Investigating Sexual Assault Against People with Disabilities

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Acknowledgments

OnLine Training Institute (OLTI) module:

Successfully Investigating Sexual Assault Against Victims with Disabilities

Available at www.evawintl.org

Critical Need for Training

- Most difficult module we’ve developed
- Good materials exist on certain topics
- But lack of information on investigation and prosecution of cases
- Problem of professional “silos”
- Training message often to “treat these cases and victims like any other”
- Yet for some cases — especially when offense is based on victim’s disability — case requires unique investigative strategy

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Critical Need for Training

- Extremely high rates of victimization
  - Yet often “invisible” within society
  - High likelihood of repeat perpetration

- Challenges to investigate and prosecute
  - Some victims are not able to establish elements with their statement, must be based on evidence and corroboration
  - Parallels to drug- and alcohol-incapacitated rape or sexual assault of very young children

Topics to be Covered

- Sexual Assault of People with Disabilities
- Dynamics of Perpetration
- Crafting an Investigative Strategy
- Stages of the Investigation
- Responding to Victim Needs
- Severe Cognitive Disabilities
- Resources for More Information

Americans with Disabilities Act

- Federal law in 1990 prohibits discrimination against people with disabilities
  - Must make reasonable accommodations to avoid excluding people with disabilities
- Detailed information in module
- More information at www.ada.gov
SEXUAL VIOLENCE AGAINST PEOPLE WITH DISABILITIES

Higher Rates of Victimization

- People with disabilities far more likely to be sexually assaulted than others
  - Research suggests at least 2-4 times more likely, and maybe far more
  - Particular problem in institutional, segregated, and/or isolated settings (e.g., schools or residential group homes)
  - Yet often invisible, denied by society

She couldn’t have been raped.
Who would want to rape him?
She doesn’t even know what sex is.
He doesn’t know the difference.
He just makes stuff up.
She lies all the time.
Abuse from Caregivers and Others

- Offenders usually known to victim; often family member or paid professional (e.g., caregiver, transportation provider)
  - Manipulate and isolate the victim
  - Threaten the victim not to tell
  - Prevent resistance, restrict escape
  - Withhold mobility or communication devices
  - Exacerbate health conditions purposefully
  - Limit access to reporting, potential help

Dynamics of Perpetration

- Perpetrator may target person with disability because of:
  - Lack of education about rights, sexuality, body, boundaries, privacy, speaking up, etc.
  - Lack of power
  - Dependency (limited ability to resist, disclose)
  - Feelings of love, loyalty for perpetrator
  - Lack of equality in system response
  - Societal myths (no one will believe them)

He could never do something like that!
But she's such a nice person!
He takes such good care of his mother.
She's the best teacher we've ever had.
He even volunteers to help people with disabilities!
RESPONDING TO VICTIMS

Barriers to Services and Support
- In every aspect of response system
  - Criminal justice system
  - Disability organizations
  - Health system
  - Victim services

Barriers Can Pertain To:
- Communication / Information
- Physical Access
- Policy and Programmatic Issues
- Legal Issues
- Attitudinal Challenges
No one would believe me because they could not imagine anyone sexually assaulting someone like me.

I would talk to someone who listened, who took their time, and who was comfortable with my disability.

I waited for hours in the emergency room, because they didn’t know how to get me on the examining table.

Unhelpful Model for Response

I need to be competent and knowledgeable about all types of disabilities, legal issues, and accommodations before I can work with people who have disabilities

Better Approach for Victims

When I meet someone with a disability, I will be open, creative, respectful, and ready to learn. I will treat everyone with a disability as a unique person.
CRAFTING AN INVESTIGATIVE STRATEGY

Investigative Strategy

- Designed to:
  1. Establish legal elements
  2. Guide evidence collection
  3. Overcome potential defenses
  4. Or exonerate suspect based on evidence

- Defense will seek to counter charges by challenging the evidence for one or more of the legal elements that must be proven in order to prosecute a specific criminal offense code

Example: Forcible Rape, Sodomy, or Oral Copulation

- Legal elements:
  1. Sexual penetration (no matter how slight)
  2. Force, threat or fear

- Likely defense: Consent (i.e., not force)
  - Could also deny sexual act
  - Argue wrong suspect
CA PENAL CODE, SECTION 261

261. (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

(2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

Drug or Alcohol Facilitated Rape

• Legal elements:
  1. Sexual penetration
  2. Victim too incapacitated to consent
  3. Suspect knew / should have known victim was incapacitated
  4. Some states, suspects have to also administer the drug

• Consent defense, or suspect did not / could not know victim was incapacitated

CA PENAL CODE, SECTION 261 (a)(3)

261. (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

(1) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

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Age-Based Offenses

- Legal elements:
  1. Sexual penetration and/or contact
  2. Victim under the age specified by law
  3. Suspect knew / should have known victim's age
- NO CONSENT DEFENSE AVAILABLE
  - Designed to protect children who cannot consent
- Most likely defense: At first, denial
  - However, if sexual contact is proven, suspect will argue did not / could not know victim's true age

CA PENAL CODE, SECTION 288

288. (a) Except as provided in subdivision (f), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.
(b) (1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.
(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

Offense Based on Caregiver Role

- Not available in all states
- Legal elements:
  1. Sexual penetration and/or sexual contact
  2. Suspect in caregiver role (or position of authority, as defined in law)
- Again, no consent defense available
- Most likely defense: Denial of sexual act
  - OR contesting role / position of suspect
CA PENAL CODE, SECTION 288

288. (a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

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Based on Severe Cognitive Disability

- Legal elements:
  1. Sexual penetration and/or sexual contact
  2. Victim has severe cognitive disability, lacks capacity to consent to sexual acts
  3. Suspect knew / should know victim has severe cognitive impairment

- No consent defense available – once a person is qualified as lacking the legal capacity to consent to sexual acts and suspect knowledge of the victim’s severe cognitive disability is proven

Based on Severe Cognitive Disability

- Most likely defenses for sexual assault based on severe cognitive disability:
  1. Victim disability not severe enough:
     Suspect argues victim can and did consent
  2. Suspect did not / could not know severity of victim's cognitive disability
CA PENAL CODE, SECTION 261(a)(1)

261. (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:

1. Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

2. Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

3. Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.

Legal Tests for Capacity to Consent

- Various legal tests depending on state to determine if a person is legally capable of providing informed consent to sexual acts
  - See module for more information, including which test is used in your state
  - Appendix includes criteria for mild, moderate, severe, and profound levels of intellectual disability according to DSM-V

Legal Tests for Capacity to Consent

- **Nature of conduct:** Person understands sexual and voluntary nature of act
- **Nature and consequences:** Person understands both nature (as above) and potential consequences of sex acts
- **Morality test:** Understands that sex acts have moral import
- **Evidence of mental disability:** Establish the person's cognitive capacity generally
- **Judgment test:** Whether person can give knowing and intelligent consent to sex acts
Sample Definition of Consent

'Consent shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [CA Penal Code 261.6]

Capacity to Consent

- Victims who have cognitive disabilities that are NOT severe or profound
  - Case most likely not prosecuted as a person "incapable of consent because of a mental disorder"
- Offense must qualify under a different penal code to be prosecuted:
  - Force, threat, fear
  - Drug- or alcohol facilitated rape (incapacitation)
  - Other type of criminal offense (e.g., sexual battery)

Victims with Other Disabilities

- Examples:
  - Mild or moderate cognitive disabilities
  - Physical or sensory disabilities (e.g., person is blind, Deaf, uses a wheelchair or walker)
  - NO EFFECT ON CAPACITY TO CONSENT
- With severe/profound cognitive disability, person may be qualified as permanently incapable of consenting to sexual acts
Victims with Other Disabilities

- Evidence of the victim’s disability may be relevant for investigation and prosecution
  - For example, forcible sexual assault:
    - Disability could have contributed to the environment of force, threat, or fear
    - Could have increased victim’s vulnerability
    - Evidence to support these facts will be established, collected, documented

Victims with Other Disabilities

- Other penal codes might apply:
  - Additional criminal offenses (e.g., hate crimes)
  - Enhancements (e.g., aggravating factors)

- But for victims with disabilities other than severe/profound cognitive disabilities, the criminal charge for sexual assault is not based on the victim’s disability

Key Questions When the Victim Has a Disability

- Any reason to believe victim lacks capacity to consent to sexual acts?
  - If so, gather evidence to answer question and determine which type of offense
  - If not, investigate as other type of offense

- Is suspect in caregiver role?
  - Not all states have caregiver criminal codes
Key Questions When the Victim Has a Disability

- Were drugs or alcohol involved?
  - Suspects often administer prescription medications to impair or incapacitate victims
  - Offense may be based on victim incapacitation due to drugs or alcohol, not disability
  - OR, factor contributing to force, threat, fear
  - Decreases chance of getting caught
  - Additional charges related to drug misuse?

STAGES OF THE INVESTIGATION

- Initial response
- Preliminary investigation
- Follow-up investigation
  - Detailed follow-up victim interview(s)
  - Identify additional evidence / witnesses
  - Suspect interview(s)
- Documentation throughout / Final report
- Decisions: Arrest? Refer to prosecutor?
Initial Response

- Coordinate with social service agencies
- Contact a sexual assault advocate
- Address victim’s immediate concerns
- Gather basic information about victim’s disability and accommodations

Preliminary Investigation

- Begin formulating investigative strategy
  - Any reason to question capacity to consent?
  - Determination not made at this stage, but if it may be an issue, gather information
  - Similar logic as drug- and alcohol-facilitated sexual assault: Determination not made at this stage but gather information

- Collect information and evidence

Concluding Preliminary Investigation

- Let victims know it takes a lot of courage to tell what happened and you are honored they trust you enough to talk with you
- Explain what happens next
  - **Not:** “Do you want to press charges?”
- Assist with resources and referrals
  - In format they can realistically access
- Provide contact information, case number for follow-up, in accessible format
Ensure the Victim’s Safety

- Make sure victim is not left in unsafe situation without essential care giving
- If caregiver is arrested or leaves
  - Alternative housing, caregiving arrangements?
  - Take victim into protective custody?
- Help from Adult Protective Services (APS) and Centers for Independent Living (CILs)

NEED FOR COLLABORATION

Collaboration is Essential

- Collaboration with community resources, essential to meet victim’s needs
  - Create a roster of support agencies
  - Establish Memoranda of Understanding
- Proactive approach to accommodations
  - Ensures access to high quality police services for everyone
Collaborative Partners

- SAFEs, law enforcement, sexual assault advocacy, Adult Protective Services, disability organizations, and others
  - Cross-training
  - Share resources
  - Work as a team to meet victim’s needs
  - Helps to make things clear and personal for survivors

Collaboration - A True Story

- Collaborative partners in solution:
  - Disability Organizations
  - Rape Crisis Centers
  - Victim Witness Coordinators
  - Investigators
  - Prosecutor
  - Community Experts

DETAILED FOLLOW-UP VICTIM INTERVIEW
Prepare for Detailed, Follow-Up Interview
- Conduct background research
- Write key questions in advance
- Evaluate need for accommodations
- Consider forensic interviewing specialist depending on victim’s impairment
- Notify victim advocacy organization
- Select appropriate setting
- Prepare to record interview

Conduct Detailed, Follow-Up Interview with Victim
- Introduce yourself
- Address victim’s concerns
- Acknowledge victim’s ordeal
- Determine who will be present
- Explain role of support people
- Help victim feel comfortable
- Ask victims what they want and need

Conduct Detailed, Follow-Up Interview with Victim
- Evaluate victim’s ability to participate
- Assess for abuse or coercion
- Allow more time than usual for interview
Consider Individual Needs

- Okay to ask if the person needs anything to participate or be more comfortable
- Person with disability is an expert on what he/she needs to participate fully
- Primary consideration given to victim’s choice of communication and/or other services requested

Provide Accommodations

- Think about your own accommodations
  - What we need to participate fully and equally
  - Many are no cost or low cost
  - Plan for the widest range of people and situations without special/separate design
  - Ask: “Can everyone participate equally?”
Provide Accommodations

- The right thing to do
  - Also necessary for successful investigation and prosecution
  - Ask: "What do I need that I don't have?"

Provide Accommodations

- Ask what victim needs to fully participate
- Be prepared! Collaborate with Center for Independent Living (CIL)
  - Have materials in alternate format available
  - List of American Sign Language Interpreters

I feel most welcome when accommodations are not a big deal.
Possible Accommodations

- Specific services, devices, tools
  - American Sign Language (ASL) interpreters
  - Documents in alternate formats (large print, Braille, pictures)
  - Electronic communication device
  - Communication book
- General approach, considerations
  - Meeting at a specific time due to seizures, medications, pain, etc.
  - Plain language

Courtroom Examples

- Victim allowed to answer ‘yes’ and ‘no’ questions and to point (MA)
- Victim allowed to tap a pencil to answer ‘yes’ or ‘no’ (CA)
- Victim allowed to use gesture and pantomime (MA)
- Victim allowed to testify with support dog (WA)
Effective Communication

- When we don’t take the time to learn how to best to communicate with victims and witnesses, the perpetrator wins
- Begin with an assumption that everyone can communicate
- Allow time to get accustomed to the person’s communication style

I don’t want your pity. There is a big difference between pity and respect.

Establish Tone

- Do not express more outrage because the perpetrator would offend against a victim with a disability
- Do not express admiration for an accomplishment in light of their disability
- Do not assume people with disabilities suffer less or more trauma
- Start with the assumption that person is competent and proceed from there
Do not help me even if it does make you feel good. **Ask me if I need your help.** Let me show you how you can best assist me.

Establish Tone

- Show respect
- Safe environment with limited distractions
- Relax and don’t worry about using common expressions that seem related to the person’s disability
  - Saying, "See what I mean" to a person who is blind

All my life, ‘special’ has meant separate and not equal.

When I was attacked, I didn’t want a ‘special’ detective - I wanted a good detective.
Techniques for a Successful Interview

- Position yourself at eye level
- Begin with general information to establish rapport
- Make eye contact with the person (not the interpreter)
- Use active listening skills
- Communicate with adults as adults

Techniques for a Successful Interview

- Maintain physical boundaries
  - Do not touch the person
  - Do not touch wheelchair or other device without permission
- Allow time to respond to questions and actions (e.g., handshake)

Communication

- Receptive language
- Expressive language
I can learn. Can you teach?

What if You Can’t Understand What the Victim is Saying?
- Listen and wait
- Ask person to repeat it
- Repeat the words you do understand
- Ask the person to spell or draw
- Don’t pretend you understand
- Is there someone you trust who can help?
- Consider a different interviewer

Listen with our

Listen with our

Listen with our

Listen with our
Help People Understand
- Avoid legal jargon
- Simpler words / sentences
- Break down key concepts
- Not: “Do you understand?”
- Ask same question in different ways

Effective Communication
- Avoid sarcasm, clichés, words with multiple meanings
- Use visual, kinesthetic, interpersonal approaches
- Take breaks

Intellectual Disabilities
- Implications for how investigation and prosecution will proceed
- Emphasis on interviewing strategies
- See module for detailed information
Module Offers Additional Information

- Alzheimer’s disease
- Physical disabilities
- Communication disabilities
- Deaf or hard of hearing
- Blind or low vision
- Epilepsy
- Autism Spectrum Disorders
- Mental illnesses
- People who use service animals
- People with hidden disabilities

Kindness ... a language that the blind can see and the Deaf can hear.

FOLLOW-UP INVESTIGATION
Follow-Up Investigation
- Detailed follow-up victim interview(s)
- Identify additional evidence / witnesses
- Suspect interview(s)
- Documentation throughout / Final report
- Decisions: Arrest? Refer to prosecutor?

Other Types of Evidence
- Evidence that suspect took actions to exacerbate medical conditions or threatened to do so
  - Withhold medications, induce seizure, etc.
- Injuries from sexual assault may be "explained away"
  - "That's where her hip rubber on the wheelchair"
  - "She had a seizure and fell, was injured"

Other Types of Evidence
- Will likely need current clinical assessment of victims who have cognitive disabilities
Pre-Assault Behaviors

- Isolation
- Manipulation
- Threatening or "grooming" behavior
- Forced compliance

Behaviors During the Assault

- Behaviors and statements that indicate the victim did NOT consent
  - Victim cried, closed eyes, held legs together, froze and/or tried to "be somewhere else"
  - Document how victim "said no" or communicated no (e.g., pushing the suspect away)

Post-Assault Behaviors

- Changes described by victim, family members, friends, teachers, or caregivers
  - Can't sleep, weight gain/loss, not attending work or school, putting locks on door, afraid to answer telephone/door, moving to another residence, avoidance of perpetrator
Residential and Care Facilities
- Identify unique sources of evidence:
  - Staff logs
  - Surveillance video
  - Progress notes
  - Bed checks
  - Injury report forms
  - Staff schedules
  - Training records

Importance of Corroboration
- Successful investigation and prosecution often based on information that generally supports victim credibility, challenges suspect credibility, and/or corroborates details in victim’s statement
  - Most often includes details not directly related to any legal element

Corroboration: Examples
- Suspect denies having access to victim
  - Staff logs indicate he was assigned to bathe victim on the day of suspected abuse
  - Suspect then says he ‘forgot’ this fact
- Victim says bus driver molested him after other students were dropped off
  - On day of suspected abuse, victim dropped of at home 15 minutes later than usual
Corroboration: Examples

- Suspect statements during pretext phone call (monitored, one-party consent call)
  - Suspects don’t usually confess to crime
  - They often make admissions that corroborate the victim’s statement or are used to show that the suspect is being untruthful
  - For example, denies any sexual contact on phone, text, email, but when confronted with evidence, states is was consensual

Corroboration: Examples

- Establish that person can give accurate information, e.g., of daily activities
  - Demonstrates that victim can give accurate, truthful information, e.g., narrative of events

Resources

- Module provides tools for gathering information on people with disabilities
  - Emergency Information Form
  - Personal Information Card
  - Promote use in community, so information can be used in emergency situations
Creating Positive Change

- Develop plan for addressing barriers
  - Prioritize: Barriers to most essential services
  - Strategize: Go for some “easy wins”
  - Identify areas where you need additional resources, knowledge, or competence
  - Budget for increased access

Creating Positive Change

- Create interim plans while working to remove barriers over longer-term
- Enact policies to guide current staff
- Integrate disability issues into training for new and existing staff
- Build relationships with disability organizations BEFORE you need them
Resources

- Module provides Law Enforcement Model Policy on the Americans with Disabilities Act (ADA)
  - Developed by Police Executive Research Forum (PERF). Word document that can be adapted for use
  - Guidance for victims, suspects, and staff