

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

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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: Jennifer Oppong, Esq.

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By: Nicole A. Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway, Suite 1910
New York, New York 10006

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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 abuse.

The substantiated report 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)(a) and 495.

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: July 26, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", written over a horizontal line.

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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Jean T. Carney
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
On: ██████████

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: Jennifer DeStefano, Esq.

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By: Nicole A. Murphy, Esq.
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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] of abuse and/or neglect by the Subject of a Service Recipient. (Justice Center Exhibit 1)
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 1

It was alleged that on an unknown date on or about and between [REDACTED], and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed sexual abuse when you subjected a service recipient to sexual contact, by touching her on her breast and/or fondling her either over or under her pants.

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

3. An Administrative Review was conducted and as a result the substantiated report was retained. (Justice Center Exhibit 3)
4. The facility, located at [REDACTED], is a day program for developmentally disabled adults and is operated by [REDACTED], an agency licensed by the Office for

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People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 4)

5. At the time of the alleged abuse, the Subject had been employed by ██████████ since ██████████ as a Developmental Aide III (DA III); and was assigned to activity room █. (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was approximately 40 years old, and had been attending the ██████████ program since 2002. The Service Recipient is a bilingual, ambulatory woman of Lebanese descent with no behavioral issues and a diagnosis of moderate intellectual developmental disability. (Justice Center Exhibit 18)

7. The Service Recipient was assigned to activity room █ at ██████████ and enjoyed attending the program. (Hearing testimonies of ██████████, and Facility Director ██████████) She lived with her parents and took a bus provided by ██████████ to the program. The Service Recipient's bus was consistently the last to arrive in the morning, and the last to leave in the afternoon. (Justice Center Exhibit 11)

8. During the weekend of ██████████ to ██████████ the Service Recipient disclosed to her family that she did not want to go back to the program anymore. She communicated to them, using a combination of words and gestures, that the Subject had touched her breast and had put one hand in her pants to touch her while his other hand was in his pants, touching himself; and that this occurred where they would play ball. (Hearing testimonies of ██████████) The Service Recipient further alleged that she told the Subject to stop, but he did not; and that he told her not to tell her mother. (Justice Center Exhibits 4 and 22)

9. On ██████████, the Service Recipient's mother brought her to the local precinct to file a police report detailing the allegations against the Subject. (Hearing testimony of ██████████)

██████████, and Justice Center Exhibit 15) The Subject was never charged with any crimes arising from this incident. (Hearing testimony of Justice Center Senior Investigator ██████████)

10. The Service Recipient's mother did not want to send the Service Recipient back to ██████████, so she asked the Service Recipient's sister, ██████████, who was fluent in English, to call the facility and inform them that the Service Recipient was not returning to the program. After some discussions within the family, ██████████ also called ██████████ on Friday afternoon ██████████ to report the Service Recipient's disclosures. (Justice Center Exhibits 4, 15, and Hearing testimony of ██████████)

11. On Monday ██████████, the Subject was served with a letter of suspension pending the investigation during a meeting with Facility Director ██████████ and Assistant Director ██████████. (Justice Center Exhibit 17, Hearing testimonies of ██████████ and Subject) The next day, as part of his suspension protocol, the Subject called the facility and spoke with Assistant Director ██████████. During that conversation the Subject described an incident that he said had occurred about three weeks prior to his suspension where he tripped and fell on the Service Recipient. (Justice Center Exhibit 14, and Hearing testimony of ██████████)

12. On ██████████ the Service Recipient was interviewed by Justice Center Investigator ██████████. Also present were the Service Recipient's mother and one of her sisters. During that interview, the Service Recipient stated that the Subject put his hand in her shirt and in her pants; that he told her to not to tell anyone; and that she told him to stop. (Justice Center Exhibit 22)

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.

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 alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

- (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;

substantiated report.

substantiated report must be amended and sealed.

DISCUSSION

committed a prohibited act, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents and an audio recording of various interviews obtained during the investigation (Justice Center Exhibits 1-23). The investigation underlying the substantiated report was initiated by Justice Center Investigator [REDACTED], and concluded by Justice Center Investigator [REDACTED]. Justice Center Senior Investigator [REDACTED] supervised the investigation and testified at the hearing on behalf of the Justice Center. Additional witnesses called by the Justice Center were [REDACTED], family members of the Service Recipient; Facility Director [REDACTED], and Assistant Director [REDACTED].

The Subject testified in his own behalf and provided one document and an audio recording

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of witness interviews (Subject Exhibits A and B).

The Justice Center proved by a preponderance of the evidence that the Subject committed sexual abuse as defined in SSL §488(1)(b). Specifically, the evidence establishes that on at least one occasion the Subject touched the Service Recipient's breast; and put one of his hands in her pants.

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.

By all accounts the Service Recipient is a sweet, friendly woman with moderate intellectual capacity. (Hearing testimonies of Director ██████████, Assistant Director ██████████; and Justice Center Exhibits 4, 18, 19, 20, 21, and 22) She has no documented behavioral issues, and no history of making false reports. (Hearing testimonies of Director ██████████, Justice Center Senior Investigator ██████████; and Justice Center Exhibits 18, 19, 20, and 21).

