

**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]

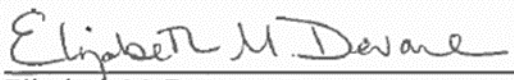
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: October 10, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Robert P. Bogdan, Esq.

**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:

Gerard D. Serlin
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
New York State Office Building
333 East Washington Street - Room 115
Syracuse, New York 13202

On:

[REDACTED]

[REDACTED]

Parties:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Linda Gafford, Esq
and Kristin Kopach, Esq.

[REDACTED]

By: Robert P. Bogdan, Esq.
214 General Smith Drive
P.O. Box 286
Sackets Harbor, New York 13685

JURISDICTION

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

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 contact with a service recipient in violation of Article 130 of the New York State Penal Law.

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 unspecified dates between [REDACTED] at the [REDACTED], located at [REDACTED], while a custodian, you committed sexual abuse when you engaged in sexual contact with a service recipient in violation of Article 130 of the New York State Penal Law.

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 [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to maintain appropriate boundaries with a service recipient including by engaging in sexual contact with her.

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

Allegation 4

It was alleged that on unspecified dates between [REDACTED] at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to maintain appropriate boundaries with a service recipient including by engaging in sexual contact with her.

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

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

4. The facility, the [REDACTED], located at [REDACTED] [REDACTED], is a facility that, in pertinent part, provides mental health care on an inpatient basis. 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. (Justice Center Exhibit 37)

5. At the time of the alleged abuse and neglect, the Subject was employed by OMH as a Licensed Practical Nurse (LPN) and had been employed by the facility since [REDACTED] 2014. (Justice Center Exhibit 41, audio interrogation by Justice Center of the Subject, [REDACTED]) In his capacity as a (LPN), the Subject's general duties included dispensing medications to service recipients, counseling service recipients and answering questions of service recipients. (Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED]) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect and abuse, the female Service Recipient was 19 years of age. (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED]) The Service Recipient suffered from major depressive disorder and exhibited borderline tendencies, had a history of suicidal ideation and engaged in multiple suicide attempts. (Hearing testimony of the Risk Manager and Justice Center Exhibit 13)

7. The Facility Investigator was the Risk Manager.¹ Before assuming her position as the Risk Manager in [REDACTED] of 2016, the Risk Manager was the unit Charge Nurse, and had regular contact with the Subject and directly supervised him during some portion of [REDACTED] and continuing into [REDACTED]. Sometime in late [REDACTED] or early [REDACTED], the Risk Manager, in her position as a Charge Nurse, spoke with the Subject about a female service recipient,² who was infatuated with the Subject. The Subject assured the Risk Manager that he could handle asking the service recipient to step away. LPNs are trained in boundaries ethics and all employees receive OMH training on boundaries ethics plus facility training. (Hearing testimony of the Risk Manager)

8. Facility rules prohibit Facility staff from engaging in any personal relationships with service recipients at any time. Facility staff have an obligation to report any personal relationship they may have with a patient, including a relationship that developed before admission. The facility has a policy which prohibits social relationships with service recipients, outside of job duties, and specifically prohibits non-business-related phone contact and “sexual conduct or activity with [service recipients].” (Justice Center Exhibit 24, Bates Stamp 1042)

9. During employee orientation, facility employees are educated on this policy. During the entirety of the Subject’s employment, this policy was in effect. The policy does not specifically prohibit social media contact. (Hearing testimony of the Risk Manager and Justice

¹ The Risk Manager was [REDACTED].

² This is not the Service Recipient alleged to have been abused and neglected in this report.

Center Exhibit 24, Bates Stamp 1040-1042) At the onset of his employment, the Subject was provided with a copy of the policy. (Hearing testimony of the Subject)

10. On an unspecified date in [REDACTED],³ the Service Recipient was admitted to the facility after a suicide attempt and remained there until [REDACTED], when she was discharged to a residential facility. (Hearing testimony of the Risk Manager) The Subject and the Service Recipient first came into contact during her admission to the facility in [REDACTED]. (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED])

11. Commencing on [REDACTED], and continuing through [REDACTED], the Subject and Service Recipient communicated with each other by Facebook. Much of the communication occurred between [REDACTED]. (Hearing testimony of the Risk Manager; Justice Center Exhibit 23; Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

12. On [REDACTED], at 9:13 p.m., the Service Recipient contacted the Subject on Facebook with a friend request, which he accepted. (Justice Center Exhibit 23, Bates Stamp 530) During initial messaging, the Subject stated to the Service Recipient, "you surprised me by getting in contact with me, pleasantly surprised." (Justice Center Exhibit 23, Bates Stamp 535)

13. The next Facebook exchange began on [REDACTED], and continued into [REDACTED]. (Justice Center Exhibit 23, Bates Stamp 555-598) In that exchange, the Subject called the Service Recipient: "exotic", stated that he was getting himself in trouble, (Justice Center Exhibit 23, Bates Stamp 565), said that he has an extra bed but noted "that wouldn't work" because his "brain caught up" with him (Justice Center Exhibit 23, Bates Stamp 568), and then called the Service Recipient "exotic" again. (Justice Center Exhibit 23, Bates Stamp 572) As the conversation continued, the Subject indicated that he was coming over to her house, (Justice Center Exhibit 23, Bates Stamp 582), and that "risky can be fun." (Justice Center Exhibit 23, Bates Stamp.

³ Exact admission date unknown.

