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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CORRIGAN,

Appellant,

-against-

No. 4

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY,

Respondent.

20 Eagle Street
Albany, New York 12207
January 05, 2017

Before:

ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 JUDGE RIVERA: Last case on this afternoon,
2 matter of Corrigan v. New York State Office of
3 Children and Family Services.

4 Counsel.

5 MR. HOFFMAN: Good afternoon. My name is
6 Peter Hoffman, I'm here on behalf of the Corrigan
7 family, and it - - - may it please the court that - -
8 - we - - - we believe that this - - -

9 JUDGE RIVERA: Sorry to interrupt you. Do
10 you want rebuttal time?

11 MR. HOFFMAN: Oh, I'm sorry. I want three
12 minutes of rebuttal. Excuse me.

13 JUDGE RIVERA: Three minutes. Thank you,
14 counsel.

15 MR. HOFFMAN: In - - - in analyzing the two
16 statutes that are in question here, Social Service
17 Law 422 and 427-a, we believe that they should be
18 read together, as we stated in our papers.

19 We believe that they should be read together
20 because, contrary to what - - - and they should be read
21 together in - - - in a theory of pari materia, because - -
22 -

23 JUDGE STEIN: But they're not the same, are
24 they? One - - - one involves a full investigation of
25 whether the - - - the charges are - - - the

1 allegations are substantiated. One says, we're not
2 going to go there. We're just going to try to
3 address whatever issues have been raised, we're not
4 going to make a finding.

5 So from a practical standpoint, how would
6 you - - - what would even be the criteria for
7 expungement?

8 MR. HOFFMAN: Okay. So - - - so, Your
9 Honor, first - - - firstly, the statute is part of
10 the same group of statutes. It's part of the Social
11 Services Law. It's not as - - -

12 JUDGE STEIN: It's a big law; that's a
13 pretty big law.

14 MR. HOFFMAN: Understood. But it's still
15 part of the same construct, as - - - as it stated in
16 - - -

17 JUDGE STEIN: Right. And one says that the
18 records must be maintained for ten years.

19 MR. HOFFMAN: Right.

20 JUDGE STEIN: And the other says, unless
21 you - - - you - - -

22 MR. HOFFMAN: Okay.

23 JUDGE STEIN: - - - that you can seek to
24 have it expunged earlier.

25 MR. HOFFMAN: But let me - - -

1 JUDGE STEIN: So there - - -

2 MR. HOFFMAN: - - - let me go to your - - -
3 answering the other part of your first question, I'll
4 - - - I want to go to, and then I'll get to this - -
5 - this third question.

6 But - - - but in the context of why they're
7 the same, there is - - - and why they are similar is
8 because when you look at the legislative intent, the
9 legislative intent, in particular, judge - - - in
10 particular, Senator Rath, one of the introduces, says
11 clearly that one of the reasons that it was meant to
12 prev - - - one of the reasons that 427-a was meant to
13 put in place was that "A record can haunt one for
14 years later."

15 And that's on page 12 of the bill jacket.

16 JUDGE STEIN: That's right. And here, and
17 - - - and in this situation, there is no record that
18 anybody has found anything.

19 MR. HOFFMAN: Right.

20 JUDGE STEIN: So - - - and that's the
21 record that could haunt. But the legislative intent
22 also indicates that when there is no investigation,
23 that maintaining these records is important because
24 it may be the only chain of evidence if there's
25 problems down the road.

1 MR. HOFFMAN: And I - - - and I agree, my
2 client agrees, and we don't disagree with the ten-
3 year retention portion of this.

4 But the ten-year retention portion, if you
5 look back at 422-a, the ten-year retention portion is
6 even more important in 422-a. But yet, in 422-a - -
7 - in 422, excuse me. In 422, what it says is that
8 even though we have somebody that's founded, they can
9 go back and - - - and have a specialized hearing,
10 then go back, and if they are successful in that
11 specialized hearing, go back and get expungement.

12 The same - - -

13 JUDGE STEIN: And what is that hearing
14 based on?

15 MR. HOFFMAN: Excuse me?

16 JUDGE STEIN: What is that hearing based
17 on? Isn't it based on the investigation?

18 MR. HOFFMAN: No, it's based on clear and
19 convincing evidence as to whether or not they're - -
20 - the falsity or the truth are the charges. So - - -

21 JUDGE STEIN: Right. But part of that
22 evidence - - -

23 MR. HOFFMAN: So - - -

24 JUDGE STEIN: - - - is what was gathered in
25 the investigation, right?

1 MR. HOFFMAN: Nothing needs to be
2 different. Nothing needs to be different in 427-a
3 than is - - - than is applied in 422.

4 JUDGE ABDUS-SALAAM: So in this case,
5 counsel, where they are - - - everybody agrees there
6 was some kind of misunderstanding about what happened
7 with this young man - - - with the - - - with the
8 boy, and the family, you know, didn't do anything
9 wrong, and so they just want - - - even though
10 there's been no finding that they've done nothing
11 wrong, or that they did something wrong, they just
12 want the record expunged.

13 MR. HOFFMAN: Well, there - - - there's a
14 ten - - - there's a - - - there's 168 pages of
15 records that are left over from this investigation.
16 It's not insubstantial.

17 I, typically - - - this is part of my
18 practice, as a - - - as a - - - as handling a lot of
19 administrative law, but this, in particular, CPS
20 charges are part of my practice. 168 pages of a
21 record is left - - -

22 JUDGE FAHEY: Okay. Let me - - -

23 MR. HOFFMAN: - - - for someone to go look
24 at is very dangerous to that person.

25 JUDGE FAHEY: Let's say - - - I think,

1 personally, it's unfair. I think that, as an
2 individual, I would agree with you. But I can't say
3 that I don't see a policy reason why the State
4 wouldn't want to do this, in terms of - - -
5 forgetting about you, in your - - - a general policy
6 reason why the State ruling wouldn't want to protect
7 its stability to - - - to identify a pattern of
8 abuse. So should - - -

9 MR. HOFFMAN: We don't disagree with that
10 policy.

11 JUDGE FAHEY: - - - should - - - should the
12 law be amended; that's a good argument.

13 MR. HOFFMAN: Well - - -

14 JUDGE FAHEY: Do we have the right to
15 modify 427-a to put it in line with 422, in the
16 absence of any kind of investigation, any kind of
17 finding, either unfounded or founded - - - excuse me,
18 identified, that seems to be an entirely different
19 question.

20 The fairness argument, you win. But I
21 don't - - - I - - - it's very hard for me to see how
22 the State's interest can be ignored here.

23 MR. HOFFMAN: Nothing is - - - nothing,
24 nothing - - -

25 JUDGE FAHEY: Um-hum.

1 MR. HOFFMAN: - - - effects the State's
2 interest in retaining records any different in 422
3 from 427, if you allow 422's procedure to go forward
4 - - -

5 JUDGE FAHEY: Well, no, it would - - -

6 MR. HOFFMAN: - - - and the reason - - -
7 the reason - - -

8 JUDGE FAHEY: Let me explain it a second.
9 Hold on. It would, because simple enough, if there
10 was a - - - an accusation of abuse, one on an FAR
11 method, or investigation, it was dismissed, nobody
12 did anything with it, and then five years later,
13 there was another claim of abuse that was founded,
14 there would be no record, it could be expunged under
15 your theory. Here, it could not be expunged.

16 The more pressing problem is, why can't it be
17 expunged after ten years. The way I read the statute is,
18 it can't even be expunged then. I agree with you, there's
19 some unfairness in the way the statute operates, but that
20 still doesn't undermine the State's overriding policy to
21 protect against the pattern of abuse.

22 MR. HOFFMAN: All right. I - - - I agree
23 in the context of the ten-year retention rule - - -

24 JUDGE FAHEY: Um-hum.

25 MR. HOFFMAN: - - - there is no

1 disagreement. But where I disagree, Your Honor, is
2 that if we were to use the standards for expungement
3 under 422, which is clear and convincing evidence,
4 it's a fairly high standard by which - - -

5 JUDGE RIVERA: Yeah, but let's get back to
6 Judge Stein's question, because I think at the end,
7 that - - - that's really the nub of it.

8 When you - - - when that determination is
9 being made, is that going to be a de novo review, is
10 there some new investigatory process that's going
11 through, or are you deciding then, or will that be
12 decided on the record as it exists - - -

13 MR. HOFFMAN: It would - - - it would - - -

14 JUDGE RIVERA: - - - which then there are
15 two different - - - right, there isn't a full
16 investigation under FAR.

17 MR. HOFFMAN: Understood. But you would
18 still have to reach the issue of clear and convincing
19 evidence, as to whether or not - - - as to the truth
20 of the matter of whether or not abuse occurred - - -

21 JUDGE STEIN: But based - - -

22 MR. HOFFMAN: - - - or neglect occurred.

23 JUDGE STEIN: But the question is based on
24 what? I think that's what - - -

25 MR. HOFFMAN: Based on a hundred and - - -

1 in this case, based on 168 pages of records that
2 clearly show - - - that clearly show that the
3 District was not reporting factual information to
4 CPS, that sits there - - -

5 JUDGE STEIN: If that's the case - - -

6 MR. HOFFMAN: - - - that sits there - - -

7 JUDGE STEIN: If that's the case,
8 counselor, then what's the harm - - - you know, you
9 say, we have these records that anybody can look at -
10 - -

11 MR. HOFFMAN: So - - -

12 JUDGE STEIN: - - - and of course the
13 statute very, very narrowly defines who can look at
14 it, but even as to those agencies or - - - or
15 persons, if - - - if the record, as you indicate,
16 shows so clearly that they weren't at fault, then
17 what is the - - - what is the harm?

18 MR. HOFFMAN: Because someone - - - someone
19 in a position, in a bureaucratic position, in a - - -
20 in a busy office in a metropolitan area, such as
21 Westchester County, which is theoretically urban at
22 this point, and the type of caseload that that person
23 has, is not necessarily going to look at each and
24 every 168 pages.

