluation of the ability to consent to sex

Sexual Differences of Individuals with Disabilities

Perceptions that have these results are based upon myths, stereotypes and inaccurate assumptions of those “in charge” of managing reports of sexual conduct.

These cause the individual to believe that individuals with disabilities are likely to be sex maniacs, “wild sexual marauders,” unable to control their urges and needing caging. (Sadly ongoing lay community attitudes & beliefs.)

In most cases, inappropriate conduct was a result of

No or inadequate prior information being provided about sexuality and/or

Age discordant exploration of genitals (Individual perceives self as a younger person)




Sexual Differences of Individuals with Disabilities

- Recommendations for amelioration

1. All those responding to such conduct or reports receive educational programs regarding sexuality & individuals with disabilities.
2. Persons with disabilities receive the information they need.
3. Use of "The Rules of Sex: For Those Who Have Never Been Told" to provide information on laws and social customs.
4. That sex education programs include sexual conduct, social relationships, information on the sexual system as well as the reproductive system, and positive relationship building supports AND support of decision making skills.



History of Individual's exposure to and mastery of sexuality information

- ▶ What is the individual's history of sex education?
 - ▶ Each state has laws on sex education to be provided in schools, with an opportunity for parents to have their child "opted out."
 - ▶ It is important to learn if the individual has taken classes throughout their educational career that would support informed decision making.
- 



What determines consent for adults with Intellectual & Developmental Disabilities?

- ▶ Each state has statutory language to discriminate between consensual and non-consensual sexual contact.
- ▶ Most identify age, consciousness, and *ability to understand the nature and consequences of the act*.
- ▶ Some states also require an understanding of the moral and social consequences related to engaging sexually with another adult.
- ▶ In addition, there is language regarding threat (perceived and real), use of a weapon and force.
- ▶ As there is not uniformity of criteria among the states, there is no nationally accepted assessment instrument to measure consent to sex.



Elements of Consent

- ▶ “A legal definition of sexual consent across states generally involves three elements, with some exceptions by state:
 1. Does the individual have the requisite knowledge needed to make the decision (appropriate time/place/person, lawfulness of the activity);
 2. Can the person demonstrate that their participation was fully voluntary... did they participate without coercion or undue influence?
 3. Does the person demonstrate a ‘reasoned understanding and weigh the risks and benefits of the sexual engagement?
 4. (Only in some states): Does the person appreciate the moral quality of their sexual activity)

Source: Tang, 2015



Variations among the states of defining consent

- ▶ Most states have laws which state that those with “significant cognitive disabilities” may be incapable of legally consenting to a sex act.
- ▶ There may be an option to provide support to help the individual achieve an understanding of the nature and consequences of sexual conduct.
- ▶ In most states criteria for achieving ability to consent includes
 - ▶ requisite knowledge of sexual activity, unlawful sexual activity and appropriate times and places for sexual activity.
 - ▶ Analysis of the individual’s freedom to choose to engage sexually (can they resist coercion of whatever level?)
 - ▶ Does the person understand the consequences? (Tang, 2015)



What determines consent?

- ▶ An evaluation of the “whole person” should be conducted including
 - ▶ The individual’s intellectual ability to understand sexual matters
 - ▶ The individual’s ability to make choices – informed choices
 - ▶ The individual’s ability to express these choices
 - ▶ The individual’s ability to resist undue pressure (social pressure to please another, notwithstanding the usual expectation to agree or go along with others)
 - ▶ The individual’s ability to express and maintain a “no” to sexual activity when such is their preference





CAPACITY TO CONSENT TO SEX

- ▶ The laws regarding factors to consider in assessing an individual for capacity to consent to sex vary among the states.
- ▶ Commonalities include the voluntariness of the act in question, and understanding the possible consequences of participating in acts of sexual intercourse.
- ▶ "Capacity (to consent to sex) can vary over time..." from "incapable due to knowledge deficits..." but later having received "training, education and counseling ...it may be possible to remedy the knowledge deficits..." which may later result in a finding "that the individual has achieved capacity." (Martin Lyden, "Assessment of Sexual Consent Capacity," *Sexual Disability* (2007) 25:3-20, p.5). Such capacity may also later be lost due to factors of time and additional disability."




Presumption of Capacity

- ▶ This concept is that every adult has the capacity to consent to sex.
 - ▶ This is amended under a variety of circumstances, most commonly when the individual is before the court when a petition for guardianship (conservatorship) has been filed and is being adjudicated.
 - ▶ It is also considered when an individual with a developmental (or other) disability is alleging (or someone on their behalf is alleging) that the person has been the victim of sexual assault.
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Allegation of sexual abuse based on lack of capacity to consent to sex

- ▶ Must determine if the sexual act was voluntary on the part of the individual with a disability
 - ▶ Did the person with a disability have the capacity to consent to sex?
- 




NATURE OF CONDUCT

- ▶ WHAT IS THE SEX ACT /ARE THE SEX ACTS? (nature)
 - ▶ DID YOU WANT TO DO IT BEFORE YOU DID IT? (voluntariness)
 - ▶ DID YOU WANT TO DO IT WITH X AND AT X LOCATION AND TIME?
- 




NEGATIVE CONSEQUENCES OF THE SEXUAL ACT(S)

- UNWANTED PREGNANCY
 - ACQUISITION OF A SEXUALLY TRANSMITTED DISEASE
 - SENSE OF ENTRAPMENT
 - SENSE OF OBLIGATION
 - Is the individual aware of these consequences of sexual intercourse including pregnancy, and STD's? (and how to prevent them)
- 



What is missing?

- ▶ These do not inquire about the **emotional impact** of the sexual activity upon the individual. That is, how do they feel about having engaged sexually with x person?
 - ▶ Although not a legally required aspect, it is important to ask, as this provides important information about how the individual is psychologically/emotionally affected by having engaged sexually with the person/persons in the case under investigation.
- 




MORALITY ISSUES (INCLUDED IN SOME STATES FOR CONSENT)

APPLIED IN SOME STATES, THE PERSON MUST HAVE AN UNDERSTANDING OF THE MORAL IMPLICATIONS OF SEXUAL ACTIVITY.

- IS SEXUAL CONTACT/ACTIVITY ACCEPTABLE
- EXPLAIN WHAT HAPPENS REGARDING FORCED SEX (DID THE PERSON AGREE TO SEX DUE TO SOCIAL PRESSURE? OFFER OF A BRIBE (MONEY, CANDY, ETC.)?)
- WAS THERE PHYSICAL FORCE?
- DOES THE INDIVIDUAL ATTACH A MORAL IMPORT TO SEX?



Substitute Decision Making

- ▶ Although in other matters, authorized persons (conservators/guardians, parents) may offer substitute consent under certain circumstances such as for medical / psychological treatment, no one other than the individual can consent to sexual relationships.
 - ▶ This has been done, unfortunately, in cases of trafficking by parents or other individuals who have gained control over individuals with disabilities.
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When is consent questioned?


- ▶ When an individual states s/he has been a victim of rape and has a disability.
- ▶ When an individual with a developmental (or other) disability is discovered to have had sexual interaction
- ▶ When an individual's ability to consent appears to be compromised and a complaint is filed or report of sexual abuse.

When should consent be questioned?

- ▶ When any individual with a developmental disability states she/he has been in a sexual relationship or "having sex"?
- ▶ When such a person has a disability?
- ▶ When such a person is elderly?
- ▶ Whenever a dependent person makes known their desire for sexual activity?




When should consent NOT be questioned?

- As a condition of admission into a residential care program or facility;
 - As a matter of procedure for anyone with a disability to receive social services;
 - For all individuals with developmental disabilities who want to have a sexual relationship.
- 




Who is qualified to assess consent to sex of individuals with I/DD?

- ▶ According to the laws in your state, this would be a person with appropriate educational background, training and experience with this population and an understanding of measuring consent, such as a psychologist, social worker, psychiatrist or other designated professional. If the person holds a Certification as a Sex Educator, Counselor or Therapist, this is a plus.
- 



Who is qualified to assess

- There is no one “designated” professional category
 - Best if there are legal grounds for inquiring into an individual’s ability to consent; and
 - A team of qualified individuals participate in assessment of the outcome; and
 - Consideration for consequences is present.
- 




What are the pitfalls of an erroneous conclusion?

- One is that if a consent question is determined “forever” rather than on a case by case basis, an individual usually able to consent could be decreed unable to consent, thus all future sexual contacts would logically be considered sexual assault...potentially a bad situation for them and their partners.



A Plan to habilitate the individual to achieve capacity to consent to sex

- ▶ Similar to other habilitative programs to build capacity to understand sexual matters (similar to the CAST program for people with developmental disabilities who have committed sex crimes), a program can be recommended to bring the individual to a level of cognitive, emotional and social understanding of interpersonal sexual conduct.
- 



Assessment





Quick Background

- Essence: Did the person know they were going to have sex and did they want to?
- How much mastery of human anatomy & physiology is required to know if one wants to be sexual with another person? (Compare to native/illiterate populations, unaware of anatomy/physiology, laws...?)
- Must one demonstrate an understanding of the reproductive, sexual, nervous, skeletal, respiratory and digestive systems PRIOR to engaging in sex?

Quick Background

- ▶ How much understanding of community and social living is or should be required?
- ▶ How much personal or physical autonomy is needed for the person to know their sexual desires and attractions?
- ▶ Who decides what partner another person may have?

Quick Background

- ▶ Application of standards that do not match the ability, culture or knowledge base of the individual are sure to fail the person, as well as fail to answer the question.
- ▶ Administration of supportive evaluations (IQ, SSSQ , ADLs) are not a substitute for direct questioning about the event and consent. Sadly, in the past, some evaluators have used the Street Survival Skills Questionnaire, that does not address sexuality at all.
- ▶ The SSSQ was designed to assess prevocational skills of persons who are developmentally disabled, not the adaptive behavior of those being evaluated for the possibility of developmental disabilities or consent to sex.

Developmental/Intellectual Disabilities and the Culture of Disability

- ▶ DO AS YOU ARE TOLD
- ▶ VIOLATION OF FOLLOWING THE RULES RESULTS IN LOSS OF PRIVILEGES, REPRIMAND, PUBLIC SHAMING + REWARD FOR COMPLIANCE
- ▶ OTHERS ARE ALLOWED TO DISAGREE WITH "ADULTS" BUT NOT PERSON WITH I/DD
- ▶ LACK OF ADEQUATE SEX EDUCATION (GETTING BETTER IN SOME STATES)
- ▶ SEXUALITY IS COMPLICATED, HARD TO COMPREHEND BEFORE FIRST EXPERIENCE.
- ▶ ABSENCE OF ASSERTION TRAINING
- ▶ NO "RIGHT" TO MAKE BAD CHOICES/LEARN BY EXPERIENCE

(Modes of learning from least effective to most effective: explanation, example, experience)



CHARACTERISTICS WHICH INFLUENCE ABILITY TO UNDERSTAND SEXUALITY

- ▶ HISTORY OF ABUSE
- ▶ EXPOSURE TO PORNOGRAPHY
- ▶ SEX EDUCATION USUALLY NOT PROVIDED BY CERTIFIED SEX EDUCATORS AND NOT REPEATED AFTER ONE COURSE OR CLASS
- ▶ HIGH VALUE OF INDIVIDUAL ON HAVE A PARTNER/BOYFRIEND (LIKE OTHER FAMILY MEMBERS DO)
- ▶ DO NOT WANT TO BE SEEN AS A VICTIM, TO LOSE STATUS AS GIRLFRIEND
- ▶ DO NOT WANT (IN SOME CASES) TO LOSE THEIR BOYFRIEND/GIRLFRIEND
- ▶ DO NOT WANT TO BE SINGLE (WITHOUT A PARTNER)



WHAT ARE THE SEX ACTS

- ▶ VAGINA/PENIS INTERCOURSE
- ▶ PENIS/ANUS INTERCOURSE
- ▶ ORAL INTERCOURSE

- ▶ WHAT ARE "PRIVATE" BODY PARTS? WHAT ARE SEXUAL BODY PARTS? (ALL OF THE BODY SHOULD BE CONSIDERED PRIVATE)
- ▶ CAN INDIVIDUAL EXPRESS/INDICATE CONSENT, YES / NO
- ▶ DOES THE INDIVIDUAL UNDERSTAND S/HE CAN REFUSE SEXUAL ACTIVITY?



NATURE AND CONSEQUENCES

INDIVIDUAL MUST UNDERSTAND BOTH

- ▶ MUST UNDERSTAND THE RISKS:
 - ▶ PREGNANCY
 - ▶ SEXUALLY TRANSMITTED DISEASES
- ▶ MUST UNDERSTAND
 - ▶ WHAT CAUSES A PREGNANCY (WHERE BABIES COME FROM)
 - ▶ WHY CONDOMS ARE USED
 - ▶ SEXUALLY TRANSMITTED DISEASES



TOTALITY OF CIRCUMSTANCES

- ▶ WHAT IS THE RELATONSHIP BETWEEN THE PARTIES?
- ▶ WHAT WAS THE LOCATION OF THE SEXUAL ACT IN QUESTION?
- ▶ WHAT IS THE VICTIM'S EDUCATIONAL BACKGROUND, LEVEL OF INDEPENDENCE? WITH WHOM DO THEY LIVE?
- ▶ HOW DID THE TWO PARTIES MEET?
- ▶ WAS THERE AN ELEMENT OF SECRECY REGARDING THE SEXUAL ACTIVITY?



IT IS ESSENTIAL TO KNOW THE LAW IN THE INDIVIDUAL'S STATE TO MATCH THE EVALUATION TO THE LAWS IN THEIR STATE.

- ▶ THERE ARE COMMONALITIES AMONG THE STATES, BUT VARIATIONS THAT MUST BE CONSIDERED DEPENDING ON THE STATE'S LAW ON CONSENT.



DIFFICULTY ADDRESSING SEXUAL MATTERS DUE TO CULTURAL PROHIBITIONS

- ▶ WHEN CONDUCTING AN EVALUATION THE EVALUATOR MUST BE COMFORTABLE FRANKLY DISCUSSING AND INITIATING A CONVERSATION, USUALLY A SOCIALLY PROSCRIBED DISCUSSION.
- ▶ TALKING EASILY/COMFORTABLY ABOUT SEXUAL ACTS, SEXUAL BODY PARTS, AND SEXUAL FEELINGS, IS ESSENTIAL WHEN CONDUCTING THESE EVALUATIONS.
- ▶ THE EVALUATOR'S EASE WILL CONTRIBUTE TO THE INTERVIEWEE'S ABILITY TO FEEL AT EASE AS WELL (AS MUCH AS IS POSSIBLE)
- ▶ IT IS ESSENTIAL TO BE ABLE TO ASK "WHAT DO YOU CALL THIS BODY PART?" THEN USE THE TERM USED BY THE INTERVIEWEE AS WELL AS THE MEDICAL TERM COMMONLY USED. SOME MAY USE BABY TALK ("WEE WEE" WHICH CAN BE USED INITIALLY AND INTRODUCE THE ANATOMICAL DESIGNATION).



Conducting the Assessment

- ▶ Use Plain English
- ▶ Adapting the interview to the individual's disability-related cultural background, making

sure they understand they are not "in trouble."

That the purpose of the interview is to make sure they are safe (are not being hurt or frightened) by another person.

Understand that the individual's chronological age may not match their maturational age.



Language to use during the interview

- ▶ Avoid abstract concepts...make the questions as concrete as possible
- ▶ Use anatomical dolls if necessary to learn the person's understanding of body parts, as some people cannot understand a 2 dimensional representation.
- ▶ If asking about a specific event, know that when asked, the individual may tell the story in reverse chronological order, with the most important fact first. Example: "Tell me what happened." Their story begins with "We had sex," rather than, "I met him on the corner..."
- ▶ Use one concept per question
- ▶ Avoid questions that may result in an "I don't know " answer.



Language and Concept Tips

- Usually the individual will want to “please” the interviewer, and “do well” during the interview.
- The individual may not have a concept of time (“how long”) but may know from what time to what time (from 3 to 4).
- Use simple sentences.
- May not want to say they do not understand the question



Characteristics of Adults with Developmental Disabilities

- ▶ When asked about reproductive/sexual body parts, may be reluctant to say the words aloud, due to embarrassment, and
- ▶ May only know names for external body parts taught at home where alternative names are used for body parts
- ▶ Perpetrators "groom" their victims to
 - ▶ Establish emotional "currency," or loyalty (protecting the perpetrator)
 - ▶ Reduce the chance of discovery, encouraging "this is our secret"
 - ▶ Build self-esteem "You are an adult now, you do not have to tell your parents."



Determining Ability to Consent

- ▶ There is no clear legal standard of cognitive disability to establish that inability to consent to sex beyond the profound range of I.Q.
- ▶ Some people at the severe range of intellectual disability may be able to distinguish and express choice in personal matters...therefore an assessment must be conducted by a qualified examiner.
- ▶ Some individuals at the higher levels may appear to understand and be autonomous, *but in fact* are unable to resist commands by perpetrators
- ▶ Some individuals, due to the severity of their disability, will never be able to understand sexual touch or interaction.



Making a determination must include the consequences of a determination that the individual is unable to consent to sex

- ▶ In such case, the person will never be able to engage in a romantic or sexual relationship for his/her lifetime.



Additional issues

- ▶ Your state may identify professionals qualified to assess Capacity to Consent to sex.
- ▶ One should consider that the gender of the assessor may have an effect on the ease of participating in the assessment of the subject of the assessment.
- ▶ One should explain to the individuals being assessed the purpose of the evaluation and possible impact on their life.

Discussing and Assessing Capacity for Sexual Consent

[Alexander A. Boni-Saenz, MSc, JD](#)

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- ▶ “Individuals with mental impairments deserve capacity assessments that accurately reflect their psychological capabilities, respect their sexual rights, and protect them from sexual abuse.
- ▶ At one end of the spectrum are states like New York, which takes a broad view of what one should be capable of understanding. In *People v Easley*, the New York Court of Appeals, the state’s highest court, ruled that one must be capable of understanding not only the physical consequences of sex, such as sexually transmitted diseases and pregnancy, but also the moral consequences of sex.⁸ That is, one must have an appreciation of how one’s sexual behaviors might be judged by others in order to have [capacity to engage](#) in them. One can still flaunt prevailing sexual norms, but one must understand that one is doing so.”



What tool to use for assessment?

- ▶ “While there are several tools assessing consent to sex, there is no one instrument that enjoys general acceptance.”

Citation: (Buchanan AA, Brock DW. Deciding for others: The Ethics of Surrogate Decision-making. Cambridge, UK: Cambridge University Press: 1989) Quote from Psychiatric Times: “Discussing and Assessing Capacity for Sexual Consent July 29 2016, by Alexander A Bonni-Saenz, MSC., JD.



Case Examples

Is this rape or not


- ▶ Couple over 18 years of age
- ▶ He has autism, she has Tourette's
- ▶ **COMPLAINT: They decided to have sex as they were boyfriend/girlfriend.**
- ▶ During the sex act, she asked him to stop
- ▶ He could not stop "in the middle"
- ▶ She reported to law enforcement that she had been raped.
- ▶ A trial was held

Many people with autism have great difficulty with transitions, from one activity to the next. Early childhood development and on through the lifetime, many require preparation and time to make the shift. Example: changing from eating breakfast to getting dressed for school to preparing to get on the bus. At school preparation time is allocated for children to change from one activity to another (math to science, prepare for breaks, etc. Many use a visual calendar to assist in the change. Overall, change is very difficult for those with autism.



Those with mild intellectual disability

- ▶ Young woman lives with her parents
- ▶ Graduated from high school
- ▶ Works at her father's office as a receptionist
- ▶ Able to take the bus home on her own
- ▶ Invited on a date by customer, advised not to tell her parents
- ▶ Man was 30 years older than young woman, told her to keep his visits to the family home a secret from her parents. Told her that grown ups do sex things together. She knew her sister, about to get married probably had sex with her boyfriend.
- ▶ Was proud to have a boyfriend
- ▶ Parents found out. Evaluation found her primary knowledge of sex was the experience with this man. She "did as she was told" by this man, did not express having love for him or plans/desire to marry. After many sexual encounters with him, her knowledge (not understanding) of sexual activity was increased. Yet, she was unable to say "no" to his directives.






Young woman lives with family in trailer park


- She has mild-moderate intellectual disability
- She was told by neighbor that she could come over for a visit during which he had sex with her. He gave her candy, told her to keep this a secret
- She returned several times to his trailer, but one day was mad because he did not have the candy for her
- She did not think of him as a boyfriend.
- On evaluation, she had never had a sexual experience before, did not like the sex but liked to get the candy. She did not think of him as a boyfriend.
- She was afraid to tell her parents.



F.A.C.T.S.

- This instrument is designed to be used by a multidisciplinary team
 - Administered by one person
 - Results discussed with the team
 - In consideration of one situation for the individual being assessed.
 - Originally designed for individuals with developmental disabilities.
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- ▶ Questions are in “Plain English”
 - ▶ Questions relate specifically to the issues of legal consent to sex
 - ▶ Questions can be read to the alleged victim of abuse/exploitation
 - ▶ Options are presented to simplify if the victim cannot understand the first option.



The instrument is designed to assess the individual's understanding of the "nature and consequences of the act" of sexual intercourse/interaction.

- Challenge: Defining...
- The nature
- The consequences
- The act



Procedure - Typical Interview

- ▶ Step One
 - ▶ Developing Rapport
 - ▶ Obtain consent to audiotape or videotape
- ▶ Step Two
 - ▶ Administer Declaration of Understanding the Difference between the truth and a lie (depending on the laws in the state)
- ▶ Step Three
 - ▶ Administration of the instrument
- ▶ Step Four
 - ▶ Positive interview termination
- ▶ Step Five
 - ▶ Team Analysis of results



Case of Susan S.

- ▶ Profile:
 - ▶ 22 year old woman, lives at ICF/DDH/MR
 - ▶ Moderate mental retardation, no other problems, verbal, cooperative
 - ▶ Parents deceased, sister her conservator upon advice of attorney (right to engage in sex not removed)
 - ▶ Had opted x3 to take in-house sex ed class
- ▶ Obtaining background data:
 - ▶ ICF/DD/MR refused to provide Sex Education curriculum
 - ▶ Conservator, 24 year old sister, naïve to the issues, very cooperative



Case of Susan S.

▶ Case presentation

- ▶ Staff saw Susan in the hallway with blouse buttoned “in whiskey”, questioned Susan about this
- ▶ Learned that Susan had been “out with her boyfriend” and had had sex with him
- ▶ Staff called 911, had her transferred to rape emergency treatment hospital
- ▶ Disability services case manager spoke with District Attorney, referred case to NB
- ▶ Victim denied sexual assault, states sex occurred and was consensual
- ▶ Residential program staff state their sex ed program & policy permit sex but not at the residence (then where?)



Case of Susan S.

- ▶ Case presentation (continued)
 - ▶ Boyfriend, employed at local department store, had been arrested and incarcerated.
 - ▶ Boyfriend states it was consensual
 - ▶ DA requests assistance to determine if Susan understands the nature and consequences of the act.
 - ▶ If Susan is unable to understand, and thus did not legally consent, boyfriend will be charged with statutory rape.
 - ▶ If Susan is able to understand and did consent, charges will be dropped.



Understanding “the Act”

- ▶ Does “having sex” mean
 - ▶ Taking your clothes off?
 - ▶ When you bite each other?
 - ▶ Teaching about sex?
 - ▶ Putting a penis into a woman’s vagina?
 - ▶ Putting a penis into someone’s butt?
 - ▶ Somebody touches you “down there”?



Understanding “the Act”

- ▶ Why do people have sex?
 - ▶ Open question...suggestions
 - ▶ To have a baby
 - ▶ To show love
 - ▶ It's fun
 - ▶ Because we like to pretend we are boyfriend and girlfriend.
- ▶ What can you tell me about sex?
 - ▶ When is it OK to have sex?
 - ▶ When no one else can see you.
- ▶ Who decides if you can be alone with another person? I guess I can
- ▶ Who decides if you can have sex? Me?
- ▶ What are the rules about having sex?
 - ▶ It's OK to have sex but not at where I live.



Understanding “the Nature”

- ▶ Who usually has sex together:
 - ▶ Boyfriend/girlfriend
 - ▶ Brothers/sisters - NO!
 - ▶ Husband/wife
- ▶ What is the meaning of sex:
 - ▶ It means you are normal
 - ▶ It feels good
 - ▶ It shows you love someone
- ▶ Do you have to have sex if someone asks you to? No, only if you want to.
- ▶ What do people feel after they've had sex? (NOT exhausted !!) I feel happy.




Understanding “the Consequences”

- ▶ What happens when two people have sex? They feel good.
- ▶ What happens if one wants to and the other does not? I don't know, I guess they don't do it.
- ▶ What can happen after people have sex?
 - ▶ Desire to do it again
 - ▶ Woman can get pregnant, not me, because he wore the rubber penis. And I take a pill.
 - ▶ They both feel happy
 - ▶ One can go to jail




Vocabulary Comprehension Assessment

- ▶ The instrument contains a comprehensive list of terms related to sexuality, sexual assault, forensic intervention, medical treatment and criminal conduct.
 - ▶ This provides for deeper conversation & assessment of the individual's exposure to and understanding of typical terms.
- 




Questions related to the specifics of the Act in the Case under Investigation

- ▶ Why (or what happened that made) sex happen between you and xxx? **We had a date!**
- ▶ Did you know there was going to be sex when he told you to go with him? **YES / NO**
- ▶ Did you want to have sex with him? **YES / NO**




Questions related to the specifics of the Act in the Case under Investigation

- ▶ If “no” to “did you want to...”
- ▶ What happened that made
 - ▶ you go to x location?
 - ▶ The sex happen?
- ▶ Did you want it to stop? Yes
 - ▶ Why? He was doing it too hard. What did you want to do to make it stop? I wanted him to do it softer. Were you able to say this? Yes, then it was really good.
- ▶ What do you call what he did to you?
 - ▶ We were “doing it”. Making love. You know.




Questions related to the specifics of the Act in the Case under Investigation

- ▶ If “yes” to “did you want to...”
- ▶ Can you have sex with him again? I don't know.
- ▶ Will you be able to? I don't know.
- ▶ Would you want to have sex with xxx again? No...’ cuzl don't want him to go to jail again.
- ▶ Would you like to have sex with a different person? I don't know, maybe.



Questions related to the specifics of the Act in the Case under Investigation

- ▶ When sex happened what feelings did you have?
 - ▶ Mad Disappointed
 - ▶ Happy Upset
 - ▶ Excited Alone
 - ▶ Sad In-love
 - ▶ Stupid Guilty
 - ▶ Proud In trouble
 - ▶ Dirty Helpless



Questions related to the specifics of the Act in the Case under Investigation

- ▶ Questions about the individual's perception of the relationship between them. *We liked to pretend we were boyfriend and girlfriend.*
- ▶ Questions regarding possible pregnancy. *He used the rubber penis. I take a pill.*
- ▶ Questions regarding possible STIs. *He says he has nothing.*
- ▶ Questions if someone will be angry with them for having sex with this person. *I guess the staff.*



Final Assessment



- ▶ Susan understood "the Act"
- ▶ Susan understood "the nature"
- ▶ Susan understood "the consequences"
- ▶ Susan knew she was going on a date, and that sex was part of the date.
- ▶ She had wanted and planned to have sex with her date.
- ▶ She had consented to sex.



Additional Issues



- ▶ She liked her boyfriend a lot
- ▶ She also liked that he was “normal”, that is, he did not have a disability.
- ▶ She knew he was not available as a full time boyfriend because of his marriage.
- ▶ She knew and was on good terms with the wife.



Additional Issues



- ▶ She had taken the sex education class x3 and had learned (and respected) their rule not to have sex at home.
- ▶ She had a rudimentary understanding of STIs & birth control.
- ▶ She met her boyfriend when he had been an employee at her home.



When law clashes with norms or “moral” issues

- ▶ Having sex with someone married to another
- ▶ Having sex with someone in an authority position (work supervisor, teacher) or other employee (janitor, secretary, Director)
- ▶ Having sex with someone of a different age range/race/religion/class.
- ▶ When one has a developmental disability and the other does not.



Use of this Instrument

- ▶ Should be used to assess consent when there is a forensic reason to do so
- ▶ Should be administered by a qualified forensic mental health specialist or qualified MDT team member
- ▶ Results are best determined by those familiar with the culture of disability and issues of sexuality, sexual assault, undue influence and partner choice limitations and preferences.

Adaptations to similar populations:

Adaptations for use with individuals with a different cultural background

Elders

Individuals with dementia

Resources

- ▶ End Violence Against Women International (EVAWI), "Successfully Investigating Sexual Assault Against Victims with Disabilities" Training guide available at: www.evawintl.org
- ▶ Spectrum Institute: "Capacity To Consent To Sex: Legal Standards And Best Practices For Adult Protective Services," Thomas F. Coleman, J.D. (<https://spectruminstitute.org/capacity>)
- ▶ Victims With Disabilities: The Forensic Interview, (Forensic Interviewing Skills To Use With Abuse Victims With Intellectual And Developmental Disabilities (Baladerian – Source: Office For Victims Of Crime. NCJRS # NCJ 234678, July 2011, DVD, OVC, (72 pages). www.ncjrs.gov
- ▶ FACTS: Forensic Assessment Of Consent To Sex, Baladerian, N., (<https://disabilityandabuse.org>
- ▶ Interviewing and treatment of elder abuse victims with cognitive and/or communication impairments, Baladerian, N. J., March 1998 (NASUA, APWA, NCPEA, UNIV. OF DELAWARE)



Resources



- ▶ “Victims and Witnesses with Developmental Disabilities and the Prosecution of Sexual Assault” in “The Voice.” Deal, William Paul, Ph.D. and Victoria Kristianson, National Center for the Prosecution of Violence Against Women, APRI – American Prosecutors Research Institute, Volume 1. Number10.
- ▶ Capacity to consent to sexual relationships in adults with learning disabilities, Murphy, Glynis H., Journal of Family Planning and Reproductive Health Care, 2003: 29(3): 148 – 149
- ▶ “With Liberty and Justice for All: The Sexual Rights of Adults with Developmental Disabilities: A Focus on California,” Sept. 10, 2014, Coleman, Thomas F. www.disabilityandabuse.org/sexual-rights.

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The End!

Have a GREAT DAY !!!

Thank you!





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