Initially, several family members testified that the Service Recipient disclosed the abuse to them, and that the disclosure appeared consistent and unrehearsed. They all recalled the Service Recipient describing in words and in gestures that someone named ██████████, at her program, touched her breast and put his hand in her pants; that she told him to stop but he did not; and that he also

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put his hand in his pants. (Hearing testimonies of ██████████)

They further testified that ██████████ told the Service Recipient either "shh" (Hearing testimony of ██████████), or "don't tell you mother". (Hearing testimony of ██████████) Later in the investigation, the Service Recipient was interviewed by Justice Center Investigator ██████████, who recorded the interview, and again she was able to consistently describe being touched, saying no, and being told not to say anything. (Justice Center Exhibit 22). The Service Recipient's consistent recitation of the abuse is credible. She does not have a history of making false claims, and is known to be truthful. By all accounts she enjoyed attending the program, so when she cried and said that she didn't want to go back, her family was immediately concerned.

In his defense, the Subject denies the allegations and contends that there was no opportunity for him to have committed this offense. He claimed that he was never alone in the room with the Service Recipient; but even if he was alone with her, it was not for a long enough period of time to engage in the abuse as alleged.

However, the evidence presented contradicts the Subject's assertion. Director ██████████ testified very credibly about the layout of the room. OPWDD regulations require that the doors to the activity rooms are closed when occupied. There is a window in the door, but there is a blind spot to the right of the door as one looks in from the hallway. This is where the Subject would play a form of garbage can basketball with the service recipients in his care. Director ██████████ also testified that the Service Recipient's bus is always the last to arrive in the afternoon. The bus schedule from the Service Recipient's last week at the program shows anywhere from 3 to 10 minutes between the Service Recipient's bus and the one just prior to her bus that carries another service recipient from activity room █. (Hearing testimony of Director ██████████ and Justice Center Exhibit 11) This is a sufficient period of time for the abuse to have

■■■■■ occurred. The Service Recipient rides the same bus as another service recipient from activity room ■■■■■ who is diagnosed with moderate cognitive functioning, wears a hearing aid in her right ear, and is legally blind. (Justice Center Exhibit 7) This service recipient was interviewed by the Justice Center investigator, but was not asked what she may have heard while waiting for the bus with the Service Recipient. As a result, her statement neither confirms nor refutes the Service Recipient's statements. (Justice Center Exhibit 22) Therefore, the competent evidence shows that the Subject had time between buses, as well as an area in the room that was relatively private, where he could have fondled the Service Recipient without arousing suspicion.

The Subject also raises two alternate theories of how the Service Recipient could have misinterpreted his actions, thereby explaining her accusation. Under the first theory, the Subject recounted an incident in early ■■■■■ where he was sweeping the floor, tripped over a service recipient's foot and fell onto the Service Recipient. The Subject indicated that during that fall he may have inadvertently touched her breast or her leg, but he is not certain. (Hearing testimony of Subject) However, there is no incident report for this event, and according to policy, he should have completed a report. (Hearing testimony of ■■■■■) The Subject further testified that he did not write up the incident because no one was hurt; all the service recipients were present and laughed about it. (Hearing testimony of Subject) However, none of the service recipients in the Subject's activity room who were interviewed remembered this event. (Justice Center Exhibit 22, and Subject Exhibit B)

The Subject's other theory is that the Service Recipient had a close personal relationship with another service recipient in activity room ■■■■■. During his interrogation, the Subject was asked if he had ever told the Service Recipient to not tell her parents about anything that had happened in the class. The Subject denied having said that. However, in response to a subsequent question

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regarding his relationship with the Service Recipient, the Subject described how the Service Recipient and another service recipient were very close. The Subject would admonish the Service Recipient to not get so close to that service recipient because the Service Recipient's mother would get mad. The implication being that the Service Recipient's allegation regarding the Subject telling her not to tell her mother was actually an innocent comment regarding a completely different event.

In weighting recorded and written witness statements against conflicting hearing testimony, the Administrative Law Judge needs to consider several factors, including: (1) the circumstances under which the statements were originally made; (2) information bearing on the credibility of the person who made the statement, and his or her motive to fabricate; (3) the consistency and degree of inherent believability of the statements, the degree of detail provided in the statement, the completeness of the interviewer's questions; and (4) the credibility assessed to any sworn hearing testimony, including the self-serving motivation of the subject to testify in a manner favorable to him or her.

In this case, the Subject could not remember certain salient details regarding the incident where he said that he tripped on another service recipient's foot and fell onto the Service Recipient. In addition, none of the other service recipients who were interviewed remembered this incident. The other service recipients' statements were believable, albeit not very detailed; and the record contains no evidence of their motivation to fabricate. The Subject also stated no other staff was in the room during this incident, contradicting his earlier assertion that there was always other staff present unless one was escorting a service recipient to the rest room. Finally, the fact that the Subject did not document the tripping event, in contravention of ██████████ policy, lends credence to the Justice Center's contention that the Subject fabricated that incident.

Taking all of the above factors into consideration, the Subject's testimony is not credited.

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The combination of testimony taken at the hearing, and the documents received into evidence, proves that it is more likely than not that the Subject had the opportunity to commit the abuse as alleged. The Subject's alternate theory, telling the Service Recipient that her mother would not approve of her sitting close to another service recipient, does not merit serious consideration. It appears to have been a hastily contrived effort either to implicate someone else, or explain why the Service Recipient would have made that comment when, in fact, the most reasonable explanation is the one proffered by the Service Recipient herself.

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 alleged. The substantiated report will not be amended or sealed.

The Subject's conduct meets the elements of Penal Law § 130.52, forcible touching. He acted with intent when he fondled the Service Recipient's breast and put his hand in her pants; his actions were forcible in that the Service Recipient asked him to stop. The Subject had no legitimate purpose for doing so; and he did it for the purpose of his own sexual gratification, as evidenced by the Service Recipient's report that his other hand was in his pants while he was fondling her. 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 ██████████ 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 abuse.

The substantiated report is properly categorized, as a Category 1 act.

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

DATED: June 30, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge