

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

[REDACTED]

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

By: Sandra J. McCarthy, Esq.
PO Box 84
Wynantskill, New York 12198

██████████

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED:

The request of ██████████ that the substantiated report dated ██████████
██████████, ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed sexual abuse and neglect.

The substantiated report of Neglect is properly categorized, as a Category 2 act.

The substantiated report of Sexual Abuse is properly categorized as a Category 1 act.

NOW, THEREFORE, IT IS DETERMINED that reports resulting in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list of the Vulnerable Persons' Central Register (VPCR), and the report to be permanently retained. Thus, the record of this report for Sexual Abuse shall be permanently retained by the VPCR, and the Subject's name shall be placed permanently on the staff exclusion list, pursuant to SSL §§ 493(5) and 495.

ALSO, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five

years. The record of the report for Neglect shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: May 31, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Juliane O'Brien, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Sandra J. McCarthy, Esq.
PO Box 84
Wynantskill, New York 12198

[REDACTED]

2.

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], [REDACTED] of abuse and/or neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 1

It was alleged that on or about and between [REDACTED], and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you engaged in inappropriate conversations of a sexual nature with a service recipient.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed sexual abuse when you engaged in sexual contact with a service recipient by grabbing her buttocks and putting your hand down her pants.

This allegation has been SUBSTANTIATED as Category 1 sexual abuse pursuant to Social Services Law § 493(4)(a).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. The facility, located at [REDACTED], is a residential treatment facility for adolescents, and is licensed by the New York State Office of Alcoholism and Substance Abuse Services (OASAS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged abuse and/or neglect, the Subject had been employed by [REDACTED] since [REDACTED] 2007. The Subject worked as a Certified Alcoholism and Substance Abuse Counselor (CASAC). (Hearing testimony of Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 17 years old, and had been a resident of the facility for approximately 4 months. The Service Recipient is an adolescent female with diagnoses of opiate dependence, amphetamine dependence, marijuana dependence, alcohol abuse, and sedative/hypnotic/anxiolytic abuse. (Justice Center Exhibit 28)

7. The Service Recipient began using alcohol and marijuana when she was 12 years old. By the time she was 16, she was smoking crack and injecting heroin on a daily basis. Growing up, the Service Recipient was exposed to illegal drug use and domestic violence by her parents. She was admitted to [REDACTED] through her placement in the care and custody of her home county Department of Social Services, having already been unsuccessfully discharged from another residential treatment facility. (Justice Center Exhibit 28, and Hearing testimony of Admission and Discharge Supervisor [REDACTED])

8. On the evening of [REDACTED], the Service Recipient went AWOL from [REDACTED] with another service recipient, returning in the early morning hours of [REDACTED]. (Justice Center Exhibit 4, and Hearing testimony of [REDACTED])

9. Upon their return, the Service Recipient was segregated from the rest of the community while the treatment team decided how best to respond to their AWOL. The Service Recipient's belongings were packed into a large bag, and she spent the rest of the night sleeping in the girl's group room. In the morning, the Service Recipient was moved to an office in the administrative wing of the facility. (Hearing testimony of [REDACTED], Hearing testimony of [REDACTED], and Justice Center Exhibit 25: video footage of [REDACTED])

10. At 11:27 a.m., the Service Recipient and the Subject approached the elevator doors on the first floor of the building. The Subject used his key to call the elevator, and 23 seconds later the elevator doors opened. The Subject and the Service Recipient then entered the elevator. In reviewing the video footage of the elevator, it takes an average of 23 seconds for the elevator doors to open after an employee calls for it, unless the elevator is already sitting at the first floor. The elevator services 3 floors. (Justice Center Exhibit 25)

11. At 11:28 a.m., the Service Recipient comes into view and goes into a room about mid-way down the hall on the second floor. The bedroom is located on the left side of the hallway relative to the direction of the surveillance camera. The Service Recipient exited the bedroom at 11:32 a.m., having changed her clothes, and headed toward the Subject's office, located near the elevator on the second floor. (Justice Center Exhibit 25)

