

NEW BRUNSWICK ASSOCIATION
OF SOCIAL WORKERS

Guideline on Assessing the Capacity of Minors



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1.0 Background

In February 2021, the New Brunswick Association of Social Workers (NBASW) adopted the *Standards Regarding the Capacity of Minors to Consent to Social Work Services*. These Standards were adopted to clarify the responsibilities of social workers when providing services to children and youth; ensuring that social work services uphold their rights and focus on the client's best interest.

The Standards clarify that, before providing social work services to minors (anyone under 19 years of age), social workers must use professional judgment in assessing whether an individual has the ability to understand the nature and consequences of the social work interventions being offered and, thus, whether they can be considered a mature minor with the capacity to provide informed consent for services.

Clients who are assessed to be a mature minor can consent to receiving social work services, with their consent being the only that is required to proceed with services. When a minor is assessed to meet the mature minor threshold, they are the client and have the right to access their file. Minors who are not considered mature minors require the consent of a parent or legal guardian to receive social work services.

Since adopting these Standards, the NBASW received many requests for further information and guidance on how to conduct capacity assessments on children and youth. The NBASW developed the *Guideline on Assessing the Capacity of Minors* as an additional informational resource and tool that social workers may choose to draw upon to help guide the capacity assessment process when working with children and youth.

2.0 Informed Consent

Informed consent is integral to the social worker-client relationship and is obtained from clients at the onset of service delivery and throughout the professional relationship, as necessary.

Informed consent is a cornerstone of ethical social work practice. The NBASW Code of Ethics (2007) defines informed consent as an "agreement reached voluntarily by the competent client after discussion as to foreseeable risks and benefits associated with the disclosure of confidential information". There are three key elements of informed consent: communicating information, voluntariness, and competence, as outlined in Table A (pg. 4).

Table A¹

Elements of Informed Consent	
<u>Communicating information</u>	Clients must be provided the information relevant to a decision. This includes social workers informing clients of the nature and purpose of the proposed service, its potential benefits and risks, and the alternative approaches/options available, along with their benefits and risks. This is typically done both verbally and through the use of forms, such as consent forms.
<u>Voluntariness</u>	Based on the information the client has been provided, the client is able to make decisions on their own free will. The goal of informed consent is to help individuals make their own decisions about their care. Decisions must be made without the use of coercion or undue influence by a social worker.
<u>Competence (capacity)</u>	A client’s ability to understand and make meaningful choices and accept risks. It is a precondition for the exercise of decision-making powers and must be assessed by social workers during service provision. There are four abilities that serve as indicators of decision-making capacity, as found in Table B (pg. 6).

Section 1.3.2 of the NBASW Code of Ethics (2007) indicates that social workers, at the earliest opportunity, shall discuss with clients their rights and responsibilities and provide them with honest and accurate information regarding the nature of the services. Social workers should also discuss with clients the recording of information, the potential risks and benefits, and limitations of professional confidentiality.

Informed consent is only possible when the person giving consent has the capacity to use the disclosed information to decide whether to accept a proposed intervention. Social workers must evaluate a client’s capacity to give informed consent as early in the relationship as possible, ensuring that an individual is capable of fully understanding the nature and consequences of a service.

Assessing whether a client has the capacity to provide informed consent is an ethical principle that has always been an integral part of a social workers responsibilities at the onset of services, and throughout the social worker-client relationship, as required. Social workers must ensure that clients understand informed consent and the circumstances in which it may be required and provide services to clients only on valid informed consent, or when required to by legislation or

¹ Information found in Table A was adapted from *Assessing competence to consent to treatment: A guide for physicians and other health professionals* (Grisso & Appelbaum, 1998).

by a court. This preliminary assessment shall take place during the first meeting with a client and must be documented in the client's file.

2.1 Mature Minor Doctrine

Recognizing that, currently, there is no existing New Brunswick legislation that pertains to social work service provision, the NBASW *Standards Regarding the Capacity of Minors to Consent to Social Work Services* are based on the mature minor doctrine. The mature minor doctrine is a common law that indicates that a minor who can understand the nature and consequences of a proposed intervention has decision-making abilities and can consent to receiving services. Since a mature minor has the capacity to fully understand and appreciate a situation and its' consequences, they can make decisions about their lives, including their participation in services and the disclosure of their information.

3.0 Overview of Capacity

The term capacity is short for decision-making capacity and refers to an individual's cognitive abilities and mental processes such as knowing, judging, and evaluating. Capacity is defined as the ability to both understand information relevant to a decision and to appreciate the consequences of a decision.

Capacity is not a single ability that people have or do not have, it is task-specific, with people using different abilities to make different kinds of choices. Capacity is not a test result or a diagnosis, rather, it is a snapshot of an individual's level of understanding and ability at a specific point in time. Capacity deals with the process of decision making and does not depend on the actual choice that is made. Competent people can make rational decisions, based on their values, goals, knowledge, and understanding of the issues facing them. Individuals with capacity can identify and accept risks.

For an individual to have the capacity to be considered a mature minor, they must demonstrate the four decision-making abilities that serve as indicators of capacity. If a minor demonstrates these abilities, they have demonstrated that they have the capacity required to make a decision. Competent minors may choose to consent to receive social work services, with their consent being the only that is required. In demonstrating the required capacity, the minor is the client and can make decisions regarding the interventions they receive and has the right to access their file.

The four decision-making abilities clients require to be able to demonstrate capacity include:

- **the ability to understand relevant information;**
- **the ability to appreciate the situation and its consequences;**
- **the ability to reason; and**
- **the ability to communicate and express a choice.**

Social workers need to assess the degree to which an individual possesses each of these abilities, recognizing that the presentation of these abilities may vary among individuals. To determine whether an individual functions sufficiently in these areas of ability to make a decision requires consideration of the nature of the decision to be made (i.e., its complexity and risks) and includes consideration of individual factors (i.e., age), as further discussed in section 4. Social workers must assess each client’s decision-making abilities individually and may use probing questions to assist in the evaluation process. Further information on the four decision-making abilities and examples of potential probing questions can be found below in Table B.

Table B²

Four decision-making abilities	Examples of probing questions that may be used to help guide discussions
<p><u>Ability to understand relevant information</u> The ability to comprehend the information and concepts related to a decision, including information on the potential risks and benefits. The ability to understand does not include the ability to relate that information to the situation at hand. Some factors that may influence an individual’s ability to understand relevant information include their intellectual abilities and how information is presented and communicated to them. Social workers may ask clients to restate information in their own words.</p>	<p><i>Social workers ask questions that prompt clients to restate the information that they’ve been provided.</i></p> <ul style="list-style-type: none"> • What is your understanding of your condition/situation? • Tell me about the proposed intervention, what information have we discussed? • What are the possible risks and benefits of the proposed intervention? • What alternative options exist and what are their risks and benefits? • What are the risks and benefits of not accessing an intervention? • What does confidentiality mean to you and what are its limitations?

² Information found in Table B was adapted from *Assessing competence to consent to treatment: A guide for physicians and other health professionals* (Grisso & Appelbaum, 1998) and *Toolkit for primary care: Capacity assessment* (Scott, 2008).

<p><u>Ability to appreciate the situation and its consequences</u></p> <p>The ability to recognize how a problem or solution pertains to one’s own situation. This is the ability to apply abstractly understood information to the decision at hand. Some factors that may influence an individuals’ ability to appreciate a situation and its consequences include the type of decision to be made and the complexity of the situation.</p>	<p><i>Social workers ask questions that prompt the client to apply the information that they’ve been provided to their specific situation.</i></p> <ul style="list-style-type: none"> • What problems are you experiencing and what are some things that could help solve these problems? • How might this option positively or negatively affect you? • What positive or negative affect might this option have on your situation? • What positive or negative affects could other potential options have on your situation? • What do you believe will happen if you don’t receive this intervention?
<p><u>Ability to reason</u></p> <p>Focuses on the decision-making process and addresses a person’s ability to employ logical thought processes to compare the risks and benefits of various options. The ability to consider potential solutions to problems by describing how a solution would affect everyday life, demonstrating how one solution is better in comparison to another, and demonstrating logical thought processes in determining a choice.</p>	<p><i>Social workers ask questions that prompt an understanding of the thought processes clients used in the decision-making process.</i></p> <ul style="list-style-type: none"> • Share how you reached your decision, what factors did you consider? • How did you balance those factors? • What things were important to you in making this decision? • What do you think the impact of your decision will be?
<p><u>Ability to communicate and express a choice</u></p> <p>The ability to render a clear choice for the decision under consideration. This choice should be made autonomously and be consistent with expressed beliefs and values and previous decisions and actions. Method of communication is not necessarily verbal and depends on each clients’ abilities (clients may communicate using sign language, by writing, etc.).</p>	<p><i>Social workers prompt clients to clearly communicate their decision.</i></p> <ul style="list-style-type: none"> • Have you decided what option is best for you at this time? • How would you like to proceed? • Can you tell me what your decision is?

3.1 Additional Questions for Consideration: The Four C’s of Capacity

Another way of understanding capacity is through the “Four C’s of Capacity”, which stands for context, choices, consequences, and consistency. When assessing an individual’s capacity, social workers can ask themselves questions pertaining to each of the C’s, as found below in Table C.

Table C³

<u>Context</u>	Does the person understand the situation they are facing?
<u>Choices</u>	Does the person understand their options?
<u>Consequences</u>	Does the person understand the possible ramifications of choosing various options?
<u>Consistency</u>	Does the person fluctuate in their understanding of choices?

4.0 Assessing Capacity

To receive social work services, clients of all ages must have the *capacity* to have a fulsome understanding of the intervention in question, including the potential pros, cons, and limitations associated with the service, in order to provide valid informed consent. Capacity is decision specific; an assessment of a person’s capacity must be based on their ability to make a specific decision at the time it needs to be made and not their ability to make decisions in general. Capacity assessments require consideration of the whole person. Social workers factor in individual and situational factors and employ professional judgment when coming to capacity determinations.

Assessing a client’s decision-making capacity is part of every client encounter. For the most part, this process is straight forward and often occurs naturally in meetings through the process of engaging in dialogue with someone. In talking with clients, a social worker can get a sense of a client’s capacity. Throughout the client-social worker relationship, social workers are continually able to assess whether a client fully understands the situation and options available to them, with these assessments happening naturally and informally.

Assessing a client’s decision-making capacity is part of every encounter. This process is typically straight forward and occurs naturally when engaging in dialogue.

There are times when social workers need to assess a client’s decision-making capacity more thoroughly and more formally. An example of this would be at the onset of social work services, when social workers must engage in a more formalized discussion with clients regarding the nature and limitations of services, so that the

³ Table C was taken from the *Toolkit for primary care: Capacity assessment* (Scott, 2008).

social worker can gain a clear understanding that the client possesses the decision-making capacity that is necessary for them to provide informed consent.

Social workers should undertake this assessment during the first meeting with the individual. This is also explained in the NBASW Code of Ethics (2007), section 1.4.4, which states: "Social workers who have children as clients shall determine the child's capacity to consent and shall explain to the child (where appropriate), and to the child's parents or legal guardians (where appropriate) the nature of the social worker's relationship to the child and others involved in the child's care."

4.1 Factoring in Risk Levels

When discussing capacity, it is important to recognize that different contexts may require different kinds or levels of functional abilities. A lower level of decision-making capacity is required when an individual is accepting an intervention that is much needed, likely to ameliorate their situation, and presents a low risk of negative effects. Individuals are required to demonstrate higher capacity thresholds when making a decision that poses substantial risk. Low-risk interventions have less potential for widespread impacts or adverse outcomes than do high-risk interventions (i.e., accessing inpatient care may be high risk when compared to accessing typical counselling, due to the impact the decision may have on other aspects of life).

Social workers are responsible for determining what level of capacity is appropriate for each specific situation and decision. Social workers must apply a holistic understanding to the individual, their environment, and the situation and must use their professional judgement in determining what capacity threshold is appropriate for the individual, factoring in their age, abilities, and the risk level of the sought-after intervention.

4.2 Factoring in Age/Capacity Increases

Social workers must remain mindful of the fluent and ever evolving nature of capacity with all clients; however, this is particularly important when working with minors, as age is a factor that impacts development and must be considered when assessing capacity. While age is not an indicator of capacity, capacity typically increases with age, with individuals being able to make more independent decisions for themselves. The younger the minor, the higher the threshold to determine capacity should be. Social workers should undertake a more in-depth assessment for younger clients, to ensure they have a complete understanding of the nature and consequences of services. This may include asking open ended questions to clients in different ways to ensure they have a fulsome understanding.

4.3 Capacity Regressions

In some cases, an individual's capacity may regress, such as following a physically or emotionally traumatic event. While capacity regressions are likely to be rarer when working with a younger population, there are situations in which it still occurs. Capacities may be reduced by cognitive impairment, certain psychiatric symptoms, traumatic experiences, and other situational factors such as the complexity of the information disclosed and the manner of disclosure. Children and youth who may not have initially met the mature minor threshold may later be determined to be a mature minor, and vice versa. It is important that these factors are considered throughout the capacity assessment and re-assessment process.

4.4 Re-Assessing Capacity

Cognitive and emotional states of individuals may fluctuate, influencing changes in critical decision-making abilities. Social workers who are working with minors must continue to assess capacity throughout the social worker-client relationship, keeping in mind that capacity assessments are often a natural, informal process that occur intuitively through discussions between social workers and clients. This natural process is even more salient within the provision of social work services, due to the particular skills, knowledge, and training that social workers have.

In recognizing that capacity is fluid and changes over time, the purpose of capacity assessments is to capture an individual's decision-making ability at that point in time, to allow for the highest level of self-determination as is appropriate for a situation. Capacity may increase or decrease over time and may be influenced by internal and external factors.

Social workers will have a sense of whether a client's capacity levels are increasing, decreasing, or remaining consistent throughout the course of service provision. A more thorough capacity re-assessment may be required if there are abrupt changes in a client's mental state, the client is refusing a recommended intervention, a client is consenting to a risky or invasive intervention, or there are other risk factors present that may impair decision-making capacity (i.e., clinical factors, situational factors, etc.).

Social workers must ensure that the consent they received at the onset of services remains valid throughout the course of service provision. If, during service provision, a social worker has concerns that a client's capacity has regressed to a point where their consent for services is no longer valid, a social worker may choose to conduct a thorough capacity assessment. If, in the social worker's professional judgement, a client is no longer capable of consenting to services, the social worker must seek the consent of a substitute decision-maker. When working with minors, a parent or legal guardian is the appropriate substitute decision-maker.

5.0 Capacity Assessment Tools

There are many capacity assessment tools that exist and, while some tools are more widely used than others, no tool is universally recognized as being the most effective in measuring decision-making capacity. While decisional tools/aids can be helpful to guide the capacity assessment process, they should never be used in place of professional judgement. If social workers choose to utilize capacity assessment tools in their practice, they should ensure they are competent to do so and have the knowledge required to use the tools as intended.

Social workers have an ethical responsibility to assess client capacity as early in the social worker-client relationship as possible and may use an assessment tool to guide the capacity assessment process. While social workers are

required to maintain up-to-date documentation of information relevant to services with a client, capacity assessments do not require the use of formalized assessment tools. An example of an optional capacity assessment tool can be found in Appendix A (pg. 12).

Regardless of whether or not social workers use formalized assessment tools, a comprehensive assessment of the client should always be taken, at the onset of services and as required. Documenting the details in coming to a capacity determination, including the outcome and the reasoning behind it, is crucial.

While social workers are required to maintain up-to-date documentation of information relevant to services with a client, capacity assessments do not require the use of formalized assessment tools

Appendix A: Optional Tool to Aid in Assessing Capacity

Name of individual being assessed:	
Date of assessment:	
Description of the matter that requires a specific decision:	
On the date above and in relation to the decision, the individual was able to:	Yes/No
1. Understand the information relevant to the decision.	
2. Understand the situation and the potential consequences relating to a decision.	
3. Apply reasoning to make a decision (apply information to their particular situation).	
4. Communicate the decision and express a choice (not necessarily verbally).	
<i>If the answer was <u>yes</u> to all four points, the individual possesses decision-making capacity. If the answer was <u>no</u> to any one point the person lacks the capacity, at this time, to make the decision outlined above.</i>	
	Please ✓
The individual <u>has</u> decision-making capacity (answer was <u>yes</u> to all points 1-4).	
The individual <u>lacks</u> decision-making capacity (answer was <u>no</u> to any one of points 1-4).	
Describe the outcome of the capacity assessment and provide details that led to the capacity determination (i.e., how the individual demonstrated reasoning, how they communicated the decision, etc.).	
Name of social worker:	
Signature:	Date signed:

Appendix B: Case Studies

Using the information contained in the above guidelines, in the *Standards Regarding the Capacity of Minors to Consent to Social Work Services* (2021) and in the NBASW Code of Ethics (2007), consider each case scenario outlined and discussed below.

Case Study #1: A social worker who is working on a multi-disciplinary team has a youth who is 13 years old referred to them by another team member, who is a Registered Nurse. This team member previously provided a medical treatment to the youth based on their consent for the treatment, after having assessed the youth as a mature minor under the *Medical Consent of Minors Act*. The nurse has connected the youth with the social worker, as the nurse believes the youth would benefit from receiving additional counselling. The social worker meets with the youth and proceeds to assess the youth's capacity to provide informed consent for social work services. During the assessment, it is made clear that the youth is unable to understand the concept of confidentiality and the limitations of confidentiality. Based on this information and using the information provided in the above guidelines, what is important to consider and what are the appropriate next steps for the social worker to take?

Discussion #1: Social workers must be the professionals assessing whether individuals have the capacity to provide informed consent to receive social work services. Decision-making capacity is fluid, it can increase or decrease overtime. Capacity is also decision-specific, with an assessment of a person's capacity being based on their ability to make a specific decision at the time it needs to be made and not their ability to make decisions in general. Although the individual had been assessed by the nurse as having the capacity required to provide consent for the previously received medical treatment, the social worker has determined that, at this time, the youth is not able to fully understand the information relevant to a decision; one of the four decision-making abilities that are required to be considered a mature minor. Based on this assessment, the social worker is not able to proceed with service provision. The social worker must receive consent from an appropriate substitute decision-maker before providing the youth with services. When working with minors, parents or legal guardians are the appropriate substitute decision-makers and the consent of one parent or legal guardian must be received to proceed with services.

Case Study #2: A social worker who is working on a multi-disciplinary team has a youth who is 12 years old approach them, looking for counselling. The social worker meets with the youth and discusses their situation, to gain a sense of why they're seeking counselling. In the discussion, the social worker learns that the youth has lived with their grandparents, who are not their legal guardians, since they were young. The youth speaks fondly of their grandparents and says they are in support of the youth seeking counselling. The youth hasn't spoken with their biological parents, who are the youth's legal guardians, in over a year.

The social worker provides the youth with information on the counselling services they provide, including the potential benefits (i.e., positive therapeutic outcomes, reduced stress, enhanced social and emotional functioning, etc.) and risks (i.e., no changes, potential to evoke painful memories and emotions, etc.) associated with the service, the nature and limitations of confidentiality, how information is stored and recorded, and provides the youth with information on other options and community resources that exist.

The social worker then assesses whether the youth understands the information they have discussed, whether the youth is capable of connecting this information with their situation, and whether the youth is able to reason and communicate a choice. Due to the youth being somewhat younger, at 12 years old, the social worker takes the time to ask more questions than they otherwise would when working with an older individual and asks the youth to rephrase things at times, to fully ensure the youth has the decision-making capacity required to provide informed consent. The social worker assesses the youth as having the capacity to be considered a mature minor and the youth provides consent to receive social work services. The social worker documents the capacity determination and the reasons the youth met the mature minor threshold in the client's file.

After working with the youth for several months, the social worker is contacted by the youth's biological parents out of the blue. Their parents ask for information on the youth and ask to be sent the youth's file, emphasizing that they are the parents and that they have a right to know information about their child. Based on this information and using the information provided in the above guidelines, what are the appropriate next steps for the social worker to take?

Discussion #2: Although the youths' parents have parental rights, the youth was assessed as having the decision-making capacity required to be a mature minor and provided their own consent to receive counselling through the social worker. In doing so, the youth is the client; they have the right to confidentiality and have the right to access their file. The social worker is not able to share the information contained within the youth's file without the youth's consent to release the information or unless otherwise legally required to.

In this case, the social worker should meet with the youth to discuss the parents request to access the file. This discussion must include all factors, including potential risks and benefits of sharing

any/all of the information. The social worker and youth may also explore other potential options, such as engaging parents and grandparents in the counselling sessions, being sure to fully discuss the potential risks and benefits associated with these options.

If the youth agrees with the social worker sharing the file and/or information (in part or in full) and signs a consent form for the social worker to release information to the parents, the social worker must still use professional judgment and factor in ongoing capacity determinations and what is in the best interest of the client when determining what information should be masked (i.e., third party information) or withheld (for a just and reasonable cause). All discussions, decision-making processes, and decisions must be documented in the client's file.

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