

**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: Jennifer Oppong, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Lawrence Schaefer, Esq.
Lippes Mathias Wexler Friedman, LLP
54 State Street, Suite 1001
Albany, New York 12207

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 [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed sexual 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 abuse (physical 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: January 6, 2017
Schenectady, New York

A handwritten signature in black ink, appearing to read "David Molik", is 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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
207 Genesee Street, Room 103D
Utica, New York 13501
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
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161 Delaware Avenue
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By: Jennifer Oppong, Esq.

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████████████████████

By: Lawrence Schaefer, Esq.
Lippes Mathias Wexler Friedman, LLP
54 State Street, Suite 1001
Albany, New York 12207

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. 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 by the Subject of two Service Recipients¹.

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

Allegation 2²

It was alleged that on undetermined dates between [REDACTED], and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed sexual abuse when you engaged in sexual contact and/or sexual conduct with a service recipient, including touching of intimate body parts, kissing, oral sex and/or fondling.

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

Allegation 3

It was alleged that on undetermined dates between [REDACTED], and [REDACTED], at the [REDACTED]

¹ In opening statements and closing arguments in the hearing, the Justice Center attorney stated that the allegations contained in Allegation 2 pertained to one service recipient and the allegations contained in Allegation 3 pertained to a second service recipient. Therefore, hereinafter the service recipient in Allegation 2 shall be referred to as "Service Recipient 1" and the service recipient in Allegation 3 shall be referred to as "Service Recipient 2."

² The acts in Allegation 1 are alleged to have taken place prior to the inception of the Justice Center, therefore, the Justice Center has no jurisdiction to make a finding concerning the allegation.

██████████, while acting as a custodian, you committed sexual abuse when you engaged in sexual contact with a service recipient including touching of intimate body parts, fondling and/or requesting oral sex.

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, the ██████████, located at ██████████, is a facility that, in pertinent part, provides mental health care and treatment for persons incarcerated by the State of New York and by the counties of New York State. The facility is operated by the New York State Office of Mental Health (OMH), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimonies of ██████████, PhD and ██████████, Justice Center Investigator)

5. At the time of the alleged abuse, the Subject was employed by the New York State Office of Mental Health (OMH)³ as a Secure Hospital Treatment Assistant (SHTA) and had been employed by the facility since ██████████ 2005. (Hearing testimony of the Subject) As a SHTA, the Subject was assigned to a ward housing the Service Recipients and worked directly with the Service Recipients. SHTA duties include keeping service recipients safe and making sure their daily needs are met. (Hearing testimony of ██████████, PhD) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse, Service Recipient 1 was an adult female who was temporarily incarcerated as a patient/inmate at the ██████████, having been transferred to the ██████████ by ██████████ pending her criminal trial. Service Recipient 1

³ The Subject testified that he was employed by the ██████████. (Hearing testimony of the Subject). The ██████████ is a facility operated by the OMH and therefore, the Subject was ultimately an employee of the OMH. (Justice Center Exhibits 40 and 41, and the OMH website: https://www.omh.ny.gov/omhweb/aboutomh/omh_facility.html)

was incarcerated in the women's ward at the [REDACTED] from [REDACTED] until [REDACTED], when Service Recipient 1 was returned to [REDACTED]. (Hearing testimony of [REDACTED], Justice Center Investigator and Justice Center Exhibit 24)

7. At the time of the alleged abuse, Service Recipient 2 was an adult female who was temporarily incarcerated as a patient/inmate in the women's ward at the [REDACTED] from [REDACTED] [REDACTED]. (Hearing testimony of [REDACTED], Justice Center Investigator and Justice Center Exhibit 22)

8. Service recipient A was incarcerated in the women's ward at [REDACTED] from [REDACTED] until [REDACTED]. (Justice Center Exhibit 21) Service recipient B was incarcerated in the women's ward at [REDACTED] from [REDACTED] until [REDACTED]. (Justice Center Exhibit 23)

9. The Subject worked on the ward in which Service Recipient 1, Service Recipient 2 and the other service recipients were incarcerated on seventeen of the thirty-five days that Service Recipient 1 was in the ward. On eight of the days the Subject worked a single shift (eight hours) and on the other nine days he worked a double shift (sixteen hours). The Subject worked on the ward on twelve of the thirty-seven days that Service Recipient 2 was in the ward. On six of the days the Subject worked a single shift and on the other six days he worked a double shift. (Justice Center Exhibits 22, 24 and 49)

10. On [REDACTED], Service Recipient 1 revealed to a [REDACTED] Correctional Facility Lieutenant that, while she was incarcerated at the [REDACTED], she participated in sexual activity with an employee of the [REDACTED] named [REDACTED]. (Justice Center Exhibits 7, 8 and 9)

11. On unknown dates and times between [REDACTED] and [REDACTED], the Subject engaged in the following activities with Service Recipient 1: the Subject exposed his

penis to Service Recipient 1 (Justice Center Exhibits 10, 17, 41 and 50 – audio recording of Justice Center interviews of Service Recipient 1 and Service Recipient 2); the Subject sucked Service Recipient 1's breasts (Justice Center Exhibits 10, 12, 17, 41 and 50 – audio recording of Justice Center interviews of Service Recipient 1 and Service Recipient 2); the Subject kissed Service Recipient 1 (Justice Center Exhibits 10, 12, 41 and 50 – audio recording of Justice Center interviews of Service Recipient 1 and service recipient B); the Subject put his hands down Service Recipient 1's pants (Justice Center Exhibits 10, 17, 41 and 50 – audio recording of Justice Center interviews of Service Recipient 1, Service Recipient 2 and service recipient B); the Subject requested oral sex from Service Recipient 1 (Justice Center Exhibit 10); the Subject engaged in oral sex with Service Recipient 1 (Justice Center Exhibits 10 and 11); and the Subject penetrated Service Recipient 1's vagina with his penis on at least two occasions. (Justice Center Exhibits 10, 17 and 50 – audio recording of Justice Center interview of Service Recipient 1)

12. On unknown dates and times between [REDACTED] and [REDACTED], the Subject engaged in the following activities with Service Recipient 2: the Subject sucked Service Recipient 2's breasts and grabbed her buttocks (Justice Center Exhibits 11, 17 and 50 – audio recording of Justice Center interview of Service Recipient 2); and the Subject exposed his penis to Service Recipient 2 and told her to suck it. (Justice Center Exhibits 17 and 50 – audio recording of Justice Center interview of Service Recipient 2).

13. The [REDACTED] policy provides in pertinent part: "Any sexual relations between an employee and a patient would be considered patient abuse and unethical conduct. Any such relationship is absolutely forbidden." On [REDACTED], the Subject received a copy of the [REDACTED] Employee Handbook which contained this policy. (Justice Center Exhibit 27)

14. The [REDACTED] Policy [REDACTED] defines "sexual abuse" as: "any sexual activity involving a patient/resident and staff member ..." (Justice Center Exhibit 34)

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 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)(b), to include:

"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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category (1), which is defined in pertinent part 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;

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))

If the Justice Center proves the alleged abuse, 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 cited in the substantiated report constitutes the category of abuse as set forth in the substantiated report.

If the Justice Center did not prove the abuse 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 the acts described as “Allegation 2” and “Allegation 3” 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 through 49 and 53) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses and interrogation of the Subject (Justice Center Exhibit 50) and an audio/video of the New York State Police interrogation of the Subject (Justice Center Exhibits 51 and 52). The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. [REDACTED], PhD, [REDACTED] Director of In-Patient Operations and [REDACTED], [REDACTED] Director of Staff Development and Training, also testified on behalf of the Justice Center.

The Subject testified in his own behalf and presented [REDACTED] and [REDACTED], who testified on his behalf.

In order to prove sexual abuse as the Justice Center has alleged, the Justice Center must establish that the Subject's conduct subjected the Service Recipients 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))

Initially, it is determined that the Service Recipients lacked the requisite consent to engage in sexual activity with the Subject. The New York State Penal Law (PL) deems a person incapable of giving consent when he or she is:

committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital, as such term is defined in subdivision two of section four hundred of the correction law, and the actor is an employee who knows or reasonably should know that such person is committed to the care and custody or supervision of such department or hospital.

(PL § 130.05(3)(e)) The term "hospital" is defined by New York State Correction Law as "a hospital in the department of mental hygiene which is designated as such by the commissioner of mental hygiene for the care and treatment of mentally ill inmates." (CL §400(2)) The [REDACTED] is a hospital that is operated by the OMH and the specific ward at issue in this hearing was designated at the time of the alleged conduct to provide treatment for mentally ill inmates. (Hearing testimony of [REDACTED], PhD, [REDACTED] Director of In-Patient Operations)

At the time of the alleged abuse, the Service Recipients were committed to the care and custody of the [REDACTED]. The Subject was an employee of the OMH at the [REDACTED] and, by virtue of his employment, he was charged with knowledge that the Service Recipients were committed to the care and custody of the [REDACTED].

The Justice Center alleges that the Subject engaged in various sexual activities with Service Recipient 1 and Service Recipient 2. The Subject categorically denied the allegations but offered no explanation for any of the sexual contact alleged in the statements of Service Recipient 1,

Service Recipient 2 or any of the other service recipients.

The Subject argued that it would have been impossible for the alleged activity to occur due to the requirement and practice of the SHTAs to always keep other staff within eyesight. (Hearing testimonies of [REDACTED], PhD and the Subject) However, it is clear from the various witnesses' statements that there were times when the Subject was alone with Service Recipient 1, Service Recipient 2 and the other service recipients. (Justice Center Exhibits 10, 11, 12, 16, 17, 41 and 50) Furthermore, the record contains evidence that at least one of the SHTAs did not adhere to the eyesight requirement. The record reflects that a SHTA left several service recipients in the music room unattended for approximately fifteen seconds before another SHTA arrived to correct the situation. (Hearing testimonies of [REDACTED] and the Subject) Also, in contradiction to the Subject's claim that he could not have been left alone with a service recipient, is evidence in the record that the Subject told his supervisor that Service Recipient 1 flashed her breasts to him and that none of the other SHTAs reported seeing this. (Hearing testimony of [REDACTED]) The logical conclusion that can be drawn is that the breast flashing happened when the Subject and Service Recipient 1 were alone, or at least out of the eyesight of another SHTA. Finally, of the witnesses who testified that they never saw the Subject do anything inappropriate, none of the witnesses worked all the same shifts as the Subject during the relevant timeframe. (Hearing testimonies of [REDACTED], [REDACTED] and the Subject)

Additionally, the various statements of other service recipients who were incarcerated at the same time as the Service Recipients, both written and oral, corroborate to various extents the Service Recipients' claims of sexual contact and/or conduct by the Subject.

Having had the opportunity to consider and evaluate the hearing testimony of the Subject and having considered and weighed the opposing evidence, the ALJ presiding over the hearing concludes that the entirety of the Subject's hearing testimony on this material issue, is not credited

evidence. The statements of the Service Recipients and the other service recipients are credited evidence.

Allegation 2

The Justice Center first contends that the Subject committed sexual abuse when he sucked Service Recipient 1's breasts, kissed Service Recipient 1 and put his hands in Service Recipient 1's pants. The credible evidence in the record establishes that the Subject committed Sexual Abuse in the Second Degree as defined in Penal Law. In order to prove Sexual Abuse in the Second Degree, the Justice Center must establish that the Subject subjected Service Recipient 1 to sexual contact and that Service Recipient 1 was incapable of giving consent. (PL § 130.60(1)) The term "Sexual Contact" is defined by New York State Penal Law, in pertinent part, as: "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party ..." (PL § 130.00(3)) The element of sexual gratification can be inferred from the Subject's conduct. (People v. Hill, 34 A.D.3d 1130, 824 N.Y.S.2d 802, 2006; People v. Ortiz, 16 A.D.3d 831, 833, 791 N.Y.S.2d 709, 2005; People v. Watson, 281 A.D.2d 691)

As stated above, Service Recipient 1's status as patient/inmate at the [REDACTED] rendered her incapable of consenting to sexual contact. (PL § 130.05(3)(e) and CL §400(2)) Additionally, the credible evidence in the record establishes that while Service Recipient 1 was incarcerated at the [REDACTED] and the Subject was working, the Subject sucked Service Recipient 1's breasts, kissed Service Recipient 1 and put his hands inside the genital area of Service Recipient 1's pants. The record reflects that the Subject made contact with Service Recipient 1's sexual or intimate body parts for the purpose of the Subject's sexual gratification. The element of sexual gratification can be inferred from the sexual nature of the contact and the lack of explanation from the Subject why such contact would have happened accidentally or legitimately.

Having sufficiently established that the Subject subjected Service Recipient 1 to sexual

contact and that Service Recipient 1 is incapable of consenting to such contact, the Justice Center has sufficiently established that the Subject committed Sexual Abuse in the Second Degree and, consequently, the Justice Center has sufficiently established that the Subject has committed sexual abuse under SSL §488(1)(b).

The Justice Center next contends that the Subject committed sexual abuse when he engaged in oral sex with Service Recipient 1. The credible evidence in the record establishes that the Subject committed a Criminal Sexual Act in the Third Degree as defined in the Penal Law. In order to prove Criminal Sexual Act in the Third Degree, the Justice Center must establish that the Subject engaged in oral sex with Service Recipient 1 and that Service Recipient 1 was incapable of consenting to such contact. (PL § 130.40(1))

As stated above, Service Recipient 1's status as patient/inmate at the █████ rendered her incapable of consenting to sexual contact. (PL § 130.05(3)(e) and CL §400(2)) Additionally, the credible evidence in the record establishes that while Service Recipient 1 was incarcerated at the █████ and the Subject was working, the Subject engaged in oral sex with Service Recipient 1. Consequently, the Justice Center has sufficiently established that the Subject committed Criminal Sexual Act in the Third Degree and, consequently, the Justice Center has sufficiently established that the Subject has committed sexual abuse under SSL §488(1)(b).

The Justice Center next contends that the Subject committed sexual abuse when he penetrated Service Recipient 1's vagina with his penis. The credible evidence in the record establishes that the Subject committed Rape in the Third Degree as defined in the Penal Law. In order to prove Rape in the Third Degree, the Justice Center must establish that the Subject had sexual intercourse with Service Recipient 1 and that Service Recipient 1 was a person who was incapable of consenting by some reason other than being less than seventeen years of age. (PL § 130.25(1))

As stated above, Service Recipient 1's status as patient/inmate at the [REDACTED] rendered her incapable of consenting to sexual contact. (PL § 130.05(3)(e) and CL §400(2)) Additionally, the credible evidence in the record establishes that while Service Recipient 1 was incarcerated at the [REDACTED] and the Subject was working, the Subject penetrated Service Recipient 1's vagina with his penis, thereby engaging in sexual intercourse with Service Recipient 1. Consequently, the Justice Center has sufficiently established that the Subject committed Rape in the Third Degree and, consequently, the Justice Center has sufficiently established that the Subject has committed sexual abuse under SSL §488(1)(b).

The Justice Center next contends that the Subject committed sexual abuse when he exposed his penis to Service Recipient 1. The Justice Center has sufficiently established that the Subject exposed his penis to Service Recipient 1. However, although the Subject's conduct may be a violation of the penal law, there is no provision in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law that would be violated by the Subject exposing his penis to Service Recipient 1. Because the statute requires a violation of article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law (SSL § 488 (1)(b)), the Justice Center has not sufficiently established that the Subject committed sexual abuse by exposing his penis to Service Recipient 1.