12. At 11:36 a.m., Assistant Manager [REDACTED] entered the elevator on the first floor, carrying 2 large, clear bags appearing to contain clothing. She then exited the elevator on the second floor and went into the Service Recipient's bedroom, leaving one of the

bags of clothing. Then she went into another bedroom farther down the hall and left the other bag in that bedroom. Assistant Manager [REDACTED] then continued down the hall and went down the stairs to the first floor. (Justice Center Exhibit 25)

13. After the Service Recipient changed her clothes, she met the Subject in his office to discuss her AWOL incident. At one point, the Subject walked over to the Service Recipient, put his hands on the arms of her chair, and leaned toward her face as if to kiss her. She pushed him away, and as she stood up to walk out of the office, the Subject pinched her butt cheek. After they got into the elevator to go back down to the first floor, the Subject grabbed the Service Recipient by the shirt, inserted his hand into her sweatpants, and stroked her vagina over her underwear. The Subject then pulled his hand out and licked his fingers. He told the Service Recipient that he wanted an early birthday present, and that he wanted to perform oral sex on her. (Justice Center Exhibits 4, 8, 9, 12, and 14)

14. At 11:38 a.m., the Subject and the Service Recipient came into camera view from the Subject's office, and walked toward the elevator. (Justice Center Exhibit 25)

15. The Service Recipient and the Subject disembarked the elevator on the first floor at 11:39 a.m. and moved down the hall toward the administrative offices. The Service Recipient walked back down the hall and around the corner, returning almost immediately carrying a comforter, and then entered an office to the right, about halfway up the hall. At 11:40 a.m. the Subject exited that same office, holding the fingers of his right hand under his nose, and walked down the hall past the elevator. (Justice Center Exhibit 25)

16. The next day, [REDACTED], after being taken off packed bag status, the Service Recipient disclosed to [REDACTED] what the Subject had done on the previous day when he was assigned to escort her to her room. (Hearing testimony of [REDACTED])

[REDACTED], and Justice Center Exhibit 4)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492[3][c] and 493[1] and [3]) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3[f])

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1), to include:

- (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.

- (h) "Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 1 and Category 2, which are defined as follows:

- (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
- (v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;
- (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) committed the act or acts of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the

category of abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and/or neglect, the report will not be amended and sealed. Pursuant to SSL § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and/or neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed acts, described as “Allegation 1” and “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-24 and 28) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. In addition, the Admission and Discharge Supervisor at [REDACTED] and the Service Recipient’s counselor, [REDACTED] testified on behalf of the Justice Center. [REDACTED], the Assistant Manager of [REDACTED] at the time of incident, testified on behalf of the Justice Center; and [REDACTED], a Supervisor Investigator at the Justice Center testified.

The Subject testified in his own behalf. In addition, two former employees of [REDACTED], [REDACTED], testified on behalf of the Subject; and two former patients of the Subject, [REDACTED] testified on behalf of the

Subject. The Subject also presented two documents (Subject Exhibits A and B) and subpoenaed records from [REDACTED] to be reviewed in camera by the Administrative Law Judge presiding over this hearing.¹

The Justice Center submitted a visual only video, which was extremely helpful and illuminating evidence with respect to the substantiated allegations. (Justice Center Exhibit 25), as well as a video interrogation of the Subject (Justice Center Exhibit 26) and an audio recording of the call made to the VPCR (Justice Center Exhibit 27).

