ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LEVADA LEE, ETC.,

Petitioner,

v.

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Respondent.

CASE NO. 87,071

DISTRICT COURT OF APPEAL
1ST DISTRICT NO. 93-1350
93-1411

BRIEF OF AMICUS CURIAE ADVOCACY CENTER FOR PERSONS WITH DISABILITIES, INC.

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INTEREST OF AMICUS CURIAE

The Advocacy Center for Persons with Disabilities, Inc. ("Advocacy Center") has been entrusted with the responsibility of providing protection and advocacy for persons with developmental disabilities,[1] mental illness, and other disabilities pursuant to federal and Florida law. See Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000, ***et seq.;*** Protection and Advocacy **for** Individuals with Mental Illness Act, 42 **U.S.C.** § 10801, ***et*** *seq.;* and Protection and Advocacy for Individual Rights, 29 **U.S.C.** § 796g; Ch. 87-130, Laws of Florida; Fla. Gov's Exec. Order 94-333 (Nov. *22,* 1994). Congress explained that the purpose of the Protection and Advocacy agencies includes protecting "the legal and human rights **of** persons with developmental disabilities." 42 **U.S.C.** § 6000(b)(8).

Since **its** founding in 1977,[2] the Advocacy Center has developed considerable expertise regarding the problems faced by individuals with developmental disabilities with a special emphasis on those involving residential, rehabilitative, educational, and vocational

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[1] Mental retardation is a developmental disability. ***See*** 42 **U.S.C.** § 6001(8); § **393.063,** Fla. Stat.

[2] The ADVOCACY CENTER was created in 1977 as the Governor's Commission on Advocacy for Persons with Disabilities and **is** now a non-profit corporation designated by the Governor and the Florida Legislature to protect and advocate for the rights of persons with developmental disabilities, mental illness, and other disabilities, pursuant to federal and Florida law. See **87-130,** Laws of Florida; Fla. Gov's Exec. Order 94-333 (Nov. 22, 1994).

services. For example, the Advocacy Center spearheaded litigation to achieve the closing of the Orlando Sunland Center, a state institution for persons with developmental disabilities, and the placement of the Orlando Sunland residents in appropriate community residences.

The United States District Court for the Northern District of Florida, Gainesville Division, appointed the Advocacy Center to serve as the compliance monitor in *Estate* of *LeClair v. Williams*, Case **No. GCA 81-0008 (Aug. 31. 1988).** As compliance monitor, it is the responsibility of the Advocacy Center to monitor the use of psychotropic medications in state institutions, including Marianna Sunland.

Pursuant to federal law, the Advocacy Center, as Florida's Protection & Advocacy agency, investigates incidents of abuse and neglect, including sexual abuse, of individuals with developmental disabilities in state institutions, community residences, and other settings. 42 U.S.C. § 6042(a)(2)(B). The Advocacy Center thus is knowledgeable about the issues involving abuse and neglect of individuals with developmental disabilities. 42 U.S.C. § 6042(a)(2)(A)(i).

The Advocacy Center has in addition to its legal staff a Monitoring Unit which visits facilities which house individuals with developmental disabilities who probably would not be able to initiate contact on their own with the Advocacy Center. In **1992,** the Advocacy Center's Monitoring Team surveyed Marianna Sunland and the three other state institutions for individuals with

developmental disabilities. The Advocacy Center has continued to investigate allegations of abuse and neglect at these institutions and to advocate for those who live there. The Advocacy Center is therefore knowledgeable about the problems at Sunland Marianna and the other similar institutions, including problems of sexual and physical abuse.

The Advocacy Center seeks leave to appear in this matter as *amicus* ***curiae*** in order to fulfill its responsibilities under federal and state law to protect and advocate for the approximately 1500 individuals with developmental disabilities who presently live in Florida's state institutions for individuals with developmental disabilities. These individuals will be profoundly affected by this proceeding, yet without the participation of the Advocacy Center they would not have any voice in this proceeding.

The Advocacy Center has appeared as *amicus* in many cases affecting the rights of persons with disabilities, including: before the Florida Supreme Court in Re: *T.A.C.P.*, 609 So.2d 588 (1992); before the United States Court of Appeals for the Eleventh Circuit in *Heichelbech III v. Evans,* 995 F.2d 237 (11th Cir. 1993), cert. *denied,* 114 *S.* Ct. 389 (1993); ***S.H.*** V. *Edwards, 880* F.2d 1203 (11th Cir. 1989); and *Martinez v. Hillsborough* ***County*** *School Board,* 861 F.2d 1502 (11th Cir. 1988); before the United States District Court for the Middle District of Florida, ***Johnson*** *v. Bradley,* Case #87-369-Civ-T-99A (M.D. Fla.); *Martinez v. Hillsborough* ***County School*** *Board,* Case #87-1308-Civ-T-17A (M.D. Fla. 1989); and before the United States District Court for the Southern District of

Florida, ***Ellen*** S. v. *Florida Board* ***of*** *Bar* Examiners, **859 F.** Supp. **1489** (S.D. Fla. 1994); and *Bridges* v. *Felton*, Case #74-994-Civ-AH (S.D. **Fla.** pending).

As a Protection & Advocacy agency, the Advocacy Center has **a** dual mission: to protect individuals with developmental disabilities from abuse and neglect and to advocate for their civil rights. The Advocacy Center therefore is keenly aware of the tensions that may come into play between the goal of protecting clients from sexual abuse and advocating for their rights to sexuality. The Advocacy Center believes however that these tensions can be reconciled and that protection of individuals from rape and coercive sexuality is essential to providing a safe environment that provides the freedom for individuals to express their sexuality.

As a result of the Advocacy Center's expertise in the rights of individuals with developmental disabilities, including mental retardation, and in investigating abuse and neglect, Amicus believes that this brief will elucidate the policy of normalization and the rights of individuals with developmental disabilities.

