

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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: April 12, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
AAU
SUBJECT

**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:

David Molik
Supervising Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305

On: [REDACTED], record closed on
[REDACTED]

Parties:

New York State Justice Center for the Protection
of People with Special Needs
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Delmar, New York 12054-1310
By: Laurie Cummings, Esq.

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for sexual abuse and 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 sexual abuse and neglect by the Subject of two Service Recipients.
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 1

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed sexual abuse when you engaged in sexual conduct or contact with a service recipient in violation of New York State Penal Law Article 130.

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

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to the service recipient by engaging in sexual contact and/or sexual conduct with her, which included embracing her and/or kissing her on her lips.

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

Allegation 3

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to the service recipient by offering him items and favors in exchange for his silence about inappropriate conduct that he witnessed.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(a) (sic).

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

4. The [REDACTED], located at [REDACTED], is an alcoholism and substance abuse counseling and rehabilitation program serving approximately sixty-five service recipients in a co-educational holistic approach to chemical dependency. It is licensed by the NYS 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 I [REDACTED] (Investigator [REDACTED]); hearing testimony of the Subject; Justice Center Exhibit 6)

5. At the time of the alleged sexual abuse and neglect, the Subject was employed by The [REDACTED] for approximately four months. The Subject worked as a [REDACTED].

6. At the time of the alleged sexual abuse and neglect, Service Recipient 1 was a female, twenty-nine years of age and Service Recipient 2 was a male, thirty-two years of age. Both service recipients had been residents of the facility for approximately one year. The Service Recipients are adults who were being treated for drug and alcohol addiction. (Justice Center

Exhibits 6, 7, 8 and 11; Hearing testimony of Investigator [REDACTED])

7. On [REDACTED], the Subject was observed kissing and embracing Service Recipient 1 by Service Recipient 2 in the Subject's office as Service Recipient 2 walked by.

8. The Subject made admissions that he enjoyed the kiss, that it went on for three to five seconds, that he realized it was wrong and then pushed Service Recipient 1 away from him when he made that realization. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11)

9. Service Recipient 1 acknowledged to other service recipients that the kissing occurred on more than one occasion and that she and the Subject had feelings for each other. Service Recipient 1 had also indicated that she and another service recipient would find excuses to visit the Subject in his office. Service Recipient 1 would enter his office and sit close to him to look at his computer screen to get lyrics from various songs. The other service recipient would stay in the hallway as a lookout. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

10. There were no other interactions of a sexual nature. (Hearing testimony of the Subject; Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

11. Subsequent to the observations made by Service Recipient 2, the Subject requested to speak to Service Recipient 2. In that conversation, Service Recipient 2 was told by the Subject that if he kept quiet about the incident that he had observed, the Subject could make Service Recipient 2's stay at [REDACTED] comfortable. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

12. The day after the discussion with Service Recipient 2, the Subject offered candy to Service Recipient 2. Service Recipients are not permitted to possess candy in the facility. (Hearing

testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

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 sexual abuse and neglect.
- Pursuant to Social Services Law § 493(4), the category of sexual abuse and neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse and 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 sexual 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 sexual abuse and neglect occurred...” (Title 14 NYCRR 700.3(f))

The sexual abuse and neglect of a person in a facility or provider agency are defined by SSL § 488(1)(b) and (h):

(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.

At the hearing, the Justice Center specified Penal Law § 130.55 (Sexual abuse in the third degree) as being the applicable sections of Article 130 relied upon and incorporated into the substantiated report in this matter:

§ 130.55 Sexual abuse in the third degree. A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent;...

Sexual abuse in the third degree is a class B misdemeanor.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Categories 1, 2 and 3 which, as relevant here, 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.

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three 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 committed the act or acts of sexual abuse and neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of sexual abuse and neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the sexual abuse and 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 in Allegations 1, 2 and 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 1-11) The investigation underlying the substantiated report was conducted by Investigator [REDACTED], who was the only witness who testified at the hearing in behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

There was no dispute between the parties regarding the Subject's status as a custodian as that term is defined by SSL § 488(2).

Allegation 1 – Sexual Abuse

The Justice Center has established by a preponderance of the evidence that the Subject committed sexual abuse, described as Allegation 1 in the substantiated report.

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)) The Justice Center specified on the record that section 130.55 (Sexual abuse in the third degree) is the applicable section of Penal Law (PL) Article 130 being relied upon in this matter.

The Justice Center contends that the Subject committed sexual abuse in the third degree in violation of PL § 130.55. In order to sustain the allegation under this theory, the Justice Center must prove by a preponderance of the evidence that the Subject subjected the Service Recipient to sexual contact without her consent.

One of the elements of PL § 130.55 is that there be a lack of consent by the Service Recipient. In this case, the Service Recipient is incapable of giving consent because of her status as a patient within an OASAS facility. The statute is very clear: NYS Penal Law § 130.05(3)(i) states that a person is incapable of consent when he or she is a resident or inpatient of a residential facility operated, licensed or certified by the Office of Alcoholism and Substance Abuse Services (among other State Oversight Agencies), and the actor is an employee of the facility. Service Recipient 1 was a resident of [REDACTED]. The Subject admitted that he was an employee of [REDACTED]. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11). Therefore, lack of consent has been established.