583) During the exchanges, the Service Recipient disclosed that she had been raped as a child and the Subject consoled her. (Justice Center Exhibit 23; Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

14. During that Facebook message exchange, the Subject referred to the Service Recipient as a "pussy" (Justice Center Exhibit 23, Bates Stamp 584) and had an extended discussion with the Service Recipient referencing oral sex. (Justice Center Exhibit 23, Bates Stamp 593-598)

15. The following day, [REDACTED], the Subject completed OMH/Justice Center code of conduct and affiliated training. (Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

16. Continuing over the next several months, the Subject and the Service Recipient exchanged text messages, including times when the Subject was at work or leaving work. (Justice Center Exhibit 23, Bates Stamp 535) The Service Recipient sought advice about her relationship with a boyfriend. (Justice Center Exhibit 23, Bates Stamp 540-541) In subsequent text messaging the Subject told the Service Recipient that she was a "beautiful, intelligent, insightful woman" and said: "LOL I wish I knew someone like you." (Justice Center Exhibit 23, Bates Stamp 546) Later in the same exchange, the subject stated: "you are beautiful, intelligent, insightful, sexy, friendly and loving" (Justice Center Exhibit 23, Bates Stamp 548), and then made a joke that the Service Recipient was an angel who fell from heaven. (Justice Center Exhibit 23, Bates Stamp 550-551) During the period of messaging, the Service Recipient sent to the Subject nude and nearly nude photos. (Hearing testimonies of the Risk Manager and the Subject and Justice Center Exhibit 23) At least one message included a video made by the Service Recipient of her showering naked, which the Service Recipient sent to the Subject via Facebook or social media. The Subject also sent a picture of himself to the Service Recipient. During the course of the exchanges, the Subject

instructed the Service Recipient in how to be more seductive in her photographs. (Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

17. During the time when the Service Recipient was admitted in-patient to the facility, the Service Recipient did not have access to social media (Hearing testimony of the Risk Manager) and the Subject and the Service Recipient did not communicate via Facebook. (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED])

18. On [REDACTED], the Service Recipient was readmitted to the Facility and received treatment on Ward [REDACTED]. The Service Recipient remained in the Facility from [REDACTED] [REDACTED], on Ward [REDACTED]. (Hearing testimony of the Risk Manager)

19. The Service Recipient was prescribed the pharmaceutical Ambien to assist her with sleep. The specific dates on which she received Ambien were [REDACTED] [REDACTED]. During that time, the Subject worked at the Facility from [REDACTED] [REDACTED], and [REDACTED]. (Hearing testimony of Justice Center Investigator, 1⁴)

20. During the period or periods of the Service Recipient's facility admission, Staff 3 observed that the Subject approached the Service Recipient many times and touched her arm. (Justice Center Exhibit 41, audio interview of Staff 3) On more than one occasion while she was admitted to the facility as an inpatient, the Subject touched the Service Recipient on her thigh over her clothing, and bumped into, patted, (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED]) and groped the Service Recipient on her behind. (Hearing testimony of Staff 1⁵ and Justice Center Exhibit 42) The Subject would try to make this contact "look like an accident." (Justice Center Exhibit 41, audio interview with the Service Recipient:

⁴ Justice Center Investigator 1 is [REDACTED].

⁵ Staff 1 is [REDACTED], Assistant to the Chief of Nursing.

██████████) On at least one occasion, service recipient 2 witnessed this behavior. (Hearing testimony of Staff 1 and Justice Center Exhibit 42, audio interview with service recipient 2)

21. Service recipient 2⁶ resided in the Facility for most of ██████████. He had a diagnosis of schizophrenia or schizoid affective disorder. On ██████████, service recipient 2 reported to Staff 1 that he had witnessed the Subject inappropriately brush up against, touch and grope the behinds of two female patients, service recipient 1⁷ and the Service Recipient. The service recipients, including the Service Recipient, were interviewed and denied the allegation. (Hearing testimony of Staff 1 and Justice Center Exhibit 29, Bates Stamp 1051)

22. Thereafter, service recipient 1, who was apparently trained as a paralegal, wrote a letter and produced a quasi-affirmation in support of the Subject, denying the allegations, and sent the same to the director of the Facility. (Hearing testimony of the Risk Manager, Justice Center Exhibit 41, audio interview with NA and Justice Center Exhibits 36 and 39) At some point during the relevant time, the Subject also accepted a Facebook friend request from service recipient 1. (Justice Center Exhibit 43, Subject's internal Interrogation: ██████████.)

23. The Service Recipient also provided a letter, ostensibly drafted by her, in support of the Subject and denied the allegations made by service recipient 2. (Justice Center Exhibit 34) Neither the Service Recipient nor service recipient 1 wanted the Subject to get into trouble. (Justice Center Exhibit 41, audio interview of Staff 2) Thereafter, the Subject thanked the Service Recipient for writing the letter on his behalf. (Justice Center Exhibit 41, audio interview of the Service Recipient: ██████████)

⁶ Service recipient 2 is ██████████. His audio interview is memorialized in Justice Center Exhibit 42. At the time of this interview, service recipient 2, more than a year after the event, was incarcerated in the ██████████ Correctional Facility. (Hearing testimony of Justice Center Investigator ██████████)

⁷ Service recipient 1 is ██████████.

24. The allegation of [REDACTED], was reported to the Justice Center and adjudged to be a significant incident, whereupon responsibility was delegated back to the Facility for investigation. (Hearing testimony of the Risk Manager and Justice Center Exhibits 34 and 37, Bates Stamp 1070-1077)

25. On [REDACTED], the Service Recipient stabilized and was discharged to [REDACTED].⁸ On [REDACTED], while at [REDACTED], the Service Recipient and the Subject communicated via Facebook. In those exchanges, the Service Recipient indicated that she wished to die and often felt unworthy of living. (Justice Center Exhibit 23, Bates Stamp 993-996⁹) The Subject did not alert staff at [REDACTED] of this clear illustration of depression. (Hearing testimony of the Subject) The following day, on [REDACTED], the Service Recipient was readmitted to the Facility and housed on Ward [REDACTED]. The Service Recipient remained there until [REDACTED]. (Hearing testimony of the Risk Manager)

26. As a LPN, the Subject was often tasked with medication distribution. (Hearing testimony of the Risk Manager) The Subject was assigned to WARD [REDACTED] generally, but did get assigned to Ward [REDACTED] and, when he was, the Subject worked in the med-room. (Justice Center Exhibit 41, audio interrogation by Justice Center of the Subject, [REDACTED])

27. The door between Wards [REDACTED] and [REDACTED] was secured and alarmed, and guards were posted. However, there was co-mingling of patients between Wards [REDACTED] and [REDACTED] for classes, group and recreation and during meals. (Hearing testimonies of the Risk Manager and the Subject) At the time of the Service Recipient's first admission she chose a preference for receiving her

⁸ [REDACTED] is [REDACTED], which is a separate facility located on the same campus as the facility where the Subject was employed. [REDACTED] is for service recipients who are psychiatrically stable but are not to the point where they are considered safe to be unsupervised. While in [REDACTED], the Service Recipient engaged in larceny of alcohol. This culminated with the Service Recipient's readmission to the Facility. (Hearing testimony of the Risk Manager and Justice Center Exhibit 13, Bates Stamp 83)

⁹ Chronologically, the Facebook messages are reversed, meaning the messages on page 996 are earlier in time those messages on page 993.

medications orally and to generally receive assistance from a female staff member. (Justice Center Exhibit 14 and Hearing testimony of the Risk Manager)

28. During the week of [REDACTED], the Service Recipient actively participated in her group therapy. (Justice Center Exhibit 15, Bates Stamp 284-286)

29. Sometime on [REDACTED], during the Subject's shift, the Service Recipient disclosed to Staff 2 that she thought the Subject was "eye candy" or "man candy" and, based upon this, Staff 2 warned the Subject to be careful while interacting with the Service Recipient, because it could be misinterpreted. (Justice Center Exhibit 41, audio interview with Staff 2)

30. On [REDACTED], the Subject was assigned to Ward [REDACTED]. The Subject worked from 3:15 p.m. to 11:45 p.m. on that date (Justice Center Exhibit 20, Bates Stamp 469-469, and Justice Center Exhibit 22), and was assigned to medication in the Ward [REDACTED] med-room. (Hearing testimony of Justice Center Investigator 1)

31. While assigned to the med-room on [REDACTED], and generally, the Subject's job duties would have been to prepare medications for administration between 4:00 p.m. and 5:00 p.m. He would then prepare the medications for a scheduled 8:00 p.m.- 9:00 p.m. distribution. (Hearing testimony of the Risk Manager) Typically, when assigned to the med-room, the assigned LPN spent most of their shift in the med-room and did not participate in service recipient status checks, or routine rounds on the ward floor. (Justice Center Exhibit 41, audio interview with Staff 2)

32. On [REDACTED], at least twice during his evening shift, the Subject left the med-room with the med-room door open and unsecured. (Justice Center Exhibit 41, audio interview with Staff 2 and Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED] [REDACTED])

33. The Service Recipient laid in bed on the evening of [REDACTED]. The Subject came into the Service Recipient's room at least twice, and attempted to get her up and moving. The two joked around, and the Subject pretended to jump onto her bed. The Service Recipient sat up and the Subject sat down on the bed. (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED]) The Subject kissed the Service Recipient twice, with closed lips on the Service Recipient's mouth, (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED])

34. Sometime that evening, the Service Recipient was in the bathroom, getting ready to shower and was partially clothed or changing her clothes, and the Subject peaked into the bathroom. (Justice Center Exhibit 41, audio interview of the Service Recipient: [REDACTED])

35. On [REDACTED] the Service Recipient intentionally cut herself with a razor blade. (Hearing testimony of the Risk Manager and Justice Center Exhibit 15, Bates Stamp 300) The cuts required sutures to close, and Staff 2¹⁰ took the Service Recipient to the hospital. (Justice Center Exhibit 41, audio interview of Staff 2 and Hearing testimony of Justice Center Investigator 1)

36. On [REDACTED], Staff 2¹¹ encountered the Service Recipient in a common area of the facility. Staff 2 told Staff 3 that she had overheard the Service Recipient refer to the Subject as "man candy" or "eye candy" on a previous shift. (Justice Center Exhibit 41, audio interview of Staff 3) Staff 3 took the opportunity to counsel the Service Recipient and explained that referring to staff as "eye candy" or the like was inappropriate. The Service Recipient appeared to be surprised by this boundary. Staff 3 then said to the Service Recipient: "you do not want

¹⁰ Staff 2 is [REDACTED].

¹¹ Staff 3 is [REDACTED], Mental Health Therapy Aid Trainee

something to happen, like it did last time.” Staff 3 was referring to the allegation made by service recipient 2 on [REDACTED]. The Service Recipient replied, “I understand what you are saying.” However, Staff 3 was concerned by the look on the Service Recipient’s face and asked the Service Recipient if something else was bothering her. (Justice Center Exhibit 41, audio interview of Staff 3)

37. The Service Recipient told Staff 3 that the prior allegation was in fact true, despite her denial in [REDACTED]. The Service Recipient explained that she had not wanted the Subject to lose his job, and therefore she had not been truthful. The Service Recipient then disclosed that the Subject had touched her near her private parts on her thigh and that the Subject had come in to her room, and kissed her twice.¹² The Service Recipient then begged Staff 3 not to say anything because she did not want the Subject to get into trouble, or to lose his job. Staff 3 explained that she absolutely had to disclose this allegation. The Service Recipient began to cry hysterically. (Justice Center Exhibit 41, audio interview of Staff 3)

38. The following day, on [REDACTED], the Service Recipient approached Staff 2, and asked if she could speak to her. The two went to the Service Recipient’s room where the Service Recipient began to cry; she then curled up in a ball on her bed. The Service Recipient wanted to know if Staff 3, whom she had disclosed to the day before, was going to be mad at her. Staff 2, unaware of the disclosure of the previous day, reassured the Service Recipient that no one was mad at her, or was going to be mad at her. (Justice Center Exhibit 41, audio interview with Staff 2)

39. The Service Recipient then disclosed that the Subject kissed her and had rubbed her thighs. Staff 2 then asked the Service Recipient if this was the reason why the Service Recipient

¹² This appears to have been disclosed as two separate incidents, but may have been interpreted by Staff 3 as the occurring during the same incident.

had cut her arm on [REDACTED], to which the Service Recipient replied that yes it was. (Justice Center Exhibit 41, audio interview with Staff 2 and Hearing testimony of Justice Center Investigator 1 and Justice Center Exhibit 44, Bates Stamp 1084) During this disclosure the Service Recipient also indicated that the allegation made by service recipient 2 in [REDACTED] was true. (Justice Center Exhibit 41, audio interview with Staff 2 and Hearing testimony of Justice Center Investigator 1)

40. On that same date, Staff 3 reported this disclosure to the Nurse Administrator (NA).¹³ The NA made the appropriate notifications and ensured that, for the remainder of his shift, the Subject was to have no contact with any service recipient on Ward [REDACTED]. After the Subject's shift ended, or shortly thereafter, the Subject was placed on administrative leave. The NA and the Service Recipient spoke briefly; the Service Recipient was crying and the NA simply reassured her that she was safe and they did not discuss details of the allegations. (Justice Center Exhibit 41, audio interview with NA)

41. Also on [REDACTED], the Service Recipient encountered the Nurse Administrator-1 (NA-1),¹⁴ in the Facility. The Service Recipient asked the NA-1 if she could speak with her and the two went to a private office. The Service Recipient disclosed that the Subject had kissed her twice and rubbed her leg. She also stated that that the Subject had attempted to open the bathroom door while she was in the shower, and that he attempted to put his hand down her pants on another occasion. She began to cry; she stated that she did not want anyone to get trouble. (Justice Center Exhibit 41, audio interview NA-1)

42. The following day, [REDACTED], the Service Recipient came to Staff 2 and said that she was just going to recant the latest allegations. Staff 2 told the Service Recipient to

¹³ The Nurse Administrator was [REDACTED].

¹⁴ The Nurse Administrator-1 is [REDACTED].

just be truthful. (Justice Center Exhibit 41, audio interview with Staff 2 and Hearing testimony of Justice Center Investigator 1)

43. The Risk Manager interviewed the Service Recipient on [REDACTED], in furtherance of this allegation. During the interview, the Risk Manager took contemporaneous notes of exactly what the Service Recipient said, and those notes were reproduced in Justice Center Exhibit 44, Bates Stamp 1082) The Service Recipient alleged that, while she was medicated with a sleep aid, Ambien, and was “foggy,” the Subject placed his hands on the waist of her leggings, touching underneath her shirt. The Service Recipient also alleged that, on [REDACTED], during the evening, (Hearing testimony of Justice Center Investigator, 1), the Subject entered her room on Ward [REDACTED] three times; one of those times, the Subject kissed her. The Service Recipient also alleged that, on that [REDACTED] the Subject let her into the shower and then peaked his head inside the shower, while the Service Recipient was partially clothed or covered. (Hearing testimony of the Risk Manager and Justice Center 44, Bates Stamp 1082)

44. During the [REDACTED] interview, the Service Recipient retracted her denial of the [REDACTED] allegations, and stated that previously she had been untruthful when questioned about the Subject’s conduct because she did not want him to get in trouble. (Justice Center 44, Bates Stamp 1082) The allegation of [REDACTED] was then reported to the Justice Center and the Justice Center initiated an investigation of the matter. (Hearing testimony of the Risk Manager)

45. During [REDACTED], Justice Center Investigators interviewed the Service Recipient twice. During both interviews she maintained that she did not want the Subject to get in trouble, or to lose his job. During the second interview on [REDACTED], the Service Recipient was less engaged than she had been during the first interview and did not provide much

information. (Justice Center Exhibit 41, audio interviews with the Service Recipient and Hearing testimony of Justice Center Investigator 1)

46. On [REDACTED], the Service Recipient sent the Subject a Facebook message. She wrote: "... I am so sorry." Shortly thereafter, she followed with another message: "I thought I could talk to someone about it and I didn't think anything would happen." (Justice Center Exhibit 23 and Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED]) The Subject, who was by this time on paid administrative leave, did not respond to the Service Recipient. (Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

47. Sometime in late [REDACTED], the Risk Manager received a copy of the substantiation letter and investigative report which resulted from the Justice Center Investigation of the allegations of [REDACTED]. In that report, there was some mention of Facebook communication between the Service Recipient and the Subject. The Risk Manager was concerned about this revelation and, on or about [REDACTED]¹⁵ [REDACTED], the Risk Manager interviewed the Service Recipient again. At that time the Service Recipient was residing at the [REDACTED] facility. The Service Recipient was asked specifically about social media (Facebook) communication between the Service Recipient and the Subject. The Service Recipient then produced a letter (Justice Center Exhibit 1) from the Justice Center regarding the allegations of [REDACTED], [REDACTED] [REDACTED]. (Hearing testimony of the Risk Manager) The Service Recipient stated, in essence, that she could corroborate those allegations with Facebook messages, and it was at that time that the Service Recipient showed the Risk Manager Facebook messages from the Subject. (Hearing testimony of the Risk Manager)

¹⁵ The date was believed to be either [REDACTED].

48. Thereafter, possibly the same day or the following day, the Risk Manager and the Human Resources Manager¹⁶ met again with the Service Recipient. At that time, the Service Recipient was given access to a computer and the Service Recipient allowed the Risk Manager and the Human Resource Manager access to her Facebook account, going back to early [REDACTED]. All messages between the Subject and the Service Recipient were printed or download to a secure file. [REDACTED]

[REDACTED] (Hearing testimony of the Risk Manager)

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))

¹⁶ The Human Resources Manager is [REDACTED].

The abuse and neglect of a person in a facility or provider agency is defined by SSL § 488(1)(b) and (h), 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.

"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.

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

- (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians which includes: (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.

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 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 abuse as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged 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 abuse and neglect 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 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 the acts described as Allegations 1, 2, 3 and 4 in the substantiated report.

In support of its substantiated findings, the Justice Center presented over one-thousand pages of documents obtained during the investigation. (Justice Center Exhibits 1-40 and 44) The Justice Center also presented eleven audio recordings of the Justice Center Investigator's interview of witnesses, the Service Recipient and three separate recorded interrogations of the Subject by both the Justice Center Investigators and facility Investigators. (Justice Centers Exhibits 41, 42 and 43)

The investigation underlying the substantiated report was conducted, in part, by the facility Risk Manager and the Human Resources Manager and, in part, by Justice Center Investigators 1¹⁷ and 2.¹⁸ The facility Risk Manager, Justice Center Investigator 1 and 2 testified at the hearing in support of the Justice Center. Additionally, on behalf of the Justice Center, Staff 1 testified at hearing. The Subject testified in his own behalf.

Sexual Contact

As a point of clarification, during the testimony of Justice Center Investigator 1, she indicated that, during her first interview with the Service Recipient on [REDACTED], the

¹⁷ Justice Center Investigator 1 is [REDACTED].

¹⁸ Justice Center Investigator 2 is [REDACTED].

Service Recipient stated that on [REDACTED] the Subject came to Service Recipient's room and tried to get her up from bed, kissed her twice and touched her thigh.

Investigator 1 then testified that the Service Recipient indicated to her how the Subject touched her on [REDACTED], by motioning with her hand up her thigh coming short of her vagina. Investigator 1 testified specifically that the Service Recipient "motioned her hand [...] on the inner thigh up toward her vaginal area, but didn't make any contact with her own genitals, just high up on the inner thigh." The Investigator also testified when questioned that the Service Recipient had placed her hand right next to her vagina. However, nowhere in the recorded interviews does the Investigator provide a description of what the Service Recipient was demonstrated. (Hearing testimony of Justice Center Investigator 1, Day 2, 16 minutes and 38 seconds)

However, none of the recorded interviews in the record contains an allegation by the Service Recipient that the Subject touched her thigh while kissing her on [REDACTED]. In fact, the Service Recipient specifically denied any other physical contact when the Subject kissed her on [REDACTED]. And while there were discussions of a time or times when the Subject touched the thigh of the Service Recipient in both the interviews of [REDACTED], there was no verbalization on the record by either investigator memorializing that the Service Recipient illustrated the touch by motioning her hand. (Justice Center Exhibit 41, audio interviews with the Service Recipient: [REDACTED])

The Justice Center also alleges, and there is some evidence in the record to support the finding, that the Subject placed his hand on the Subject's thigh, underneath her waist band, while she was seated in front of a computer in the facility, between the dates of [REDACTED]. The Service Recipient was always clear in reporting that when this occurred she was taking the medication Ambien and, to use her words, she was "foggy." When interviewed

on [REDACTED], the Service Recipient reported that: “one time when I was taking Ambien I was in the day room [;] [the Subject] had his hand on the waist of my leggings touching under my shirt. I don’t remember everything because I was foggy from the Ambien.” (Justice Center Exhibit 44, Bates Stamp 1082)

When interviewed three days later by Justice Center Investigators, the Service Recipient stated that: “I don’t really know cause [sic] this is when I was taking Ambien, so it was, it was really hard on me, so I don’t really know what really happened or not, I guess, but he one time kinda [sic]of put his hand under the top of my leggings. I pulled away.” (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED]) On [REDACTED], the Service Recipient was re-interviewed and, referring to the incident, she reported: “that is when I was taking Ambien, so it was just really foggy.” (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED])

There is evidence to corroborate that the Subject assisted the Service Recipient with proofreading or typing a letter to the director of another facility, in the day room, during this time period. This was done while the Service Recipient sat in front of computer. (Justice Center Exhibit 41, audio interrogation by Justice Center of the Subject, [REDACTED]) However, the evidence to support a finding that the Subject placed his hand under the leggings of the Service Recipient in the day room during the relevant time does not rise to the level of a preponderance.

To be clear, the Service Recipient did allege that from time to time over the course of her multiple admissions, the Subject placed his hand on her thigh, over her pants. (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED]) However, there is no further discussion or inquiry about this behavior in the record, and it is simply not possible to render a conclusion that those events, if they occurred, constitute sexual contact under Article 130 of the Penal Law.

Nonetheless, there is other compelling evidence in the record to find that the Subject made sexual contact with the Service Recipient as alleged. The evidence in the record to support a finding that the Subject groped the Service Recipient's buttocks, was based upon both statements provided by the Service Recipient and by service recipient 2.

Service recipient 2 resided in the Facility for most of [REDACTED]. He had a diagnosis of schizophrenia or schizoid affective disorder and bipolar disorder. (Hearing testimony of Staff 1 and Justice Center Exhibit 29, Bates Stamp 1052)

On [REDACTED], service recipient 2 advised Staff 1 that he needed to speak with someone and that he was upset about an LPN. He stated that he witnessed the LPN inappropriately touching two service recipients and he identified the Subject as that LPN. He identified service recipient 1 and the Service Recipient as the victims. He identified the Subject and stated that the Subject had brushed up against the two service recipients' behinds and that he had groped them from behind. He reported that this had occurred during the previous two months. Staff 1 memorialized what service recipient 2 told her, including the specific characterization that the Subject had "groped" the service recipients. (Justice Center Exhibit 29, Bates Stamp 1051)

Both service recipient 1 and the Service Recipient provided letters denying that the Subject had inappropriately touched them; those letters ended the investigation – for a time. Service recipient 1, also a Facebook friend of the Subject, is known to have been trained as a paralegal, and that training is reflected in the letters which she authored. (Justice Center Exhibits 36 and 39) However, the Service Recipient, who was 19 years of age, and had only recently graduated from high school (Justice Center Exhibit 13, Bates Stamp 92-93) is, in the opinion of the Administrative Law Judge presiding over the hearing, unlikely to have authored, without assistance, the letter which she provided denying the allegations made by service recipient 2. (See, Justice Center Exhibit 35)

Approximately eight weeks after service recipient 2's allegation was made, the Justice Center entered the investigation. By that time, service recipient 2 was no longer an in-patient at the facility, and he was not interviewed during the investigation. Likewise, Service recipient 1 was also no longer an in-patient. The Justice Center Investigators made some attempt to locate her but were unsuccessful. She was never interviewed. However, likely in preparation for this hearing, service recipient 2 was interviewed by the Justice Center on [REDACTED], approximately 14 months after he made the allegation. At the time of the interview, service recipient 2 was incarcerated in the [REDACTED] Correctional facility. The interview was recorded. (Justice Center Exhibit 42)

While service recipient 2 had somewhat limited memory of the allegation, he identified a white male staff person, who normally wore a baseball cap, "grabbed at" some of the [service recipients]. He identified one of the service recipients by name (service recipient 1). He indicated that he observed the male staff person grab the backside of the female service recipients twice, and not on the same day. Service recipient 2 stated that there was "something going on" between the two, meaning one of the service recipients and the Subject, although it was unclear which of the two service recipients he was referring to. (Justice Center Exhibit 42)

Although more than a year had passed since the conduct was reported, service recipient 2 was consistent in his recollection when interviewed on [REDACTED]. Although there were some gaps in his memory, he explained what he recalled without any suggestive prompting on the part of the Investigator. The statements made by service recipient 2 and the hearing testimony of Staff 1 are credited evidence.

During the [REDACTED] interview, the Service Recipient retracted her denial of the [REDACTED] allegations, and stated that previously she had been untruthful when questioned about the Subject's conduct because she did not want him to get in trouble. (Justice Center 44, Bates

Stamp 1082) Aside from her initial denial of the [REDACTED] allegations made by service recipient 2, and the letter that she provided after [REDACTED], the Service Recipient was consistent in her disclosures.

The Service Recipient had no motive to fabricate these allegations and throughout the investigation she clearly tried to protect the Subject as much as possible. Until [REDACTED], the Service Recipient never offered to share the Facebook messages and did not give Justice Center Investigators any reason to believe that the messages would provide compelling evidence against the Subject. However, after the close of the investigation, the facility investigators had the foresight to capitalize on the passage of time and delve further, ultimately securing the Facebook evidence.

When the Service Recipient first disclosed the allegation to Staff 3, she begged her not to say anything because she did not want the Subject to get into trouble, or to lose his job. When Staff 3 explained that she had to disclose this allegation, the Service Recipient began to cry hysterically.

During the [REDACTED] interview, the Service Recipient said that she did not want the Subject to get into trouble and that she felt awful that she disclosed it. As the Service Recipient described the Subject kissing her, she began to cry. (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED])

When interviewed on [REDACTED], the Service Recipient said that she did not really want to talk to anyone about it, and did not want to pursue criminal charges. Perhaps most telling about the Service Recipient's state of mind at the time was her statement in which she said: "I don't want to ruin his life, I don't think he deserves to lose his job, I mean I let him do those things." (Justice Center Exhibit 41, audio interview with the Service Recipient: [REDACTED])

Two weeks later the Service Recipient wrote to the Subject on Facebook: "... I am so sorry ... I thought I could talk to someone about it and I didn't think anything would happen." (Justice Center Exhibit 23 and Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

The Service Recipient's allegation that the Subject touched her backside is, as discussed previously, corroborated by service recipient 2, and circumstantially by the statements of other staff such as Staff 4,¹⁹ who observed that the Subject approached the Service Recipient many times, and touched her arm. (Justice Center Exhibit 41, audio interview of Staff 4)

Concerning the allegation that the Subject kissed the Service Recipient twice on the evening of [REDACTED] and later that evening he opened the door on her when she was changing for a shower and peaked his head in, the Subject was assigned to Ward [REDACTED], where the Service Recipient resided. The Subject worked from [REDACTED] on that date and was assigned to the med-room. Sometime on [REDACTED], during the Subject's shift, the Service Recipient disclosed to Staff 2 that she thought the Subject was "eye candy" or "man candy," and then Staff 2 warned the Subject to be careful with this interaction because it could be misinterpreted. When assigned to the med-room generally, the Subject's job duties would have been to prepare medications for administration between 4:00 p.m. and 5:00 p.m. He would then prepare the medications for a scheduled 8:00 p.m. distribution. (Hearing testimony of the Risk Manager) Typically, when assigned to the med-room, the assigned LPNs spent most of their shift in the med-room and did not participate in service recipient status checks or routine rounds on the floor. At least twice during his evening shift, the Subject left the med-room leaving the med-room door open and unsecured.

There is also credible evidence in the record that the Service Recipient, who had a number of previous suicide attempts in her history (Justice Center Exhibit 13), cut herself on [REDACTED]

¹⁹ Staff 4 is [REDACTED].

██████████, so severely that closure of the wound required sutures. A few days later the Service Recipient reflected that the events of ██████████ had caused her to engage in cutting.

The Service Recipient was interviewed a minimum four times; the interviews with the Justice Center were recorded. The Service Recipient presented as extremely credible in these recorded interviews, and she candidly stated that she was unsure of the incident at the computer during the time she was taking Ambien, because that drug made her “foggy.” In all respects the Service Recipient presented as credible and appeared to have no motive to fabricate. There is no evidence of delusions in her core history, and not one staff who was interviewed during the investigation could recall the Service Recipient making an allegation of this nature against any one during her multiple admissions at the facility. The statements of the Service Recipient concerning the events of ██████████ and the Subject’s pattern of groping her behind and are credited evidence in the record.

This case is unique in that in this record there are three recorded interrogations of the Subject. In all three interrogations the Subject lied rather blatantly about his outside communications with the Service Recipient, his social media contact with her and the fact that he clearly had sexual feelings for her. The Subject’s lies are exposed by the more than 500 pages of Facebook messages which came to light after the Justice Center investigation was closed.

During the first post investigation interrogation of the Subject ██████████, facility interrogators spent significant time questioning the Subject about the nature of his relationship with the Service Recipient and about his contact with her in general. After the Subject had offered more lies in response to these questions, the interrogators confronted him with the irrefutable record of his Facebook communications with the Service Recipient.

The Administrative Law Judge presiding over the hearing had the unique opportunity to listen to the Subject provide definitive untruths to the interrogators on many questions. That record provides valuable insight into the Subject's demeanor when he is lying.

At the hearing, the Subject testified that he was "not guilty" of all four substantiated findings.

The Subject denied that he entered the Service Recipient's room on [REDACTED], denied that he kissed the Service Recipient and denied that he had ever groped the Service Recipient's rear end. He further denied entering the shower area while the Service Recipient was changing on [REDACTED]. The Subject also denied that he ever spoke with the Service Recipient about the allegation made by service recipient 2.

The Subject even denied that he was ever aware of the Service Recipient's history as a sexual assault victim, even though she disclosed this to him on Facebook and he had consoled her during that exchange. (Justice Center Exhibits 23 and 43, Subject's internal Interrogation: [REDACTED] [REDACTED])

The Administrative Law Judge presiding over the hearing having had the opportunity to view and consider the hearing testimony of the Subject finds that this hearing testimony on all material issues, is not credited evidence.