STATEMENT OF THE CASE

Plaintiff in this case brought an action in negligence on behalf of her daughter, D.L., a woman with mental retardation. HRS is the defendant. Plaintiff's contend that HRS negligently supervised D.L. and, as a result, she was sexually abused and became pregnant. Plaintiff won a jury verdict of one million dollars at trial, subject to the liability cap set forth in

§ 768.28(5), Fla. Stat. (1995). The First District Court of Appeals found that HRS had sovereign immunity with respect to the negligence alleged in this case. The Court then certified the question: "Where a severely retarded resident becomes pregnant while in HRS care where there is no evidence of negligence as to her impregnation and no specific act of negligence has been alleged, can HRS be held negligent in tort under general doctrine of negligent supervision given the normalization principle?"

SUMMARY OF ARGUMENT

This case involves a very complex set of issues. This court may accomplish great good or great harm for citizens with mental retardation of the state of Florida through its ruling in this case, as well as through the language it uses and the assumptions it makes. In Part I, the Advocacy Center clarifies some of the terms used by the parties and correct some of the misconceptions about people with mental retardation and their sexuality common to both parties.

Women with mental retardation in the state's custody are particularly vulnerable on two fronts: women are historically and presently both far more obstructed from intimate and loving relationships and consensual sex, and at the same time far less protected from sexual abuse. The particular vulnerability of women with mental retardation to sexual abuse while in state custody comes from neglect and indifference as historic as the prohibition on personal relationships.

Part II of the brief addresses the sovereign immunity question certified to the court, and urges this Court to answer the question in the affirmative. *Amicus curiae* Advocacy Center argues that normalization principles endorsed by the Legislature require *both* an affirmation of the sexuality of individuals with mental retardation in state custody *and* intensive efforts at education and planning to ensure that clients not be sexually exploited. It is true for all of us that intimacy and sexuality can be powerful forces for good in our lives, and powerful forces for injury. HRS in cases such as this should not be immune from liability if it cannot show the efforts that it made to maximize the former and minimize the latter. Lack of any effort at all, resulting in a belated discovery of pregnancy, is no more reflective of normalization than an outright prohibition on sexuality.

ARGUMENT

I. BACKGROUND *AND* CONTEXT: MYTHS AND STEREOTYPES ABOUT MENTAL RETARDATION

A. Both Parties Used Outdated and Irrelevant Classifications of Mental Retardation in this Case

The diagnostic descriptions of D.L. made by plaintiffs and defendants in their briefs below in this case lag well behind the research, literature and practice in the field of mental retardation. For example, although the parties in this case repeatedly refer to levels of mental retardation such as "severe" or "profound" (and the Court of Appeals combines the two levels into one), in 1992 the professional organization responsible for these classification schemes, the American Association of Mental

Retardation abolished the four severity grades upon which these terms are based.[3] This was done specifically to "broaden the conceptualization of mental retardation, to avoid reliance on IQ scores to assign a level of disability, and to relate the person's needs to the intensities of supports necessary to enhance the person's independence/interdependence, productivity, and community integration."[4]

The use of IQ ratings alone in the context of this case is inappropriate. IQ scores measure development in cognitive, intellectual skills. They do not measure social competence[5], the ability to control behavior, or other strengths and deficits at issue here,[6] An individual's ability to make social decisions

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[3] American Association on Mental Retardation ***Mental Retardation: Definition, Classification and System of Supports,*** 34 (9th ed. 1992). Instead, it introduced the concept of four levels of support (intermittent, limited, extensive, and pervasive) in four different domains: intellectual functioning and adaptive skills, psychological and emotional considerations, physical health and environmental considerations. This system of classification has already been incorporated or is being incorporated by state mental retardation agencies, see, ***e.g.***, Commonwealth of Massachusetts, ***Eligibility Determination and Need for Supports and Services/A Manual of Policies, Procedures and Practices,*** Executive Office of Health and Human Services, Department of Mental Retardation (scheduled for release on March 1, 1996) (document on file with attorneys for ***amicus),***

[4] Id. at 25.

[5] The cliche of the science or math genius with the pocket protector and substantial social awkwardness illustrates our common understanding that intellectual achievement (or IQ) does not necessarily correlate with social competence.

[6] ***See, e.g.,*** Penny Hauser-Cream & Jack Shonkoff, ***Rethinking the Assessment of Child-Focused Outcomes,*** in H. Weiss & F. Jacobs, eds., ***Evaluating Family Programs (1987);*** ***Vulnerable: Sexual Abuse and People with an Intellectual Handicap 65*** (1989) (hereinafter *Vulnerable)* ("Judgments of ability to consent [should] not be made

regarding relationships and intimacy is not necessarily measured by his or her I.Q. Rather, it is a function of the kind of education and habilitation to which he or she has been exposed.[7] More than intellectual capacity, social competence can be developed and taught and improved, Unlike IQ, it ***must*** **be** taught and developed, or it will barely exist at all.[8] For individuals in state custody, the responsibility to teach, provide habilitation, and maintain social skills falls on the state.[9] Because individuals in

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by uninformed persons based **on** IQ scores or knowledge **of** unrelated topics"). For doubts about the adequacy of IQ scores generally, ***see S.*** Reiss, ***Issues in Defining Mental Retardation, 99*** Am. J. Mental Retardation 1 (1994).

[7] Empirical studies have found that "[d]ifferences in knowledge were related more to respondent's sex and place **of** residence -- reflecting differences in experiences, instruction and interest --than to their IQ levels." Saunders, *The* ***Mental Health Professional, the Mentally Retarded and Sex, 32*** Hosp. & Community Psych. 717, 720 (1981). Studies have also shown that sex education increases knowledge **of** reproduction and contraception and improves social skills and reduces inappropriate behavior of individuals with mental retardation. Abramson, Paul R., Tracee Parker, & Sheila R. Weisberg, ***Sexual Expression of Mentally Retarded People: Educational and Legal Implications,*** **93** Am. J. Mental Retardation 328, 331 (1988).

[8] In fact researchers have found heightened risk of sexual abuse and exploitation in the absence of education about sexuality and assertiveness training. **A** substantial number of educational programs have been developed to this end. Issam B. Amary, ***Social Awareness, Hygiene and Sex Education for the Mentally Retarded - Developmentally Disabled*** **(1980);** Marita McCabe, *Sex* ***Education Programs for People*** with ***Mental Retardation,*** 31 Mental Retardation 377 (1993); Beth Haseltime & Raymond Miltenberger, ***Teaching Self-Protection Skills to Persons with Mental Retardation, 95*** Am. J. Mental Retardation 188 (1990).