The next element is whether kissing is considered to be "sexual contact." *People v. Miller*,

19 Misc.3d 457 (Criminal Court of the City of NY, Kings County, 2008) (affirming the mouth is an intimate part of the body, and kissing constitutes sexual contact.). *People v. Rondon*, 152 Misc.2d 1018, (Criminal Court of NYC, Queens County 1992 (no further appellate history/review) (holding, “while the legislature did not promulgate an express list of sexual or intimate body parts, support for holding that a kiss on the mouth constitutes a touch of an intimate part is found in recent case law. It has been established that “intimate parts” is a much broader term than sexual part and that intimacy must be viewed within the context in which the contact takes place.”) *People v. Rivera*, 138, Misc.2d 570, (Supreme Court of NY Bronx County 1988) (no subsequent appellate history) (holds “intimate parts” is much broader than the term “sexual parts...” and, “...it is also clear that intimacy, as regards part of the body, must be viewed within the context in which the contact takes place...a body part which might be intimate in one context, might not be intimate in another.”)

In this case, the Subject admits that he enjoyed the kiss, that it went on for three to five seconds, that he realized it was wrong and then pushed Service Recipient 1 away from him when he made that realization. It is also uncontroverted that the Subject was observed kissing and embracing Service Recipient 1 in the Subject’s office by Service Recipient 2 as Service Recipient 2 walked by. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11)

The Subject argues that this was a one-time incident and that as soon as he realized it was wrong he pushed Service Recipient 1 away. Although the Subject presents as sincere and very remorseful, the statute is quite clear. Irrespective of his intent, length of the kiss, or an alleged one-time incident, the Subject violated the statute. Also, his credibility is called into question since there is other credible evidence that shows that this was not a one-time occurrence and had

happened at least one other time. Finally, Service Recipient 1 acknowledged this to at least one other Service Recipient. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

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

Allegation 2 - Neglect

The Justice Center has established by a preponderance of the evidence that the Subject committed neglect, described as Allegation 2 in the substantiated report.

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 that duty by any action, inaction or lack of attention, 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))

As noted above, the Subject was a custodian. The Justice Center argued that, as a custodian, the Subject had a duty to maintain a professional demeanor when interacting with service recipients, and that engaging in conduct which involved inappropriate conversation and/or sexual touching with Service Recipient 1 breached that duty. This conduct was likely to result in the serious or protracted impairment of the physical, mental, or emotional condition of the Service Recipient.

As previously discussed, the Subject did embrace and kiss Service Recipient 1. He admitted to this conduct and it was observed by Service Recipient 2. The Subject's assertion that this was a one-time incident is not credited. There are interview recordings from other service

recipients to whom Service Recipient 1 admitted that she was attracted to the Subject and had been visiting his office frequently. Also, Service Recipient 1 stated that this was not the only time they had kissed. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11)

As a result of the Subject's conduct, Service Recipient 1 was placed in a position of compromising her participation in the rehab program she was placed in. Sexual contact between staff and a patient is cause for removal from the program and can cause a serious and protracted impairment of the mental and emotional condition of a Service Recipient in such a way that they will relapse into addictive behavior. The requirement of the statute is thereby satisfied.

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 neglect as alleged. The substantiated report shall not be amended or sealed.

Allegation 3 - Neglect

The Justice Center has established by a preponderance of the evidence that the Subject committed neglect, described as Allegation 3 in the substantiated report.

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 that duty by any action, inaction or lack of attention, 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. Neglect shall include, but is not limited to: (i) failure to provide proper supervision...(SSL § 488(1)(h))

As noted above, the Subject was a custodian. The Justice Center's evidence established that after the observations made by Service Recipient 2, the Subject requested to speak to Service

Recipient 2. In that conversation, Service Recipient 2 was told by the Subject that if he kept quiet about the incident that was observed, that the Subject could make Service Recipient 2's stay at [REDACTED] comfortable. The day after the discussion with Service Recipient 2, the Subject offered candy to Service Recipient 2. Candy is an unauthorized item; service recipients may not possess it in the facility. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 6 and 11)

The Justice Center argues that these actions establish that the Subject did not provide proper supervision to Service Recipient 2 by making this offer to him. Service Recipient 2 indicated in his interview that he seriously considered the Subject's offer. However, he did not take advantage of the offer, except to take some hard candy from the subject. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11)

The Subject vehemently denied this allegation, but did admit to giving hard candy to Service Recipient 2. The subject's denials are not credited since they are self-serving and contain an admission that he did offer contraband to Service Recipient 2. (Hearing testimony of Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6 and 11)

The Subject's actions placed Service Recipient 2 in a very awkward position. He was sorely tempted to take advantage of the Subject's offer, but realized that this would jeopardize his recovery. By giving candy to Service Recipient 2, the Subject placed himself in an improper relationship. By having candy in his possession, Service Recipient 2 could possibly have been released from the program. If this relationship continued, Service Recipient 2 could have asked for other favors from the Subject that were not authorized and that would jeopardize his recovery; drugs and alcohol are examples. This not only constituted improper supervision, but was also

likely to cause a serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

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 neglect as alleged. The substantiated report shall not be amended or sealed.

CONCLUSION

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of neglect and abuse set forth in the substantiated report.

With regard to Allegation 1, any substantiated violation of PL Article 130, where the victim is a service recipient, is a Category 1 offense. (SSL § 493(4)((a)(v))) Therefore, the substantiated report of sexual abuse is properly categorized as a Category 1 act.

With regard to Allegation 2, Category 2 conduct is defined as conduct in which the Subject seriously endangered the health, safety or welfare of the Service Recipient. (SSL § 493(4)(b)) The Subject's conduct of kissing and embracing a vulnerable adult in a rehabilitative environment seriously endangered the health and welfare of the Service Recipient and her success in this program. It also put the Service Recipient at risk from behavior that she should not have been subjected to. Consequently, 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 2 act.

With regard to Allegation 3, 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 3 act.


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 and neglect.

The substantiated report is properly categorized as Categories 1, 2 and 3 acts.

This decision is recommended by David Molik, Administrative Hearings Unit.

DATED: April 4, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit