The Facts of Life ...and More

Sexuality and Intimacy for People with Intellectual Disabilities

edited by

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uations have been masked and are based on the authors’ experiences. Names
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abuse, harassment, and any enhancement of penalty provisions that are related to the victim’s disability. It is also important to be familiar with doctrines such as competence to stand trial, competence to confess, and competence to waive Constitutional rights that might be relevant if the defendant has an intellectual disability, and competence to testify which might be relevant if the alleged victim has an intellectual disability.

The authoritative analysis of legally adequate consent for individuals with intellectual disabilities is found in A Guide to Consent published by the AAMR (Dinerstein et al., 1999). This work must always be considered in the context of your state’s law on consent.

CONSIDERATIONS FOR PROFESSIONALS WHO ARE ASKED TO CONTRIBUTE INFORMATION

When a professional is asked to contribute to an evaluation of whether an individual can consent to sexual activity, the professional must clarify several factors:

• What is the purpose of the evaluation?
• Who will make the decision about consent?
• What are the relevant state laws?
• What is the professional’s role?

It may also be useful for the professional to indicate in the body of the report the limits of the professional’s contribution. Leslie Walker-Hirsch, one of the authors of this chapter, often includes the following guiding statement in her clinical evaluations, “This report may be used to assist a Consent Evaluation Team/Committee to decide whether an individual meets the standards for consent. It does not represent a decision regarding informed or meaningful consent.” Ideally, decisions regarding consent should be the result of properly documented team decision making that includes the individual who is being evaluated and people who are familiar with that individual’s abilities, history, and desires for the future. The team members should attempt to reach a consensus about consent or about how to assist that individual to increase his or her ability and perhaps move toward meeting the standards for consent.

Stavis and Walker-Hirsch (1999) suggested professionals consider the following questions when asked to be a contributing member of a consent evaluation committee.

Consider whether the person:
1. Is an adult, as defined by state law
2. Demonstrates an awareness of person, time, place, and event
3. Possesses a basic knowledge of sexual activities
4. Possesses the skills to participate safely in sexual activities, that is, consider whether the person understands how and why to effectively use an appropriate method of birth control and whether the person chooses to do so
5. Understands the physical and legal responsibilities of pregnancy
6. Is aware of sexually transmittable diseases and how to avoid them
7. Demonstrates an awareness of legal implications concerning wrongful sexual behaviors (e.g., sexual assault, inappropriateness of sex with minors, exploitation)
8. Can identify when others’ rights are infringed
9. Demonstrates that “no” from another person means to stop (i.e., understands that it is always inappropriate to have sex or engage in other activities with someone who says no or otherwise objects by words or actions)
10. Knows when sexual advances are appropriate as to time and place (e.g., different places and times may apply to dancing, touching, or sexual intercourse)
11. Does not allow his or her own disability to be exploited by a partner
12. Knows when both parties are agreeing to the same sexual activity
13. Does not exploit another person with lower functioning who might not be able to say no or defend him- or herself
14. Expresses understandable responses to life experiences (i.e., can accurately report events)
15. Can describe the decision-making process used to make the choice to engage in sexual activity
16. Demonstrates the ability to differentiate between truth, fantasy, and lies
17. Possesses a reasoning process that includes an expression of individual values
18. Can reasonably execute choices associated with a judgmental process
19. Is able to identify and recognize the feelings expressed by others, both verbally and nonverbally
20. Expresses emotions consistent with the actual or proposed sexual situation
21. Rejects unwanted advances or intrusions to protect oneself from sexual exploitation
22. Identifies and uses private rooms or areas for intimate behavior
23. Is able to call for help or report unwanted advances or abuse
24. Rejects high-risk or inappropriate sexual activity to meet needs that can be better met in ways that involve less risk, are more appropriate, or do not require consent (adapted from Stavis & Walker-Hirsch, 1999, pp. 63–64)

While the list is long, the purpose of the list is not to be a test for the person with the disability; rather, the list represents documentation of the factors that the professional has considered in the evaluation. The professional’s documentation of information pertaining to the items on the list can contribute to the verification of professional practice.

The answers to these questions will not only summarize the current functional capacity of the individual but should also suggest environmental and programmatic modifications to support the person and move the person closer to meeting the standards necessary for participation in the desired activity.

The legal regulation of sexual activity is most relevant when the intrusion, risk, and irreversibility are highest. Most frequently, the legal issue is consent. As discussed previously, legally adequate consent requires three elements: capacity, information, and voluntariness. But consent can fluctuate—it is not a static one-time-for-all-activities decision. With maturation, learning, and experience, an individual may be able to gain the ability to consent. A dream of a richer life in the future that might include desired sexual activity can be a powerful motivator for a person to make the required effort for personal growth and achievement. The resulting optimism can contribute to mental health and personal satisfaction. But even if an individual never is able to provide legally adequate consent for sexual intercourse, he or she may be able to provide agreement to dance with a friend or hold hands on a date. The law should enhance the lives and liberty of individuals with intellectual disabilities while protecting those who are vulnerable from serious danger and assuring them of justice if harm occurs.

All individuals are unique, and each person’s choices about sexuality reflect that uniqueness. Risk is an inherent part of all activities, including sexual activities. It is the role of professionals to evaluate a vulnerable person’s ability to consent, but it is the person’s role to make informed and deeply personal choices consistent with his or her own
ability, culture, values, and the law. The law must be sufficiently flexible to respect not just a person’s sexuality skills and limitations but also less tangible factors such as temperament, risk tolerance, aspirations, and the right to create one’s own future. Sexuality clinicians must be sufficiently skilled to capture and contribute an accurate reflection of a person’s abilities and dreams so that the law can support the best balance of protection from harm and enhancement of well-being and liberty.

REFERENCES

In re Hayes, 608 P. 2d 635 (Wash. 1980).
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