

## **Supporting Adults with Intellectual and Other Developmental Disabilities Who May Have Limited Capacity to Consent to Sexual Activity**

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Experience with individuals who have intellectual or other developmental disabilities (IDD) teaches us that they often have typical and normal desires for intimate and sexual relationships. While some individuals with IDD may lack certain skills, there is no lack of desire for connection, acceptance, love or affection<sup>1</sup>.

Many people with IDD live in residential care programs. A few choose to live with family members or independently. The Preliminary Risk Screening (PRS) program becomes involved with an individual when the individual has engaged in some type of sexual behavior problem or offending behaviors. Following the screening, PRS consultants offer a variety of recommendations for the individual's interdisciplinary team (IDT) to consider in regard to risk management, supports, and services. The IDT then determines which recommendations they will carry forward in the individual's Risk Management Plan (RMP) and other service plans.

A common question that IDTs encounter is whether a specific individual has sufficient capacity to consent to engage in sexual activity with another person. Answering this question has become more complicated with the Federal Medicaid regulations involving home and community-based services (HCBS). There is increased emphasis placed on person-centered planning in these regulations. This involves a much more permissive perspective about choice and decision making than has been held in the past. Additional Federal Medicaid regulations and State laws require providers to ensure the participant's right to be free from abuse and exploitation. In this light, the question about safety for the individual and a potential sexual partner becomes more complicated.

Another issue that complicates the response to the question is when the individual has a guardian. New Mexico law indicates an incapacitated person with a guardian retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court (NM Statutes Chapter 45. Uniform Probate Code § 45-5-301 -1.). Some individuals' guardians may instruct that the person not be allowed to engage in sexual activity with another person. The authority to make this limitation, however, must be authorized in a Court order.

In this context, Interdisciplinary Teams can be put in a difficult situation when supporting individuals who have IDD who have engaged in sexual behavior problems or offending behaviors. It is clearly complicated to decide whether two individuals are able to consent to sexual activity.

### Sexual Rights and Responsibilities

Laws across America presume that all people have the capacity to engage in sexual activity once the individual reaches the age of majority in his or her State. Every adult

has the right to privacy, including lawful sexual activity of their own choosing. As such, the right to sexual expression cannot be restricted without a formal Court order.

Laws in the U.S. also presume that both people who are engaging in sexual activity have the capacity to consent to the activity. Some individuals with IDD may be capable to make a decision for themselves but are at risk of engaging with another person who does not have the capacity. As such it is important that individuals in care are given support and information to help them determine whether a potential sexual partner also has the capacity to consent.

### General Criteria for Capacity to Consent to Sexual Activity

Consent is integral to healthy relationships and sexuality. Agencies must be mindful of a need to determine the presence or absence of consent for sexual expression. Providers must educate individuals regarding these decision-making processes.

The following criteria have been suggested for inferring sexual consent capacity<sup>2,3</sup>.

1. Voluntariness: A person must have the ability to voluntarily decide, without coercion, with whom he or she wants to have sexual relations.
2. Safety: Both participants in the sexual behavior must be reasonably protected from physical harm (e.g., sexually transmitted disease or injury) or psychological harm (e.g., undesired separation from each other).
3. No 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.
4. No abuse: Psychological or physical abuse must not be present in the relationship.
5. Ability to say “no”: A person must be able to communicate “no” verbally or non-verbally, and to remove himself or herself from the situation at hand, indicating a wish to discontinue the interaction.
6. Socially appropriate time and place: Either the person must be able to choose a socially acceptable time and place, or the person must be responsive to directives toward that end.

### Informal Screening

Here are some important questions that may help the Interdisciplinary Team determine whether a referral should be made to seek a formal assessment of an individual’s capacity to consent to sexual activity<sup>4</sup>.

- ✓ Does the individual understand the nature of the sexual activity in which he or she would be engaging?
- ✓ Can the individual state to what extent he or she wants to engage in sexual activity? For example, kissing and touching versus sexual intercourse.
- ✓ Does the individual understand the risks of sexually transmitted infections?

- ✓ Is the sexual choice a voluntary choice?
- ✓ Does the individual have the capacity to understand sexual options and the potential consequences of sexual choices and are the individual's decisions consistent with his or her personal values?
- ✓ Does the individual know who to tell if his or her partner wants to have sexual activity?
- ✓ Is the individual able to determine appropriate times and places to engage in sexual activity?
- ✓ What is the individual's current relationship with the desired sexual partner?
- ✓ Can both partners answer questions about their relationship and do they both indicate they desire sexual contact?
- ✓ Can both partners say "no" to unwanted sexual contact?
- ✓ Do the individuals both have the ability to report unwanted sexual contact?

### Supporting Sexual Rights

Adult sexual expressions should be respectfully supported as matters of individual choice. Private and mutual sexual expression between consenting adults is a healthy and pleasurable expression of affection, bonding, and normal sexuality.

People with intellectual and other developmental disabilities should receive developmentally appropriate and accurate information about sexually transmitted infections (STIs). This includes the risks, means of transmission and recommended precautions. People with intellectual and other developmental disabilities should also receive accurate information regarding which sexual behaviors are legal and not legal.

Interdisciplinary Teams and legal guardians must consider how to balance the need to protect the individual from abuse or exploitation while also how to support the individual's right to sexual expression and activity.

### References

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