Allegation of Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that he breached his duty, and that his breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488[1][h])

There is no doubt that the Subject was a custodian as defined in SSL § 488(2). He had been working at [REDACTED] for more than 4 years as a CASAC when the incident occurred. Furthermore, the Subject was fully familiar with his ethical duties and obligations as a CASAC working with vulnerable adolescents. (Justice Center Exhibits 19, 20, 21, and Hearing testimony of Subject)

The Subject breached his duty to the Service Recipient by engaging in behavior that crossed ethical boundaries. Pursuant to [REDACTED] Staff-Client Boundaries Policy, “Staff

¹ An application was made by the Subject to [REDACTED] Supreme Court pursuant to 42 CFR §2.64 to disclose the Service Recipient’s treatment records. By Order dated [REDACTED], the Court directed that [REDACTED] provide the records for review by the Administrative Law Judge only. The records were reviewed by the Administrative Law Judge presiding over this Hearing who finds nothing within them of relevance to this proceeding that has not been otherwise admitted in other exhibits.

should never touch clients or permit clients to touch them in a manner which could be construed as inappropriate.” (Justice Center Exhibit 19) Here, the Subject pinched the Service Recipient’s butt cheek, pulled her shirt, put his hand down her pants, and touched her vagina. These actions clearly violate [REDACTED] policy, and therefore constitute a breach of duty.

Additionally, as a CASAC, the Subject is required to abide by a Canon of Ethical Principles. Included within that Canon is a prohibition against engaging in sexual activity with a patient; and a prohibition against exploiting “patients or others over whom they have a position of authority”. (Justice Center Exhibit 20) The Subject exploited a vulnerable young woman who was struggling with her addiction, and was in danger of being terminated from her placement. The Subject was in a position of power over the Service Recipient. His behavior clearly violated the CASAC Ethical Canon and was likely to result in a serious or protracted impairment of the Service Recipient’s mental and emotional condition.

The Subject has consistently denied any inappropriate behavior. However, in his interrogation he admitted to violating another provision in the Staff-Client Boundaries Policy. That provision prohibits contact with former clients, aside from chance meetings in public. In the interrogation, the Subject discussed conversations and visits with a former client from [REDACTED] every year at Christmas time. When the Subject realized he had admitted to violating policy, he tried to minimize the nature of the contact; but his conduct still violates that policy. Indeed, the fact that he had two of his former clients from [REDACTED] testify at the hearing indicates that he maintains contact in violation of this policy. (Justice Center Exhibits 19 and 26; and Hearing testimony of [REDACTED])

In support of his defense, the Subject offered a statement that was given to the Subject’s attorney and that attorney’s investigator by the Service Recipient, dated [REDACTED],

recanting the allegations against the Subject. (Subject Exhibit A) Little weight is accorded this statement for several reasons. First, it was given nearly a year after the incident, while the Service Recipient was incarcerated in [REDACTED] Jail on a subsequent, unrelated matter. Second, the statement was not written in the Service Recipient's hand and uses language inconsistent with the language used by the Service Recipient in her other writings. (Justice Center Exhibits 12, 13, and 14) Far more weight is given to the Service Recipient's handwritten statements given at the time of the incident. Those statements were voluntarily given, with no indication of coercion, and made contemporaneously with the incident.

By all accounts the Service Recipient was a troubled young person. She had been placed in the facility through Family Court, she had been unsuccessfully discharged from another treatment facility, and was struggling with her current placement. When she returned to [REDACTED] after going AWOL, the Service Recipient did not know if she would be allowed to stay. The Subject took advantage of her vulnerability when he breached his duty of care to her. The fact that she did not report his conduct until the next day indicates how deeply she was affected by this incident. Additionally, when the Service Recipient reported the incident to Assistant Manager [REDACTED], she was still too upset to talk about it. [REDACTED] had never seen the Service Recipient that distraught before, so she asked the Service Recipient to write out the allegations. Finally, the testimony at the hearing was that for several days following the incident, the Service Recipient was subdued, which was different from her usual behavior. All of which is evidence of a serious impairment of the Service Recipient's mental and emotional condition. (Hearing testimony of [REDACTED], Hearing testimony of [REDACTED], and Justice Center Exhibit 28)

Allegation of Sexual Abuse

Sexual abuse is defined in pertinent part as "any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law". (SSL § 488[1][b]) In this case, the evidence presented by the Justice Center met the elements of Penal Law §130.52, forcible touching.

In order to make out a case of forcible touching, the Justice Center must establish that (1) the Service Recipient was intentionally, forcibly, touched on her sexual or other intimate areas; and (2) for no legitimate purpose; and (3) either for the Subject's own sexual gratification, or to degrade or abuse the Service Recipient.

In her initial statements made to Assistant Manager [REDACTED], and her subsequent statement to the police, the Service Recipient consistently reported that while they were in the elevator on [REDACTED], the Subject inserted his hand in her pants and stroked her vagina over her underwear. The Subject told the Service Recipient that he wanted a birthday present from her, that he wanted to perform oral sex on her. When the Subject removed his hand from her pants, he licked his fingers. (Justice Center Exhibits 4, 5, 8, 9, 12, and 14)

The Subject contends that the Service Recipient fabricated this story because she was afraid of being kicked out of [REDACTED] after going AWOL. However, this argument is flawed because the Service Recipient did not disclose the incident until after she was taken off packed bag status and taken off segregation status. Stated differently, the Service Recipient did not report the incident until she was no longer in danger of being removed from the treatment program.

Video footage shows Assistant Manager [REDACTED] returning the Service Recipient's belongings to her room at 11:37 a.m. on [REDACTED]. That fact indicates that the Service

Recipient had been taken off packed bag status. The video reveals that at 2:30 p.m., the Service Recipient left the administrative office with her comforter, and headed toward the stairs to go up to her room. This fact also indicates that the Service Recipient was no longer being segregated from the rest of the community. (Justice Center Exhibit 25) Both actions are indicators that the decision had been made to keep the Service Recipient in [REDACTED]. Finally, the Service Recipient waited until the next day, [REDACTED], before making the allegations against the Subject. (Justice Center Exhibit 12)

While there is some evidence in the record that the Service Recipient can be impulsive, when she lies, it is to excuse her own behavior. The detailed nature of the allegations against the Subject do not appear to be impulsive in nature. (Justice Center Exhibit 25, Hearing testimony of [REDACTED], and Hearing testimony of [REDACTED])

Specific details provided by the Service Recipient are corroborated by evidence introduced at the hearing. For instance, the Service Recipient reported that during the incident, the Subject said that he wanted an early birthday present. There was no evidence submitted at the hearing to indicate that the Service Recipient would have any knowledge of the Subject's birthday. In fact, the Subject's date of birth is [REDACTED], so his birthday was 3 days after the incident occurred. (Justice Center Exhibit 8)

After exiting the elevator with the Service Recipient, the Subject took the Service Recipient into an office on the first floor. After exiting that office, the Subject appeared in camera view with the fingers of his right hand resting under his nose for a couple of seconds. He was not rubbing his nose, or trying to stave off a sneeze. He merely held his fingers under his nose. (Justice Center Exhibit 25) After considering all of the evidence, the Service Recipient's statements are deemed credible.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the abuse and neglect alleged. The substantiated report will not be amended or sealed.

Having established that the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse and neglect set forth in the substantiated report. The Service Recipient suffered a serious impairment of her mental and emotional condition. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report of Neglect is properly categorized as a Category 2 act.

The Subject's conduct meets the elements of Penal Law § 130.52, forcible touching. He acted with intent when he inserted his hand into the Service Recipient's sweatpants; his actions were forcible in that the Service Recipient neither consented to nor asked him to touch her vagina. The Subject had no legitimate purpose for doing so; and he did it for the purpose of his own sexual gratification as evidenced by his comment of wanting a birthday present, wanting to perform oral sex on her, and by licking his fingers. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report of Sexual Abuse is properly categorized as a Category 1 act. Substantiation of a Category 1 offense permanently places the Subject on the Staff Exclusion List.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed sexual abuse and neglect.

The substantiated report of Neglect is properly categorized, as a Category 2 act.

The substantiated report of Sexual Abuse is properly categorized as a Category 1 act.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: May 20, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge