

Adults with Intellectual Disabilities

Capacity to Consent to Sexual Activity

One of the core elements distinguishing unlawful sexual abuse from legal sexual activity is capacity to consent. There are situations when a person's capacity to consent is temporarily impaired, for instance due to alcohol consumption or date rape drugs. There are other situations when a person may lack the capacity to consent to sexual activity due to a disability. Of course, most people with disabilities are equally capable of consenting to sexual activity as people without disabilities. For individuals with cognitive disabilities, such as dementia or traumatic brain injury, the issue of capacity to consent to sexual activity may be more complicated. This Technical Assistance Bulletin addresses capacity to consent to sexual activity by people with intellectual disabilities (ID).

Sexual Rights of People with Intellectual Disabilities

A person will be diagnosed with ID if, prior to age 18, she has significantly substandard intellectual functioning (generally measured by an IQ of 75 or lower) and has significant adaptive functional deficits (such as care for oneself, living independently, and communicating). Until about 40 years ago, adults with ID were segregated in institutions and presumed unable to make even the most basic of decisions. They were treated, at best, as children. This was

accompanied by stereotypes and assumptions about the sexuality of people with ID. Society often presumed that people with ID were asexual and had no need for or interest in sexual relationships with others. Their sexuality was denied and rigidly controlled.

Today, most people with ID live their entire lives in the community. They are integrated in schools, workplaces, recreational activities, and other activities. As society has evolved, we also have come to recognize that adults with ID should be able to make decisions to the greatest extent of their abilities. Freedom to make decisions is a core human right, fundamental to personal autonomy and self-determination. It should be restricted only when absolutely necessary.

Decisions about sexuality and relationships are no different for people with ID. These decisions can be central to the human experience. Individuals with ID have a fundamental right to sexual expression. The American Association on Intellectual and Developmental Disabilities (AAIDD) and The Arc issued a Joint Statement in 2008 affirming that people with ID "like all people, have inherent sexual rights. These rights and needs must be affirmed, defended, and respected" (*AAIDD & The Arc, 2008*).

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Under Pennsylvania law, sexual contact with an individual who has a “mental disability” that renders him or her “incapable of consent” constitutes a felony, regardless of whether force was used (18 Pa.C.S.A. §§ 3121(a)(5), 3123(a)(5), 3125(a)(6), 3126 (a)(6)). It is critical to remember that a diagnosis of ID, by itself, does not automatically mean that a person lacks capacity to consent to sexual activity. A presumption that a person with ID who engages in sexual activity is a victim would essentially nullify the sexual rights of people with ID.

Capacity to consent to sexual activity, like capacity to make other decisions, is not all or nothing. A person may have capacity to make some decisions, but not all. This means that capacity is assessed with

respect to the ability to make a particular decision, rather than as a general status. In addition, capacity to consent to sexual activity may change over time. For instance, access to sex education geared toward people with ID may enhance their ability to make informed choices, appropriately express their sexuality, and recognize and report abuse.

In short, there must be an individualized determination of whether a person with ID has capacity to consent to sexual activity. While people with ID should never be presumed incapable of making such decisions, they must be protected against sexual abuse when they cannot make such decisions. In assessing the capacity of a person with ID to consent to sexual activity, there are several questions to be considered:

① Does the person understand the nature of the sexual contact?

- What is their knowledge about sexual activity in general?
- What is their knowledge about the specific type of sexual activity in which they engaged?
- Has the person had access to sex education?
- Does the person have support – family, friends, advocates, providers – with whom the person can discuss issues of sexuality?

② Does the person understand and are they capable of exercising the right to consent to or refuse the sexual activity?

- What is their ability to understand the facts and choices involved in the decision?
- Do they understand that they can say “no” to the sexual activity?
- What is their ability to weigh the consequences of the choices and understand how they may affect them?
- Are they capable of recognizing and reporting unwanted sexual advances or abuse?

③ Is the person able to effectively communicate their decision to consent or refuse to consent to the sexual activity?

Remember that communication for people with ID can take many forms other than verbal communication (e.g., using communication devices like picture boards, signs, or eye movements), and you should not discount a person’s capacity to consent to sexual activity because they do not communicate verbally.



④ Is the person familiar with the possible risks and consequences of the activity?

- Do they know about safe sex practices, such as how to avoid pregnancy and sexually-transmitted diseases?
- Do they understand the consequences of pregnancy and childbearing?

⑤ What is the context in which the sexual activity occurred?

- Do the circumstances suggest that coercion was involved? (e.g., were there threats to the individual or their family members)
- Was it a situation in which there was undue pressure or an imbalance of power? (e.g., is the person with whom the individual with ID engaged in sexual activity a family member or an employee of one of their service providers)

References

American Association on Intellectual and Developmental Disabilities, & The Arc. (2008). *Sexuality: Joint position statement of AAIDD and The Arc*. Retrieved from https://aidd.org/news-policy/policy/position-statements/sexuality#.WfDI_E2ovow

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This publication was printed under Grant no. 2015-SW-AX-0025 awarded by the Office of Violence Against Women, U.S. Department of Justice. The points of view in this document are those of the author and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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