Finally, the Justice Center contends that the Subject committed sexual abuse when he requested oral sex from Service Recipient 1. The Justice Center has sufficiently established that the Subject requested oral sex from Service Recipient 1. However, although the Subject's conduct may be a violation of the penal law, there is no provision in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law that would be violated by the Subject requesting oral sex from Service Recipient 1. Because the statute requires a violation of article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law (SSL § 488 (1)(b)), the Justice Center has not sufficiently established that the Subject committed sexual abuse by requesting oral sex from

Service Recipient 1.

Allegation 3

The Justice Center first contends that the Subject committed sexual abuse when he engaged in sexual contact and/or sexual conduct by touching Service Recipient 2's intimate body parts and/or fondling Service Recipient 2. The credible evidence in the record establishes that the Subject committed Sexual Abuse in the Second Degree as defined in Penal Law when he sucked Service Recipient 2's breasts and grabbed her buttocks.

In order to prove Sexual Abuse in the Second Degree, the Justice Center must establish that the Subject subjected Service Recipient 2 to sexual contact and that Service Recipient 2 was incapable of giving consent. (PL § 130.60(1)) The term "Sexual Contact" is defined by New York State Penal Law, in pertinent part, as: "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party ..." (PL § 130.00(3)) The element of sexual gratification can be inferred from the Subject's conduct. (People v. Hill, 34 A.D.3d 1130, 824 N.Y.S.2d 802, 2006; People v. Ortiz, 16 A.D.3d 831, 833, 791 N.Y.S.2d 709, 2005; People v. Watson, 281 A.D.2d 691)

As stated above, Service Recipient 2's status as patient/inmate at the [REDACTED] rendered her incapable of consenting to sexual contact. (PL § 130.05(3)(e) and CL §400(2)) Additionally, the credible evidence in the record establishes that while Service Recipient 2 was incarcerated at the [REDACTED] and the Subject was working, the Subject sucked Service Recipient 2's breasts and grabbed Service Recipient 2's buttocks. The record reflects that the Subject made contact with Service Recipient 2's sexual or intimate body parts for the purpose of the Subject's sexual gratification. The element of sexual gratification can be inferred from the sexual nature of the contact and the lack of explanation from the Subject why such contact would have happened accidentally or legitimately.

Having sufficiently established that the Subject subjected Service Recipient 2 to sexual contact and that Service Recipient 2 is incapable of consenting to such contact, the Justice Center has sufficiently established that the Subject committed Sexual Abuse in the Second Degree and, consequently, the Justice Center has sufficiently established that the Subject has committed sexual abuse under SSL §488(1)(b).

The Justice Center next contends that the Subject committed sexual abuse by telling Service Recipient 2 to perform oral sex on him. The Justice Center has sufficiently established that the Subject told Service Recipient 2 to perform oral sex on him. However, although the Subject's conduct may be a violation of the penal law, there is no provision in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law that would be violated by the Subject requesting oral sex from Service Recipient 2. Because the statute requires a violation of article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law (SSL § 488 (1)(b)), the Justice Center has not sufficiently established that the Subject committed sexual abuse by requesting oral sex from Service Recipient 2.

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.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. A Category 1 substantiation, as alleged, requires a finding that the Subject engaged in any conduct in violation of article one hundred thirty of the penal law with the Service Recipients. As stated above, the Justice Center sufficiently established that the Subject engaged in conduct that violated PL sections 130.60(1), 130.40(1), 130.10(1) and 130.25(1), and consequently, the Justice Center has sufficiently established that the Subject committed Category 1 conduct. Based upon

the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 1 act.

A substantiated Category 1 finding of abuse and/or neglect will result in the Subject being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 1 report will be disclosed to entities authorized to make inquiry to the VPCR. 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], be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed sexual abuse.

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

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: January 4, 2017
Schenectady, New York



John T. Nasci, ALJ