[9] Justice Blackmun's concurring opinion in ***Youngberg V. Romeo,*** 457 **U.S.** ***307,*** 325, 102 S. Ct. 2452, 73 L.Ed. 2d 28 (1982), since adopted by a number of federal circuit courts, suggests that **the** obligation to maintain the level of adaptive skills an individual possessed when he or she entered institutional care rises to constitutional dimensions. ***Id.*** at 327. ***See,*** *e.g.*, ***Society***

institutions typically have less information and knowledge about sexuality than their peers in the community,[10] it is essential that the state fulfill this responsibility.

It is crucial that competency to consent to sexual activity be assessed specifically and not inferred--either positively or negatively--from IQ tests. See, *e.g.*, ***People v. Whitten***, 269 Ill. App. 1037, 1042, 647 N.E.2d 1062, 1067 (1995) ("courts should broaden their inquiry in cases involving the inability to give knowing consent to more than just focusing on the IQ or mental ability of the alleged victim"). There are a number of assessment tools that have been specifically developed to assess the sexual knowledge and understanding of individuals with developmental disabilities.[11] Close personal knowledge of the individual involved provides a good basis for learning whether individuals are able to and do consent to sexual activity.[12]

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of Good Will for Retarded Children v. *Cuomo*, 737 F.2d 1239 (2d Cir. 1984); ***Association*** for ***Retarded Citizens v.*** *Olson*, 561 F. Supp. 473, 487 (D.N.D. 1982), ***aff'd***, 713 F.2d 1384 (8th Cir. 1983).

[10] ***See*** Judy E. Hall & Helen L. Morris, ***Sexual*** *Knowledge and* ***Attitudes of Institutionalized and Noninstitutionalized*** *Retarded* ***Adolescents, 80*** Am. J. Mental Deficiency 382 (1976) (noninstitutionalized adolescents were more knowledgeable about sex).

[11] These tests include the Socio-Sexual Knowledge and Attitudes Test (Wish, Fiechtl & Edmonson), and Ednick "Being Me" social-sexual education pictures for persons with developmental disabilities. ***See*** Barbara Edmonson, Katherine McCombs, & Joel Wish, ***What Retarded Adults Believe about Sex, 84 An J. Mental Deficiency*** 11, 12 (1979). As far as ***Amicus*** can tell, none of these tests or any similar assessments were ever done with D.L.

[12] One scholar has observed that ascertaining what individuals with severe mental retardation want is not a very difficult endeavor: "When they are engaged in an [sic] particular

The competence to consent to sexual activity can be developed through appropriate education and training even in individuals who might be labelled "severely" or "profoundly" retarded.[13] However, it will not appear by magic. The lack of sexual education often prevents individuals with mental retardation from being able to demonstrate competency to give consent, particularly the ability to understand the sexual act and its possible consequences.[14] Therefore, an important issue in cases like this one is whether defendants assessed D.L.'s competence in matters related to sexuality when she first arrived, provided the kind of education and training in sexuality-related issues necessary to both ensure that she had a chance at a mutual, consensual relationship and also

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activity we look to see how they respond. Do they appear happy and content? Does their body language signal to you that they want to remain involved in the activity? Or, do they appear duressed? Do they try to escape from the activity? Do they seem to be experiencing any discomfort? Have they engaged in the activity willfully? Do they make repeated attempts to engage in the activity on their own? If they are capable of verbally expressing themselves do they tell you they enjoy the activity or not? If they are unable to but could what do you think they would say?" Fred Kaeser, ***Can People with Severe Mental Retardation Consent to Mutual*** Sex?, 10 Sexuality & Disability *33*, 37 (1992).

[13] Two professionals with clinical experience in assessing individuals with mental retardation have found that most adults with developmental disabilities can satisfy the criteria of knowledge, intelligence, and voluntariness generally found in legal criteria governing consent "if the evaluation tool has been designed to assess their level of understanding and especially their capacity and mode of expression." Thomas-Robert H. Ames & Perry Samowitz, ***Perspectives: Inclusionary*** *Standard* for ***Determining Sexual Consent for*** *Individuals* ***with Developmental Disabilities,*** Mental Retardation 264, 264-65 (1995). These professionals state that individuals who are not able to verbally express informed consent may be able to give informed consent by communicating through responsible interpersonal behavior. Id. at 266-67.

[14] Abramson, *supra* n.7, at *328* (1988).

to protect her from sexual exploitation, and whether they continued to reassess her competence in the area of sexuality as she progressed through their education and training programs. This is required by the principles of normalization.

Finally, the use of "mental age" equivalents is particularly noxious, inappropriate and misleading in cases involving the sexuality of people with mental retardation. The American Association of Mental Retardation does not even consider the use of mental age equivalencies in its diagnostic and classification manual, nor is "mental age" referred to in the major works on normalization. Individuals with developmental disabilities generally possess the physical and sexual maturity of their same age peers.[15] They are not children and should not be considered as children. While age equivalences may be a lawyer's dream because they inevitably give rise to a powerful emotional association with the sexual and social development of a child of similar age, such an association is very likely to be incorrect and always misleading.

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[15] Lynda Mitchell, Ronald M. Doctor, & Donald C. Butler, *Attitudes of Caretakers toward the* ***Sexual*** *Behavior* ***of Mentally*** *Retarded Persons,* 83 Am. J. Mental Deficiency 289, 289 (1978) ("The fact that most retarded persons develop physically at a rate comparable to that of nonretarded persons implies that they experience similar sexual drives and feelings and respond to many of the same sexual stimuli and situations as do non-retarded persons"). See *also* Abramson, *supra* n. 7, at 332 ("Where sexual capacity and sexual functioning are concerned, however, there is no debate: in maturity a mentally retarded individual is clearly an adult").

B. Individuals with Mental Retardation Can And Should Enjoy Intimate Relationships

Throughout this century, states systematically prohibited individuals with mental retardation from engaging in the most fundamental relationships in life through mandatory sterilization, statutory prohibitions on marriage of people with mental retardation, and unsupported legal presumptions that permitted removing a child from a mother based on the status of mental retardation alone.[16] This was due to a fundamental misapprehension about the nature of mental retardation -- the presence of the disability meant an inherent inability to consent.[17] By 1937, thirty-one states had adopted eugenics sterilization laws.[18]

Florida joined in the eugenics trend. When Florida established its first institution for "the Epileptic and Feeble-Minded" in 1919, one of its avowed purposes was "that these unfortunates may be prevented from reproducing their kind, and the various communities and the State at Large relieved from the heavy economic and moral losses arising by reason of their existence." Ch. 7887 April 8-June 6, 1919.

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[16] *See* Susan Stefan, *Whose* Egg is *it* ***Anyway?*** *Reproductive Rights* ***of*** *Incarcerated, Institutionalized and Incompetent Women, 13* **NOVA** L. **Rev.** 405, 447-453 (1989); Robert Hayman, *Presumptions* of *Justice:* ***Law,*** *Politics, and the Mentally Retarded Parent,* 103 Harv L. Rev. 1202 (1990).

[17] *Vulnerable, supra* n. 6, at *63; see* ***also*** Kaeser, *supra* n. **12 at** 34.

[18] Maureen Crossmaker, *Behind Locked* ***Doors*** *-- Institutional Sexual Abuse,* 9 Sexuality & Disability 201, 204 (1991).

These state actions were based on myths and stereotypes about individuals with mental retardation, including individuals such as D.L. In fact, individuals with mental retardation can engage in intimate relationships and derive great joy **from** them.[19] Because sexuality is an integral and important aspect of any person's life, ignoring it for those who are largely dependent upon others for education and training is to deny them full personhood.[20]

People with what is called "severe" or even "profound" mental retardation (these are outmoded classifications, *see supra)* do have sexuality and sexual needs.[21] The understanding and acceptance of the sexuality of persons with "severe" mental retardation is not new in the field of mental retardation; it has been recognized for twenty-five years. The chapter in the classic text on normalization devoted to sexual activities specifically concerns individuals with "severe" retardation.[22] Therefore, to the extent that plaintiff argues that individuals with "severe" or "profound" retardation should not have a right to be considered sexual beings,

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[19] Huntley, Cristy & Susan Benner, *Reducing Barriers to* Sex ***Education*** for ***Adults*** *with Mental* ***Retardation,*** **31** Mental Retardation 215 (1993).

[20] ***Id.***

[21] See n.15, ***supra;*** Kaeser, *supra* n. 12, at **34-35.** ***See*** *also* ***In re Anthony,*** 402 Mass. 723, 524 N.E.2d 1361 (1988) (reversing probate court order that individuals with mental retardation in state institutions be tested for AIDS, given the institution's policy of permitting and facilitating sexual contact in general, including homosexual contact **of** Anthony, a man with "moderate" mental retardation. **The** court found such testing to be an agency decision absent statutory directive to **the** contrary).

[22] Wolf Wolfsenberger, ***The Principle of*** *Normalization in Human* ***Services*** 165, 167, 168 (1972).

or to engage in consensual, mutually desired sex solely because of their levels of mental retardation, ***amicus*** contends that this is at odds with their civil rights and the principles of normalization.

The right of individuals with mental retardation to consensual sexual activity, has been recognized in Florida law, 393.13(3), Fla. Stat., and in case law, *see, e.g., Wyatt* ***v.*** *Stickney,* 344 F. Supp. *387* (N.D. Ala. 1972), ***aff'd*** *in pertinent part and rev'd in part,* ***sub*** *nom. Wyatt v. Aderholt* (5th Cir. 1974).

C. Women with Mental Retardation Are at Higher Risk of Rape and Sexual Abuse than Other Women

Women with mental retardation are far more vulnerable than other women **to** rape and sexual abuse.[23] While historically seeking **to** prevent consensual relationships, the state has **a** shameful history of failing to adequately protect women with mental retardation in its care. People with mental retardation are sexually abused four times more often that non-retarded people.[24] The majority of this abuse **is** perpetrated by individuals known to the victim and not **by** strangers.[25] Data consistently conclude that over seventy-five per cent of individuals with mental

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[23] Clarence Sundram & Paul Stavis, *Sexuality and Mental Retardation: Unmet Challenges,* **32** Mental Retardation **255,** 256 (1994) ("It is generally recognized that people with developmental disabilities are at an increased risk for sexual assault and sexual abuse").

[24] Lynne Muccigrosso, *Sexual* ***Abuse*** *Prevention Strategies and Programs* ***for*** *Persons with Developmental* ***Disabilities,*** 9 Sexuality & Disability **261, 261** (1991).

[25] ***Id.*** at 262.

retardation have been sexually abused.[26] Vulnerability to sexual assault is also increased for residents of institutions.[27]

Lack of sex education increases vulnerability to exploitation by others, and decreases chance of reporting abuse.[28] An individual who does not know what abuse means is unlikely to know how to stop abuse.[29] If an institution such as Sunland Marianna in fact had a policy permitting or encouraging voluntary, consensual sex,[30] it should also have had provision for privacy and intensive education, including assertiveness training, the right to say no, and the propriety of reporting unwanted sexual advances immediately.[31] Because of their particular vulnerability to potential abuse or exploitations, individuals with mental

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[26] Marilyn M. Stromsness, *Sexually Abused Women with Mental Retardation: Hidden Victims, Absent Resources*, in Mary E. Willmuth & Lillian Holcomb, eds., *Women with Disabilities: Found Voices* 139, 140 (1993); Crossmaker, *supra* n. 18, at 204.

[27] Crossmaker, *supra* n. 18, at 204. In part, this is because of the greater likelihood of staff abuse.

[28] Stromsness, *supra* n. 26, at 140.

[29] Muccigrosso, *supra* n. 24, at 262. Thus, individuals frequently report that their private parts have been touched by family or friends, but they did not know that it was okay for them to say no to the touch. Id.

[30] Sunland Marianna apparently did not have a written policy relating to its residents' sexual activities. As this case demonstrates, such a policy is highly advisable. *See* Sundram & Stavis, *Sexual Behavior and Mental Retardation*, 17 Mental & Physical Disability L. Rep. 448, 455 (1993) (hereinafter Sundram & Stavis, *Sexual Behavior)*; Susan Stefan, *Dancing in the Sky without a Parachute: Love and Sex in Institutional Settings*, in Clarence Sundram, ed., *Choice and Responsibility* (1994) (hereinafter Stefan, *Dancing).*

[31] *See generally* Stefan, *Dancing, supra* n. *30;* Sundram & Stavis, *Sexual Behavior, supra* n. *30.*

retardation need training to identify situations where a person is at risk for undue harm, abuse or exploitation, to learn how to avoid or extricate themselves from such situations.[32]

Many good curricula have been developed for preventing sexual abuse and providing sexual education for persons with disabilities.[33] Because of the learning styles of most persons with developmental disabilities, participatory instruction is more effective than lecture.[34] Role-playing and dramatization are useful techniques.[35] Moreover, the education program cannot be limited to individuals with developmental disabilities but must also include careproviders, workshop staff, teachers and family so that they may reinforce appropriate behaviors and work to further self-esteem.[36]

II. SOVEREIGN IMMUNITY SHOULD NOT BAR CLAIMS OF NEGLIGENT SUPERVISION IN STATE DEVELOPMENTAL INSTITUTIONS

A. The Court of Appeals Misinterpreted Normalization Policy

The policy of normalization has been distorted by equating normalization with level of supervision in this case. Normalization is "the utilization of means which are as culturally normative as possible, in order to establish and/or maintain personal behaviors

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[32] Ames & Samowitz, *supra* n.13, at *266.*

[33] Muccigrosso, *supra* n. 24, at *265-270.*

[34] *Id.* at 270.

[35] Id.

[36] Id. at *270.*

and characteristics which are as culturally normative as possible."[37] In less cumbersome language, normalization means living a life that is as close to that of a non-retarded person in every way, especially in the area of living environment and personal choice. Thus, living in a house in the community with full-time staff providing a higher level of supervision may be far more normalizing than living in an institution, eating designated food at designated times, and having no choice about the day's activities, even if the institution provides a far lower degree of supervision.

Normalization is not synonymous with lack of supervision; instead, it has fundamentally altered the nature of supervision. Rather than simply performing a custodial function, staff facilitate learning and independent choice making. For example, instead of cooking dinner for residents and feeding them, normalization principles would have staff assist individuals, to the extent that assistance is necessary, in menu-planning, grocery shopping and cooking, and in training residents to obtain more independence in these skill areas.

Similarly, with respect to sexuality, normalization does not mean that individuals with "severe" mental retardation should be left without any supervision and without adequate training or other plans to protect them from unwanted sexual activity. Normalization with respect to sexual activity requires intensive efforts to train and educate the individuals with mental retardation as well as with

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[37] Wolfsenberger, *supra* n.22, at 28.

close personal knowledge of the individual. For example, staff should determine whether individuals are capable of removing themselves from an unwanted activity or, if not, expressing their displeasure in an adequate fashion in order to alert staff.[38] Even individuals with "profound" retardation have been successfully taught to communicate their desires for sex and to proceed with sex only after obtaining the agreement of their partner.[39]

Normalization is "both a process and a goal;" it "requires hard work, planning, consideration, sensitivity and care."[40] Under normalization principles, "imposition of either unnecessarily stringent or indefensibly lax standards would be equally inappropriate."[41] As to D.L., the goal of normalization would be that "[a]s much as possible, [her] wishes and desires should carry the same weight as they would in ordinary circumstances outside of a human management context."[42]

Issues of normalization with regard to sexuality in the context of an institutional setting are paradoxical in many ways, not because of the mental retardation of the residents but because of the nature of institutional life. Ironically, institutions like Marianna Sunland were first established explicitly to prevent their residents from having sex: "most of our residential institutions

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[38] Kaeser, *supra* n. 12, at 38.

[39] Id. at 38-39.

[40] Wolfsenberger, *supra* n.22, at 214.

[41] Id. at 88.

[42] Id. at 87.

for the mentally retarded owe their location, isolation, size and design to attempts to impose celibacy on the residents by segregating them from the community and from members of the opposite sex."[43]

The principles of normalization do encourage the recognition that clients have sexuality and sexual needs, as well as the recognition that these needs may lead to greater client vulnerability to sexual exploitation and abuse. These principles lead to a requirement of intensive sex education, not just about biological facts of life and the need for safety and contraception, but assertiveness training, the right to say no, and the propriety of reporting unwanted sexual advances immediately. For clients who are engaging in a relationship characterized by mutual desire, the principles of normalization require that provisions be made for these relationships through rooms with privacy. Any claim by an institution that it is following principles of normalization that does not also have these as regular features should be regarded with skepticism.

B. Normalization Does Not Require Sovereign Immunity For Claims of Negligent Supervision

The court below rejected plaintiffs' claim for negligent supervision, finding that constant supervision is inconsistent with the state's normalization policy, and that normalization warranted the application of sovereign immunity. ***State of Florida v. Lee,*** 665 So.2d 304 (Fla. 1st DCA 1995).

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[43] ***Id.*** **at 168.** ***See also, supra,*** at 12.

The court specifically noted as reasons for sovereign immunity the lack of evidence of the date of conception and the surrounding circumstances. Since neither voluntary sexual activity nor wrongful birth are actionable, the essence of the harm in this case is not the pregnancy but the alleged sexual abuse. In fact, plaintiffs here alleged that they had offered factual evidence that D.L. had sex involuntarily on more than one occasion.[44] If proven at trial, as plaintiff argues, the fact that D.L. had sexual intercourse on more than one occasion without any knowledge of the

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[44] The court below did not address the standard for determining consent for individuals with mental retardation. This is a complex and difficult issue that would warrant a full hearing. Although Florida courts have not reached this issue, other states have taken several different approaches to sexual activity. Some require a showing of an appreciation that there are moral dimensions to the decision to engage in sexual conduct. Some require a showing that the person could understand the nature of sexual conduct and the possible consequences of that conduct. Sundram & Stavis, *Sexual Behavior, supra* n. 30, at 451. The New Jersey Supreme Court has held that only an understanding of the sexual nature of the act and a voluntary decision to participate is required. People *v. Olivio, 123* N.J. 550, 564, 589 A.2d 597, 605 (1991) (finding that an individual is not competent to consent to sexual defect "if, at the time of sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in each conduct with another.")

Experts have suggested that the standard of knowing and intelligent consent can be applied to most individuals with mental retardation if accommodations to their disabilities are made, See *supra,* n. 13.

The ultimate issue of whether sex was consensual is a question of fact for the jury. This issue can be a difficult one, for women without disabilities as well as women with disabilities.

staff indicates not normalization but an atmosphere of indifference.[45]

Sovereign immunity is about protecting the state's ability to make policy and planning decisions. But here neither Marianna Sunland nor HRS had a policy on sexual activity. What happened here is the predictable outcome of the lack of a policy. *Amicus* believes that HRS should have a policy that protects voluntary sexual activity while giving individuals the tools to protect themselves. Such a policy is not evident here.

In fact, as is recognized in case law, it is institutionalization and not supervision that is "antithetical" to normalization. *Halderman v. **Pennhurst, 612*** F.2d 84, 93 (3d Cir. 1979) (quoting Mason & Menolascino, ***The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface,*** 10 Creighton L. Rev. 124, 156-57). The goal of normalization is for individuals with mental retardation and developmental disabilities to live in small homes in the community and not in large institutional settings. This goal has been recognized by Florida statutes. § 393.062, Fla. Stat. (1995), provides that "existing state programs for the treatment of individuals who are developmentally disabled, which often place clients in large state institutions, are unreasonably costly, are

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[45] The court below noted that normalization includes the right to have visitors and have spend time in the community. ***Lee,*** 656 So.2d at 306. However, the question of whether D.L. had visitors or left the institution during the time when she had sexual intercourse is a question of fact. There apparently was no dispute below that the only possible men with whom she could have had sex were either residents or staff.

ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to a great majority of clients." Over the past twenty-five years, Florida has made some progress towards normalization. There are now many individuals classified as having "severe" and "profound" mental retardation, including D.L., who live in the community in small facilities run by private providers and not in institutions.

The fact that D.L. is now living in the community leads ineluctably to the question of why she was institutionalized at Marianna Sunland. If it was for intensive supervision, then how did she get pregnant without the knowledge of staff? If it was for habilitation, then what training did she receive about sex and about prevention of sexual abuse? The principles of normalization are at odds with D.L. living in an institution at all. Had defendants been truly responsive to normalization, D.L. might have been living in the community many years ago.

It is ironic that the court below relied on the principal of normalization to provide HRS with greater protection from liability than private providers of similar services. § 768.28(5), Fla. Stat. (1995), provides that the state and its agencies and subdivisions shall be "liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before the judgment." The dollar amount of liability is limited to $100,000 for one claim and a total maximum

of $200,000 unless a greater amount is approved by the Legislature. *Id.*

Florida recognizes that potential civil liability is essential as a deterrent to violations of the rights of individuals with developmental disabilities. § 393.13(5), Fla. Stat. (1995), specifically provides: "Any person who violates or abuses the rights or privileges of persons who are developmentally disabled as provided by this act shall be liable for damages as determined by law." While the statute recognizes good faith immunity for actions in connection with evaluation, admission, habilitative programming, education, treatment or discharge of individuals, the legislature made clear that it did not relieve liability for negligence. Id. Thus, there is a statutory private right of action for claims like those at issue here.

Given Florida's statutory preference for community homes as opposed to institutions, sovereign immunity should not be provided for claims of abuse and neglect at state institutions resulting from negligent supervision. Such claims should be dealt with on the merits. If the facts alleged are inadequate to show negligence, or to prove negligence at trial, the proper remedy available to both public and private providers is a motion to dismiss for failure to state a claim or a motion for judgment notwithstanding the verdict.[46] To shield state institutions from claims for which private facilities may be liable would create

[46] Defendants in this case did move for a directed verdict or judgment notwithstanding the verdict. The court below did not reach that motion.

incentives to continue state institutions despite the statutory mandate for "abatement" of institutions.

C. **Precedent Supports Rejection of Sovereign Immunity** Here

Under Florida law, sovereign immunity does not shield operational acts but does shield discretionary acts. The first step in determining whether sovereign immunity applies is to determine the nature of the governmental services at issue. *Trianon Park Condominium v. City of Hialeah, 468* So.2d 912, 919-21 (Fla. 1985). Here, HRS' role in providing services to persons with developmental disabilities falls within category IV of *Trianon,* professional, educational and general services for the health and welfare of citizens. *Id.* at 921. *See also Department of Health & Rehabilitative Services v. Yamuni,* 529 So.2d 258, 261 (Fla. 1988) (HRS role in child abuse cases falls within category IV). In contrast, in *Department of Health and Rehabilitative Services v. B.J.M.,* 656 So.2d 906 (Fla. 1995), the placement decision had been made pursuant to delinquency laws, in large part, in order to protect public safety and therefore was in category II.

The court below relied on B.J.M. In that case, the court held that the legislature had vested in HRS "broad discretionary authority to determine an appropriate course of remedial treatment for the children that come within its custody through dependency and delinquency proceedings." 656 So.2d at 913. In B.J.M., the governmental activity -- placement of juveniles in delinquency proceedings -- was inherently governmental in nature. As the court noted in *Trianon,* 468 So.2d at 921, the waiver of sovereign

immunity was intended to be broad "but clearly was not intended to create causes of action for activities that are inherently governmental in nature." As discussed above, the principle of normalization means that caring for individuals with developmental disabilities is not inherently governmental in nature.

In contrast to *B.J.M.*, where placement was entirely discretionary, the state here owed a duty to D.L. to protect her from abuse and neglect. Florida law states that individuals with developmental disabilities "shall have a right to dignity, privacy, and humane care, including the right *to be free from sexual abuse in residential facilities."* § 393.13(3)(a), Fla. Stat. (1995). The Bill of Rights further provides that individuals "have **a** right to be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse or neglect." § 393.13(3)(g), Fla. Stat. These rights apply to individuals in state custody as well as to individuals in private facilities. See also Youngberg v. Romeo, 457 U.S. 307 (1982) (recognizing that individuals with mental retardation have a right to **be** protected from harm in state institutions); ***Department of Health and Rehabilitative Services v.*** *Whaley*, ***574*** So.2d 100, 103 (Fla. 1991).

Here, the issue is alleged negligent supervision. The extent to which a particular individual needs supervision is determined by the individual habilitation plans developed by the treatment team. The court below contended that one-to-one supervision of residents is in conflict with the normalization principal. Lee, **656** So.2d at

306.[47] But there is no HRS policy prohibiting one-to-one supervision of residents under all circumstances.[48] Providing one-to-one supervision for short period of time as recommended by a treatment team may be consistent with the normalization principal if training and habilitation necessary to eliminate the need for one-to-one staffing is provided. For example, if a treatment team determined that an individual was sexually aggressive and had not learned the importance of obtaining consent before having sex, providing supervision when he **was** with vulnerable individuals would be appropriate while he **was** being trained in the necessity of obtaining consent. The whole point of normalization, as shown by this example, is that constant supervision would not be a substitute for training about consent -- training that would be necessary to free him from the need for supervision and promote his independence.

That appropriate supervision geared to meet individual needs is necessary **was** recognized by the court in Wyatt v. Stickney, *supra,* a leading court decision recognizing the right of individuals with mental retardation to sexual interaction. Wyatt Standard 21 provides:

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[47] *Amicus* does not contend that one-to-one supervision was necessary for D.L. or any resident of Sunland Marianna.

[48] In fact, as the Advocacy Center has observed, treatment teams do recommend one-to-one supervision when they judge it necessary. See **also** Clarence J. Sundram, *Obstacles to Reducing Patient Abuse in Public Institutions, 35* Hosp. & Commun. Psych. 238, 240 (1984) (one-to-one supervision generally provided where necessary).

> The institution shall provide, under appropriate supervision, suitable opportunities for the resident's interaction with members of the opposite sex, except where a Qualified Mental Retardation Professional responsible for the formulation of a particular resident's habilitation plan writes an order to the contrary and explains the reasons therefor.

Id. at 399. In ***Astorino v.*** *Lensink*, ***1993*** U.S. Dist. Lexis 12748 (D. Conn. Aug. 24, 1993), the court held that an individual with mental illness who had been subjected to sexual abuse had stated a cause of action and raised a triable issue of fact with respect to claims of negligent supervision, the failure to provide a written plan, and the failure to provide sex education.

The issue presented by this case is whether HRS failed to implement the level of supervision recommended by her treatment team. The implementation of policies and planning-level decisions must be classified as operational-level activity to which sovereign immunity does not attach. ***See Dunagan v.*** *Seely*, 533 So.2d 867, 869 (Fla. 1st DCA 1988) (negligent failure to follow planning-level decision to maintain locked cell doors except for five minutes every half hour is operational-level activity).

The next step is to apply the four part test set forth in ***Evangelical Brethren Church v. State,*** 67 Wash.2d 246, 407 P.2d 440 (1965), and adopted in Commercial ***Carrier Corp. v. Indian River County,*** 371 So.2d 1010, 1020 (Fla. 1979).

The first question under ***Evangelical Brethren*** is: Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? The answer to this question is no. The state has the discretionary authority to operate or not to operate state institutions for persons with

developmental disabilities. However, once the state decides to operate the institution, it assumes the common law and statutory duties to protect individuals from sexual abuse and physical abuse, just as a private facility is obligated under like circumstances. ***See*** *Avallone* ***v. Board of County Commissioners of Citrus County, 493*** So.2d 1002, 1005 (Fla. 1986)(once government decides to operate a swimming facility, it assumes common law duty to operate it safely); ***Comuntzis v. Pinellas County School Board, 508*** So.2d 750, 752 (Fla. 2d DCA 1987) ("once the school board decides to operate a particular school, it assumes the common law duty to operate that school safely").

The court below compared the state to parents rather than to private facilities. However, adults with mental retardation are not children and should not be considered as children. Many adults with developmental disabilities live in the community in a wide variety of community settings, including foster homes, small group homes, 6-bed intermediate care facilities, and large group homes and intermediate care facilities. As a large institution, Sunland Marianna is more analogous to group homes and intermediate care facilities which provide congregate care for a substantial individuals than to a family homes. Group homes and intermediate care facilities face liability for negligent supervision and negligent training without the protection of sovereign immunity.[49]

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[49] ***See, e.g., Astorino v.*** *Lensink*, 1993 U.S. Dist. Lexis 12748 (D. Conn. Aug. 24, 1993) (denying sumary judgment on claims arising from alleged sexual abuse in private facility). ***See also*** Sundram & Stavis, Sexual Behavior, ***supra,*** n. 30, at 454 (private agencies amy be held liable for harm under tort law for failure to

The second question under Evangelical ***Brethren*** is: Is the questioned ***act,*** omission, or decision essential to the realization or accomplishment of that policy, program, or objective ***as*** opposed to one which would not change the course or direction of the policy, program, or objective? The answer to this is again no ***as*** providing adequate supervision and appropriate training in sexuality would not be antithetical to normalization policy and is in fact mandated by normalization policy.

The third question under ***Evangelical Brethren*** is: Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? Again, the answer is no. Day to day supervision of individuals with developmental disabilities does not require the exercise of basic policy evaluation, judgment and expertise.

The fourth and final question under ***Evangelical Brethren*** is: Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? The answer to this question is yes. But ***as*** this Court noted in *Yamuni*, 529 So.2d at 260, question 4 has limited value under Florida's statutory waiver of immunity "because the answer will almost invariably be yes unless the government employees, officers, or agents are acting without authority outside the scope of their office or employment."

The ***Evangelical Brethren*** court said that "[i]f, however, one

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protect incapacitated persons from sexual assaults and negligent supervision).

or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved." Id. at 445. Since here three of the four questions have negative answers, further inquiry is necessary. The essential question is whether the government acts are discretionary or operational. The Court in set forth in *Commercial Carrier Corp.,* 371 So.2d at 1021-22 set forth three policy considerations that need to be balanced.

The first policy consideration is the importance to the public of the function involved. Here, caring for individuals with developmental disabilities is an important public function. Individuals with developmental disabilities have a wide variety of abilities and disabilities. When hundreds of individuals are confined in institutions, there are many opportunities for abuse and neglect. Supervision is essential to protecting them from sexual abuse along with is close personal knowledge of the individual and training about sexuality.[50] When the state takes individuals into its custody to provide care and treatment, the public has the right to expect that the individuals will be protected from harm. Similarly, in *Comuntzis,* 508 So.2d at 753, the court found that the importance of supervision of students in school weighed toward an operational characterization of the function involved.

The second policy consideration is the extent to which governmental liability might impair free exercise of the function.

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[50] Sundram & Stavis, *Sexual Behavior, supra* n. 30 at 454-55.

As a preliminary matter, Florida state law calls for the abatement of state institutions for individuals with developmental disabilities. As state law recognizes, caring for individuals in the community is generally cheaper and more beneficial for the individual involved. § 393.11, Fla. Stat. Moreover, as discussed above, private facilities provide care for many adults with developmental disabilities, and they are not protected by sovereign immunity from liability. The court's analogy to parental responsibly is inappropriate given that the individuals involved are adults and many do not live with their parents but live in the community in private facilities.[51] Finally, the issue of whether a facility has breached a duty of care by failing to provide adequate supervision is usually a question of fact for the jury. *Comuntzis,* 508 So.2d at 753.

The third policy consideration is the availability of remedies other than tort suits for damages to the individuals affected. As in *Comuntzis,* 508 So.2d at 753, it appears that if D.L. is to be compensated for harm suffered from sexual abuse, her recourse is through a tort suit. In contrast, in *B.J.M.*, 656 So.2d at 914, the court noted that the entire juvenile court system had been set up to "supervise HRS's function in delinquency and dependency cases and to provide a remedy for any default." There are no other remedies available to her,

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[51] As with their same age peers, adults with mental retardation have needs for independence. In any event, parental care is inappropriate as a model of care for adults because, as a general rule, adult children outlive their parents.

Analysis of ***Evangelical Brethren and Commercial Carrier*** leads to the conclusion that the acts in this case were operational rather than discretionary. This Court has recognized, "all governmental functions, no matter how seemingly ministerial, can be characterized as embracing the exercise of some discretion in the manner of their performance," ***Commerical Carrier, 371*** So.2d at 1021. In ***Yamuni,*** this Court held that the actions of caseworkers in investigating and responding to reports of child abuse simply could not be elevated to the level of policy-making or planning. 529 So.2d at 260. The court stated, "We have no doubt that the HRS caseworkers exercised discretion in the dictionary or English sense of the word, but discretion in the ***Commercial Carrier*** sense refers to discretion at the policy-making or planning level. We agree with the district court that the actions of caseworkers investigating and responding to reports of child abuse simply cannot be elevated to the level of policy-making or planning." ***Yamuni,*** 529 So.2d at 260.

Moreover, the claim of inadequate supervision is not necessarily limited to the staff to client ratio. Staff may provide inadequate supervision for many reasons unrelated to staffing ratio. Available staff may simply not pay attention to the individuals whom they are responsible for supervising. Clearly, allegations concerning acts of negligence by those on duty concern acts at an operational level and are therefore not barred by sovereign immunity. ***See Cutler v. City of Jacksonville*** Beach, 489 So.2d 126, 128 (Fla. 1st DCA 1986) (city legally responsible for

negligence on the part of lifeguards or members of the beach patrol on duty at the time that drowning occurred).

If the facts in this case showed that defendants created a risk of danger by placing vulnerable individuals with mental retardation in close proximity to other individuals with mental retardation and a history of sexual aggression without providing adequate supervision,[52] HRS would have had a correlative duty of care to protect vulnerable individuals. This case is very similar to ***Department of Health & Rehabilitative Services v. Whaley, 574*** So.2d 100 (Fla. 1991). There the court held that the placement of juvenile delinquents in a room in an HRS detention facility is an operational function not protected by sovereign immunity.

To allow sovereign immunity to exempt HRS from any claim of negligent supervision would give approval for HRS to be indifferent and callous to sexual and physical abuse without taking any preventive efforts.

CONCLUSION

The certified question misses the point of normalization principles. Normalization in an institutional context is not a matter of supervision or non-supervision. It is a matter of giving the clients choice in decisions in their daily lives and the education and training necessary to make their own choices.

The principles of normalization passed by the Legislature as a direction to HRS are vital and should not be undermined. The

[52] *Amicus* believe that an important question is whether D.L. ever received any sexual education, including training in her right to say no to unwanted sexual activity.

proper answer to the certified question thus rests on four interrelated principles, First, individuals with mental retardation people, like other people, need, desire, and are entitled to voluntary, mutual, intimate relationships, and HRS is obligated by the Legislative incorporation of normalization principles into § 393, Fla. Stat. (1995), to take affirmative steps to promote and protect such relationships for people in its custody. Second, people withmental retardation --especially women--are particularly vulnerable to sexual exploitation and abuse, and that this is especially true in institutional settings. Third, normalization with respect to sexual activity among people with mental retardation in state custody requires intensive efforts from HRS at training, education, and close personal knowledge of the individual.[53] Fourth, the ultimate goal of normalization is for individuals with mental retardation to live in community settings, where sovereign immunity does not apply, rather than in institutions.

We submit that based on these principles and the foregoing discussion, sovereign immunity should not shield the state for liability for negligent supervision in institutions for individuals with mental retardation.

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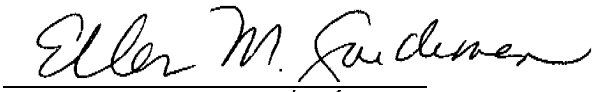
[53] *See, e.g.,* Kaeser, Can *People with Severe Mental Retardation Consent to Mutual Sex?,* Sexuality and Disability (concluding that they can, but highlighting the need for staff involvement to ensure that neither individual is being coerced and to ensure client health and safety).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to LAURA RUSH, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32301 and to EDWIN R. HUDSON, Henry, Buchanan, Mick, Hudson & Super, P.A., Post Office Drawer 1049, Tallahassee, Florida 32302, and DEAN R. LeBOEUF, ESQ., RONALD W. BROOKS, ESQ., RHONDA S. BENNETT, ESQ., LeBoeuf & Bennett, P.A., 863 East Park Avenue, Tallahassee, Florida 32301 by U.S. Mail on this 21st day of February, 1996.

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