PRACTICE ADVICE

EVALUATING CAPACITY TO CONSENT - FAQS

EFFECTIVE: SEPTEMBER 2019

BACKGROUND

Every time you have a consent conversation with a patient, you are, in fact, doing a capacity evaluation. In the consent conversation you are determining if the patient understands your assessment or treatment plan, the risks, benefits and alternatives. You are also determining if they appreciate the consequences of their decision to consent or refuse to consent. If you determine that the patient has capacity to consent to your assessment or treatment, and has consented, then you can proceed with your plan of care. Most consent conversations are straightforward when your patients have capacity.

These FAQs are directed towards more challenging aspects of evaluating capacity to consent to treatment such as fluctuating capacity, disagreement with your findings, patient refusal, age of consent, clarification between capacity evaluators and capacity assessors, as well as some tips on how to support communication and hearing barriers for decision making when needed.

These answers to the FAQs supplement the e-forum on Evaluating Capacity to Consent.

CHILDREN AND YOUTH

In the *Health Care Consent Act 1996 (HCCA)*, capacity to consent to treatment is not determined by age. It is determined by the following:

> 4 (1) A person is capable with respect to a treatment, admission to or confining in a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission, confining or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 2017, c. 25, Sched. 5, s. 56.

If the parent as the Substitute Decision Maker has provided consent for their child's assessment or treatment, you do not need to have a consent conversation with the child. However, depending on the maturity of the child, you will include them in therapy activity choices to maximise participation.

If you believe that the child/youth can understand the assessment or treatment plan and can appreciate the consequences of their decision to participate, then you would obtain consent from the child/youth.

Question: In a school setting does a capacity review need to be initiated if I find the student to be capable of consenting but the parent doesn't feel that their child has capacity to consent?

Answer: Capacity to consent to treatment is not determined by age rather by the person's ability to understand and appreciate the consequences of their decision regarding the proposed

treatment. If the student understands and appreciates why you are assessing or treating, including the nature, risks, benefits, consequences and alternatives of the services, then they have capacity to consent (refer to the Consent Tool for suggestions on what to discuss in the consent conversation).

Explain to the parents how the legislation defines capacity and share your evidence of the student's capacity to consent, that they understand and appreciate. Be sensitive and respectful about the parents' concerns regarding their child, but if you have the evidence that the child has capacity to consent or refuse consent, you should trust your professional judgement. If the issue remains contentious, consult colleagues or your manager, if you have one. Finally, you can call the Consent and Capacity Board for advice.

Question: Are there any resources on assessing consent/capacity with children?

Answer: If you decide to evaluate a child's or youth's capacity to consent, adapt your conversation to their level of understanding. Use the same strategies and resources as you would for your intervention (repetition, picture supports, key words, large font, verifying the information is understood). Document your findings including evidence of the child's ability to understand and appreciate in detail in the patient/student record.
The *Child, Youth and Family Services Act 2017* *(CYFSA)* states that every child and young person receiving services under this act has the following rights:

> -To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight, in accordance with their age and maturity.
>
> -To be informed, in language suitable to their understanding, of their rights.
>
> CYFSA Part II, ss. 3(2) and (5)

Questions:
a) I am concerned about a parent's capacity to provide consent on behalf of their child. The child would clearly benefit from speech therapy. How do I deal with this situation?

b) Can you request a review of capacity to consent when the parent has cognitive delays?

Answer: The parent is the child's substitute decision maker and, as such, must meet the following criteria:

- Be capable with respect to the service.
- Be at least 16 years old (unless the person under 16 is the incapable person's parent).
- Not be prohibited by a court order or separation agreement from having access to the incapable person or from giving or refusing consent on the incapable person's behalf.
- Be willing to assume the responsibility of giving or refusing consent.
- Be available

In the instance where the parent has cognitive delays, if they can understand the information regarding the treatment decision and appreciate the likely results of making the decision, then they have capacity to consent on behalf of their child. It is your responsibility to assist them to understand the information and appreciate the consequences of their decision. If they do not understand and appreciate, even with your assistance, they do not have capacity to consent and you must seek out another SDM.

Parents will not always agree to audiology or SLP services, even when their child needs them. Parents as SDMs have the right to decline proposed services. If you have concerns about a parent's capacity to consent on behalf of their child (the ability to understand and appreciate), then document your findings in detail and contact the Consent and Capacity Board for advice.

If you suspect neglect of the child, then consider making a mandatory report to Children's Aid (Family and Children's Services).

ADULTS:

Question: I work in a hospital and the healthcare team is concerned about some patients' capacity to consent to treatment and admission to long-term care because the patient's capacity fluctuates according to the time of day you converse with them. What do we do in this situation?

Answer: You would find the best time for the patient when they are at their most alert, responsive and capable of participating in a consent conversation where you are determining if they have capacity. Check in with your team for updates on the patient's medical status and ability to participate in consenting to treatment and intervention.

Remember, it is your responsibility to determine capacity, it's not the patient's responsibility to demonstrate capacity. You may need to return later when the responsiveness of the patient has improved.

If deterioration in the patient's decision making is more permanent, then you may need to re-evaluate capacity to consent to treatment and/or admission to long-term care. You may need to consult with the patient's substitute decision maker at this point. If the patient has a communication barrier, advocate to be involved with the capacity evaluation for admission to long-term care.

Question: I have a patient that I have determined has capacity regarding my proposed treatment and wants to replace her lost hearing aid. (such as Mrs. Kumar in the e-Forum). What do I do when a family member calls and says she is unable to understand decisions and they want to cancel the order?

Answer: You may want to start by exploring with the family member why they want to cancel the hearing aid order. However, if you were satisfied that the patient had capacity at the time of the assessment and understood and appreciated the likely results of making the health care decision such as ordering a new hearing aid, then you should share your determination of capacity to the family. In your discussions you may want to explain why a replacement hearing aid would be beneficial. If the family reports a significant change in the patient's functioning, you may want to re-evaluate her capacity to consent to the hearing aid purchase.

Question: Can you elaborate more on evaluating the appreciation of consequences of decision for swallowing assessments and treatment? I am especially interested when patients have a communication barrier.

Answer: With respect to treatment decisions, you can determine that a person is able to appreciate the consequences of their decision as long as they are able to:

1. Realistically evaluate their current condition or situation.
"I've had a stroke and now I can't swallow properly"

2. Apply relevant information to their own circumstances.
"I am choking on my food and it keeps getting stuck in my throat"

3. Weigh risks and benefits of the available options
"Pureed and soft and moist foods are easier to swallow and will reduce my coughing and choking. It will help if I take smaller bites and sips".

4. Demonstrate that they have considered the consequences of their choice.
"I understand that if I eat hard, tough, chewy, dry food like toast or steak, it might go down the wrong way making me cough, choke, and may lead to a chest infection or pneumonia."

As audiologists and SLPs, you have a unique and specialised training in communication. When evaluating capacity, you are going to provide your patient with every opportunity to use their most effective mode of communication, and consider any type of sensory loss (hearing, vision, speech etc.) or additional confounding issues such as fatigue, alertness, medical condition, delirium, mental health concerns.

When determining if a patient can appreciate the reasonably foreseeable consequences of a decision, it is important to verify the information they communicate. Ask questions which require a positive answer, then verify with a question requiring a negative response.

EXAMPLES OF COMMUNICATION SUPPORTS:

Selecting and writing key words, using simple language and avoiding jargon, hearing amplification, visual magnifiers, drawing and picture supports (Boardmaker, visual schedules, Aphasia Institute ParticiPics, Communication Aid to Capacity Evaluation (CACE), alphabet boards, communication boards), repetition and rephrasing, writing key information, forced picture or word choices suited to their level of understanding, communicating step 1, step 2, step 3 commands.

Give the patient time to respond, encourage/model pointing to forced choice picture or word answers, include 'other' as an option for unique information, use interactive drawing, rating scales, gesture, yes/no/not sure response sheet, written choices, etc.

Question: What do you do when the patient is not capable, and you can't contact the SDM? Are there situations where consent doesn't need to be obtained?

Answer: If you have determined the patient is lacking in capacity to provide consent, and the highest ranking SDM is not available, you must refer to the next individual on the hierarchy of substitute decision makers:

- Guardian of the person, provided that the guardian has the authority to give or refuse consent to the service
- Attorney for personal care, provided that the power of attorney provides authority to give or refuse consent to the service
- A representative appointed by the Consent and Capacity Board, if the representative has authority to give or refuse consent to the service
- Spouse or partner
- Child, parent or children's aid society
- Parent with right of access only
- A brother or sister
- Any other relative
- The Public Guardian and Trustee.

It is very rare that SLP or audiology services would be considered an emergency especially if there are non-oral alternatives for administering medication. According to the HCCA, (s.25(1)) a situation can be considered an emergency if:

> "…the person for whom the treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm."

Consult with the health care team to determine if it is an emergency situation. If you decide that it is, and you are going to proceed without consent, you must document your reasons in the patient record including the reasons for the emergency, risk to the patient if the intervention was not provided, and how the patient does not understand or appreciate and your efforts to find a substitute decision maker.

Question: What happens when a patient repeatedly refuses to have an audiology or speech language assessment?

Answer: If a patient refuses to be assessed, it is not grounds for determining they are incapable. If the patient has the ability to understand the information needed to make the health care decision and appreciates the likely consequences of making the decision, then that is their right to refuse an assessment. Be sure to document your capacity evaluation and their refusal.

Question: What kind of questions would be included in a capacity evaluation?

Answer: That would depend on what the patient is consenting to. You would complete a treatment decision analysis, that is consider all of the significant components of the decision. Develop questions to determine if they understand those components and appreciate the consequences of their decision. Refer to the Consent Tool on the CASLPO website for suggestions in different areas of practice.

EVALUATING CAPACITY VERSUS CAPACITY ASSESSOR

Question: With respect to capacity for admission to Long Term Care (LTC), I was always under the impression that it could only be done by a trained capacity assessor and SLPs and audiologists do not qualify to be assessors (as opposed to capacity evaluators). Can you clarify?

Answer: There is a difference between capacity evaluators and capacity assessors. Under the HCCA (s. 2(1)) all SLPs and audiologists are considered to be capacity "evaluators" for healthcare decisions, admission to LTC, support services in the home and confinement. If the patient is living with a communication or hearing barrier, you may be the most appropriate health care professional to conduct a capacity evaluation for admission to LTC. You can carry out the evaluation on your own or with another healthcare professional.

SLPs and audiologists are not on the Ministry of the Attorney General's list for capacity assessors for personal care and property (finances). As per the Ministry of the Attorney General, capacity assessors need to have completed the capacity assessor course under the *Substitute Decisions Act, 1992*.

GLOSSARY

Understand
As a construct, to 'understand' refers to a person's cognitive abilities to factually grasp and retain

information. To the extent that a person must demonstrate understanding through communication, the ability to express oneself (verbally or through symbols or gestures) is also implied. *(Capacity Assessment Office, Ministry of the Attorney General of Ontario)*

Appreciate

The 'appreciate' standard attempts to capture the evaluative nature of capable decision making and reflects the attachment of personal meaning to the facts of a given situation. *(Capacity Assessment Office, Ministry of the Attorney General of Ontario)*