Category One Sex Abuse Allegations 1 and 2

To prove sexual abuse as the Justice Center has alleged, the Justice Center must establish that the Subject's conduct subjected the Service Recipient to any offense defined in article one hundred thirty or sections 255.25, 255.26 or 255.27 of the penal law. (SSL § 488(1)(b))

Initially, it is determined that the Service Recipient lacked the requisite consent to engage in sexual activity with the Subject. The New York State Penal Law, in relevant part, PL § 130.05(3)(i), deems a person incapable of giving consent when he or she is:

a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of alcoholism and substance abuse services, and the actor is an employee of the facility not married to such resident or inpatient. For purposes of this paragraph, "employee" means either: an employee of the agency operating the residential facility, who knows or reasonably should know that such person is a resident or inpatient of such facility and who provides direct care services, case management services, medical or other clinical services, habilitative services or direct supervision of the residents in the facility in which the resident resides;

At the time of the alleged abuse, the Service Recipient was admitted as an in-patient at the facility operated by the Office of Mental Health. The Subject was an employee of the same facility and had knowledge that the Service Recipient was inpatient at the facility.

The Justice Center argues that the contact established at the hearing meets the definition of sexual contact as defined by PL § 130.00(3), which states:

(3) "Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.

The conduct established in this record consists of a closed mouth kiss on [REDACTED]

[REDACTED]²⁰ and the groping of the Service Recipient's buttocks on one or more occasions between [REDACTED]

[REDACTED]²¹.

The act of groping a person's buttocks constitutes sexual contact as that term is defined in PL § 130.00(3). In, *People v. Thomas*, 91 Misc. 2d 724, 398 N.Y.S.2d 821, [Crim Ct, City of New York 1977], the Court addressed this very conduct and concluded that when the Defendant touched a woman on the buttocks, without her consent, that act was "sexual contact," as defined in PL § 130.00(3); the Court was clear in holding that the penal law definition of sexual contact is not restricted to the touching of reproductive organs.

²⁰ This contact is covered under Allegation 1.

²¹ This contact is covered under Allegation 2.

Similarly, courts have held that a closed mouth kiss constitutes "sexual contact," as defined in defined in PL § 130.00(3). In *People v. Rondon*, the court held that:

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 touching of an intimate part is found in recent case law. It has been established that "intimate parts" is a much broader term than sexual parts and that intimacy must be viewed within the context in which the contact takes place. (*People v Rivera*, 138 Misc 2d 570 [Sup Ct, Bronx County 1988]; *People v Graydon*, 129 Misc 2d 265 [Crim Ct, NY County 1985].) Further in *Matter of David M.* (93 Misc 2d 545 [Fam Ct, Bronx County 1978]), the court held that sexual contact only requires the abuse of the victim's body and privacy. The court, in *People v Rivera* (*supra*, at 572), held that the mouth was a *sexual* part of the body where the defendant inserted his tongue into the victim's mouth. In *Anonymous G. v Anonymous G.* (132 AD2d 459 [1st Dept 1987]), the court referred to a list of *sexually* stimulating activities which included the insertion of a tongue into a mouth. Thus, courts have held the mouth to be a sexual part where a tongue has been inserted into the mouth. Since intimate part is a much broader term than sexual part (*see, People v Rivera, supra*), it is clear to this court that where an individual is kissed on the mouth absent the insertion of a tongue, the mouth can be considered an intimate part of the body. Accordingly, this court holds that a kiss on the mouth without the insertion of a tongue can be considered a touching of an *intimate* part, constituting the essential element of sexual abuse.

People v. Rondon, 152 Misc. 2d 1018,1020, [Crim Ct, City of New York 1992].
But see *People v Kittles*, 102 Misc 2d 224, [Suffolk County Ct 1979].

Irrespective, in more recent times, courts have declined to grant dismissal of prima facie challenges to the sufficiency of legal instruments which allege, only, closed mouth kissing without insertion of the tongue. See, e.g., *People v. Valentin*, 17 Misc. 3d 1132(A), [Crim Ct, City of New York, 2007]

Because it has been established that the Subject performed a closed mouth kiss on the Service Recipient and groped the Service Recipient's buttocks, the Justice Center has established by a preponderance of evidence that conduct of the Subject constitutes touching of the sexual or other intimate parts of the Service Recipient, as that term is so defined in Article 130 of the Penal law.

Having established that the Subject engaged in sexual contact with the Service Recipient,

the next issue to be addressed is whether that sexual contact violated PL § 130.52(1) and PL § 130.60(1), as alleged by the Justice Center.

PL § 130.52 (1), states that:

A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose:

1. forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire;

Initially, because the Service Recipient is deemed incapable of consent pursuant to PL § 130.05(3)(i), the Subject's kissing and groping of the Service Recipient are, as a matter of law, done forcibly. (CJI2d[NY] Penal Law § 130.52(1) [last rev Dec. 2013 and June 2014])²²

And further, the element of sexual gratification can be inferred from the Subject's conduct. (*People v. Hill*, 34 A.D.3d 1130 [3d Dept 2006]; *People v. Ortiz*, 16 A.D.3d 831, 833 [3d Dept 2005]; *People v. Watson*, 281 A.D.2d 691 [3d Dept 2001]) Such an inference is particularly strong when considered in light of the multiple sexually explicit Facebook messages²³ sent by the Subject and the nude photos and videos that the Subject sent to the Service Recipient during the relevant time.

Considering that the Subject subjected the Service Recipient to sexual contact and that the Service Recipient is incapable of consenting to such contact, the Justice Center has established by a preponderance of the evidence that the Subject committed Forcible Touching pursuant to PL § 130.52(1), and, consequently, the Justice Center has also established that the Subject has

²² The Jury Instructions provide that: Forcible touching takes place without a person's consent when it results from any circumstances in which a person does not expressly or impliedly acquiesce to the actor's conduct. (Penal Law § 130.05 (2) (c)) Lack of consent can also result from forcible compulsion or incapacity to consent (*see* Penal Law § 130.05 [2]). For definition of forcible compulsion, see Penal Law § 130.00 (8). For definition of incapacity to consent, see Penal Law § 130.05 (3).

²³ There are many examples, see Justice Center Exhibit 23, Bates Stamp 847-849.

committed sexual abuse under SSL §488(1)(b).

As is noted above, the Justice Center also contends that it has established by preponderance of the evidence that the Subject committed Sexual Abuse in the second degree pursuant to PL § 130.60 and which states in pertinent part that:

A person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is:

1. Incapable of consent by reason of some factor other than being less than seventeen years old

Based upon the findings and analysis set forth above, and for the same reasons so stated, the Justice Center has likewise established that the Subject subjected the Service Recipient to sexual contact and that the Service Recipient is incapable of consenting to such contact. Therefore, the Justice Center has established by a preponderance of the evidence that the Subject committed Sexual Abuse in the second degree pursuant to PL § 130.60 and, consequently, the Justice Center has sufficiently established that the Subject committed sexual abuse under SSL § 488(1)(b).

It should be noted that the Subject had raised, in his memorandum of law, that the proof provided by the Justice Center must include corroboration. The Justice Center takes the position, and correctly so, that corroboration is not required when incapacity to consent is based upon a finding that the service recipient is inpatient at a residential facility operated, licensed or certified by OMH.²⁴ Finally, though not required legally, there is in the record convincing corroboration of the Service Recipient's claim of sexual contact with her buttocks in the proof that the sexual contact was observed by service recipient 2.

The Justice Center sufficiently established that the Subject engaged in conduct that violated PL §§ 130.60(1) and 130.52(1); consequently, the Justice Center has sufficiently established that

²⁴ See PL § 130.16 for further explanation.

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 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.

Category 2, Neglect Allegations 3 and 4

There are two basic theories to the allegations of neglect. The first being that during the relevant time, the Subject failed to maintain appropriate boundaries with a service recipient in engaging in sexual contact with her.

The Justice Center established that the Subject engaged in sexual contact with the Service Recipient during the relevant time alleged. The Subject breached his duty to the Service Recipient when he did so, and the breach is evidenced by several factors, including the fact that the conduct he engaged in violated the Penal law. The sexual contact was likely to result in protracted impairment of the physical, mental or emotional condition of this very vulnerable service recipient, especially considering her history of suicide attempts, depression and sexual abuse, all factors the Subject was aware of.

Moreover, in both Allegations 3 and 4, the Justice Center argues that other behavior, which do not amount to sexual contact constitute a breach in that the behaviors were a failure of the Subject to maintain appropriate boundaries with the Service Recipient and, as such, the Subject breached his duty to the Service Recipient and ultimately committed neglect.

For instance, on [REDACTED], the Subject peeked into the bathroom when the Service Recipient was undressing for a shower. There was no legitimate supervision-driven motivation for this behavior. The Subject's behavior violates every norm of a therapeutic relationship.

Finally, there are the Facebook messages. Facility rules prohibit any personal relationship with service recipients, at any time. Facility staff have an obligation to report any personal relationship they may have with a patient, including a relationship that develops before admission. Specifically, the facility has a policy which prohibits social relationships with service recipients, outside of job duties, and specifically prohibits non-business-related phone contact and "sexual conduct or activity with [service recipients]. At the onset of his employment, the Subject was provided with a copy of the policy but the Subject argued that the policy does not specifically prohibit social media.

Irrespective, the Subject's relationship with the Service Recipient, as is evidenced by the Facebook communications, was clearly a personal relationship and was a breach of the Subject's duty to the Service Recipient. The 500 plus pages of Facebook communications illustrate this, and the highly sexualized communications appearing throughout the early Facebook exchanges exemplify this. The Subject had an absolute duty to report his personal relationship with the Service Recipient when she was readmitted to the facility for treatment on [REDACTED]. The Subject did not do so. And despite the Subject's claims in his testimony and in his interrogation that the Facebook communications were somehow therapeutically motivated, or some type of life advice, the explicit nature of the communications completely undermines this. Perhaps most telling are the Subject's own words during his interrogation, in which the Subject said: "She was a pretty girl, I mean she was young, but she was pretty." (Justice Center Exhibit 43, Subject's internal Interrogation: [REDACTED])

It is not speculative to assume that had the Subject disclosed this relationship on [REDACTED] that his contact with the Service Recipient at the facility would have been eliminated. The Service Recipient herself understood that the nature of the Facebook communications could cause the Subject to lose his job, and this is reflected in an exchange between the two in [REDACTED]. (Justice Center Exhibit 23, Bates Stamp 743-746)

The Service Recipient was clearly troubled by this relationship, and there is ample evidence in the record to support this, including but not limited to the audio interviews with the Service Recipient. The Service Recipient was extremely vulnerable and she sought treatment for serious depression and suicidal attempts and ideations. She did not need this “issue” causing her further disruption of her treatment.

The Justice Center has established by a preponderance of the evidence that the Subject both breached his duty in establishing a personal relationship with a former patient and by failing to disclose same upon her readmission on [REDACTED]. This breach constitutes a failure to maintain appropriate boundaries and was likely to result in protracted impairment of the physical, mental or emotional condition of this very vulnerable service recipient.

Consequently, and based upon all of the foregoing, the Justice Center has established by preponderance of the evidence that the Subject committed the neglect as alleged in Allegations 3 and 4.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. 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)) Considering the Service Recipient’s

history of suicide attempts, depression, and sexual abuse, the Subject's conduct did seriously endanger the Service Recipients' health, safety or welfare. The substantiated report is properly categorized as a Category 2 act.

A Category 2 act under this paragraph shall be elevated to a Category 1 act when such an act occurs within three years of a previous finding that such custodian engaged in a Category 2 act. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

DECISION:

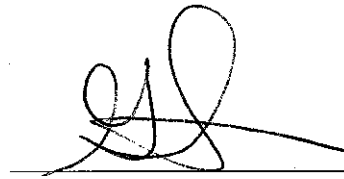
The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed sexual abuse and neglect as alleged.

Substantiated allegations numbered 1 and 2 are properly categorized, as Category 1 acts.

Substantiated allegations numbered 3 and 4 are properly categorized as Category 2 acts.

This decision is recommended by Gerard D. Serlin, Administrative
Hearings Unit.

DATED: September 24, 2018
Schenectady, New York



Gerard D. Serlin
Administrative Law Judge