



Consent & Capacity In ABA

What is consent?

Consent is agreement to do something yourself or agreement to let someone else do something. In ABA, consent refers to a process through which a person makes decisions related to the services that they or their family member receives, and the specific assessment and treatment procedures that are used. Valid consent must be legal, informed, and voluntary. Valid consent is obtained from the person with legal authority and capacity to give consent, after providing the necessary information and ensuring that they are not under undue pressure.

What is informed consent?

Informed consent is a concept that is widely discussed in health care, mental health care, and behavioural services. Informed consent is a process through which a person being asked to provide consent receives all of the necessary information to make an educated decision about the matter at hand prior to providing consent or refusing.

Who can consent to a Behavioural Service Agreement?

There are a few different answers to this question. If the service agreement for behavioural services includes terms of payment for services and the provider would like to ensure that the contract for payment is legally binding, the person signing the contract must be at least 18 years of age (Age of Majority and Accountability Act, 1990) and have the capacity to make financial decisions. A minor of at least 16 years old could sign a legally binding financial agreement if they have severed from their parents. If there is no cost for services, or if the service agreement does not require a legally binding financial commitment, a person with the capacity to understand and appreciate the terms of the service agreement and any related consequences of using or not using the services can give consent.

What is capacity?

Capacity refers to a person's legal competence to make particular decisions about themselves or someone else. A person can have the capacity to make certain decisions, but not others. For example, a person may have the capacity to make day-to-day decisions about their personal care, but may not have the capacity to make decisions related to their finances. A person may have the capacity to consent or refuse some procedures (e.g., learning to brush their teeth) but not more complicated procedures (e.g., experimental functional analysis of self-injury).

How would I know if my client has capacity?

In Ontario, for health care related decisions, the clinician who is seeking consent is responsible to determine if a person has the capacity to make the decision being presented. The Health Care Consent Act (2004) describes capacity as the ability to **understand** the information provided and the ability to **appreciate** the risks and potential consequences of agreeing to or refusing the proposed procedure.

What can I do to check if someone has capacity?

There is no single test for capacity, because capacity depends on the decision at hand. To confirm that a person has capacity, you must assess their understanding and their appreciation of the risks and benefits of different decisions (as described above). Asking the person to repeat information back to you may help you to determine if they understand. You could ask the person questions about the consequences of the decision (e.g., What might happen if...) to see if they understand the consequences you have described and appreciate the impact of the decision. A person lacking capacity may be able to describe what a procedure is, but may not appreciate the impact of the consequences of having the procedure or refusing it. A person with capacity would be able to do both.

What do I do if my client appears incapable of making the decision?

If you think that your client is not capable of making the decision at hand, share your concern with them. Ask them if there is someone who typically helps them to make decisions like the one you are asking about. Sometimes a spouse, a parent or legal guardian, another family member, or a friend, is typically involved, and can be asked to support the person to make their decision. Remember to get the person's consent to contact other people in their life.

Where can I get help if I am unsure of someone's capacity to make a decision?

If the person usually makes their own decisions and you don't think that they are capable of making this decision, you may need to seek assistance. You could obtain consent from the person to talk to their other service providers or clinicians to ask how they obtain consent for similarly complex decisions. If the other clinician agrees that the person wouldn't typically make a similar decision on their own, you could speak to the person about involving someone else in the consent process.

Should I presume that someone with a developmental disability is incapable?

In Ontario, people are presumed to have capacity for a particular decision unless there is reasonable evidence to suggest that they are incapable of making the decision. Diagnosis alone does not determine a person's capacity for a decision, though it might influence the decision. If you think that a person with a developmental disability is not capable with respect to a particular decision, consider supporting them through a shared consent process with their legal consent source, rather than leaving them out of the decision-making process altogether.

It is important to note that a person consenting on someone's behalf is expected to act in the person's best interest and in the manner that the person would want, if that were known.

Do you have to be a particular age to consent for behavioral assessment or treatment?

The answer to this question depends largely on the setting in which behavioural services are delivered, the funding source for the services, and the qualifications of those providing services. Check your organization's policies or get legal advice if you are practicing on your own.

Is there an age of consent in health care settings?

In Ontario, the Health Care Consent Act (2006) does not stipulate an age of consent for health-related decisions. The ability to consent depends on having the capacity to make the decision at hand. However, you do have to be at least 16 to consent on behalf of another person, unless that person is your child, and you must be capable to make the decision in either case. This typically applies to behaviour analysts working in health care settings, those who are also regulated health professionals (e.g., Psychologist, Nurse, Speech Language Pathologist), and those working under the supervision of a regulated health professional.

What is the age of consent in children & youth service settings?

When services fall under the Child, Youth and Family Services Act (2017), there are two different ages that are relevant to consent. A person who is at least 16 can consent for their own treatment, and can have control of their own records relating to all aspects of their service. A child at least 12 years old can consent

to counseling without parental involvement if they have the capacity to make that decision. In this case the clinician should encourage the child to involve their parent(s) at the earliest opportunity. A child of 12 can control access to the part of their record related to counseling, but cannot control access to the parts of the record pertaining to other aspects of service (e.g., placement related, reports on file).

What is the age of consent in educational settings?

Within school boards, principals or in-school teams wishing to access behavioural services for a student would typically obtain consent for the referral from the parent or guardian. There are a few age related considerations for consent for services as part of the Education Act (1990) and associated regulations (e.g., O. Reg. 181/98). A parent may request special education services for their child from the school board, and must provide consent for these services if their child is a minor (under 18). However, if the student is 16 years of age or older they should be informed of requests for services made by their parents or the by the school, and included in related discussions. However, a parent or legal guardian must always provide consent for services for minors. An exception to parental consent for minors is made if the student is 16 years of age or older, is severed from their parents, and has capacity to make the decision. Finally, if the behaviour analyst is also part of a regulated health profession (e.g., Psychologist, Nurse, Speech Language Pathologist), they would have to obtain consent from the parent to provide services within the school and they would have to obtain consent directly from the student, if they have the capacity to make the decision (HCCA, 2006).

Who can make decisions on behalf of an incapable person?

If a person is found to be incapable of making a particular decision, The Substitute Decisions Act (1992) sets out the hierarchy of decision makers for everyone in Ontario. If your client has a guardian, an attorney for personal care, or a representative under the Consent and Capacity Review Board, they would be able to consent on the person's behalf if they are capable of making the decision. The following people (in order) could be asked to provide consent on the person's behalf if they have the capacity for the decision: spouse or partner, child (16 or older) or custodial parent, parent with access (only if there is no court order prohibiting treatment decisions), brother or sister, or any other relative. If the person does not want someone else to consent on their behalf, they may be able to appeal that

decision in health care situations through the Consent and Capacity Review Board. In other situations, if the person is 18 or older, an adult protective services worker could be engaged to assist in supporting the person through an appeal process.

What if I am unsure if the legal consent source has the capacity to make a decision?

It is possible that the person deemed as the legal consent source may also lack capacity for a particular decision. Similar to what is expected when assessing the capacity of the client, you are required to determine if the consent source understands the information provided and appreciates the risks and outcomes of doing the assessment or treatment being proposed and the risks and outcomes of refusing.

Summary

Obtaining consent and determining the capacity to consent are central to behavioural service provision. The intricacies of determining capacity and the specific laws that influence consent and capacity in each practice setting and with each client group require careful consideration. This guide is intended to support learning in this area but is by no means exhaustive. If you are unsure about how to proceed with obtaining valid consent and determining capacity for decision-making, seek legal advice, in addition to consultation or supervision from a behaviour analyst with expertise in your areas of practice.

More information about Professional Practice in ABA can be found at www.ontaba.org.