25 They're going to look and say, this person

1 was investigated - - - not investigated, this person
2 went for an assessment before, why should we put them
3 on - - -

4 JUDGE RIVERA: Are you - - -

5 MR. HOFFMAN: - - - assessment again.

6 JUDGE STEIN: So should the petitioners
7 have said, we don't want to go this route, we want -
8 - -

9 MR. HOFFMAN: I - - -

10 JUDGE STEIN: - - - an investigation,
11 because we can prove that there is no foundation to
12 this.

13 MR. HOFFMAN: Your Honor - - -

14 JUDGE RIVERA: Can you address the notice
15 issue?

16 MR. HOFFMAN: Your Honor, I do that - - - I
17 do that, routinely now, with my clients after this
18 matter, and becoming aware of this matter. After
19 this matter, I know of other clients who have gone
20 before CPS, then posed the question, do you want a
21 FAR invest - - - a FAR assessment, or do you want - -
22 - or you have the option to go through a complete
23 investigation.

24 JUDGE RIVERA: But - - -

25 MR. HOFFMAN: It is never told to them - -

1 -

2 JUDGE RIVERA: Okay. Was there - - -

3 MR. HOFFMAN: - - - that they can get an
4 expungement.

5 JUDGE RIVERA: - - - isn't that preserved
6 here? Did they make the argument?

7 MR. HOFFMAN: Excuse me?

8 JUDGE RIVERA: Did they make the argument
9 on this notice, or lack of explanation, is that
10 preserved for us to consider?

11 MR. HOFFMAN: It is preserved.

12 JUDGE RIVERA: Um-hum.

13 MR. HOFFMAN: And I believe there was a
14 lack of notice, and the - - - and part of the lack -
15 - -

16 JUDGE RIVERA: But you've got the
17 checklist. What - - - what shows the lack of notice?

18 MR. HOFFMAN: But the checklist doesn't say
19 - - - the checklist itself, number one, doesn't say
20 that the parent is - - - or the person who is charged
21 is given the right to choose one or the other with
22 the information that expulsion would be okay on an
23 investigation.

24 JUDGE FAHEY: What you're saying is - - -

25 JUDGE RIVERA: Did the parents sign the

1 checklist?

2 MR. HOFFMAN: The parent - - - I can't
3 remember, but I don't think the parent signs that
4 checklist. I believe that the caseworker signs the
5 checklist.

6 JUDGE RIVERA: Does the parent sign
7 anything to indicate that they consent?

8 MR. HOFFMAN: Not that I'm aware - - - not
9 that I'm aware of, Your Honor, no.

10 JUDGE RIVERA: So that - - - that would all
11 be based on - - -

12 MR. HOFFMAN: On the word of - - -

13 JUDGE RIVERA: - - - representations - - -

14 MR. HOFFMAN: - - - the case worker.

15 JUDGE RIVERA: - - - from the caseworker.

16 MR. HOFFMAN: Right. And in this case, I -
17 - - I - - - even if - - - even if, as I read the
18 regulations, even if notice was given, which I'm not
19 disputing that notice - - - that some form of notice
20 was given, based on the checklist being signed.

21 JUDGE RIVERA: Um-hum.

22 MR. HOFFMAN: But - - - but by the same
23 token, under the regulation, nothing in the
24 regulation says to that parent or that person who is
25 charged that she will then, necessarily, be giving up

1 the right to expungement.

2 JUDGE RIVERA: Was there any investigation
3 of that assertion - - -

4 MR. HOFFMAN: Not - - -

5 JUDGE RIVERA: to your knowledge?

6 MR. HOFFMAN: - - - not to my knowledge.

7 JUDGE RIVERA: Thank you. Thank you,
8 counsel.

9 MR. HOFFMAN: Okay. Thank you very much,
10 Your Honor.

11 JUDGE RIVERA: You have a rebuttal.

12 MS. FIGUEREDO: May it please the court.
13 Valerie Figueredo, for the State Office of Children
14 and Family Services.

15 There is no early expungement here for two
16 reasons. First, the plain text of the statute requires
17 that a report, under Social Services Law 427-a, be
18 maintained for ten years. And second, the early
19 expungement provision in Social Services Law 422 - - -

20 JUDGE RIVERA: What - - - what's the
21 process if someone says, that was not explained to
22 me, I didn't understand that expungement would not be
23 an option? Is there a process now to address that?

24 MS. FIGUEREDO: The family, before the FAR
25 case is closed, the regulations require the local

1 social services district to inform the family that
2 the report will be maintained for ten years. At that
3 point, if the family wanted to, perhaps, submit to an
4 investigation for the possibility of an opportunity
5 for early expungement, they could then switch - - -

6 JUDGE RIVERA: No, no, I understand. I'm
7 sorry. If the family comes back and says, we did not
8 know that, we would never have consented to this,
9 does anyone investigate that?

10 MS. FIGUEREDO: OCFS does not conduct - - -
11 that's up to the local social services district, that
12 would be a lawsuit against Westchester DSS. The
13 family could attempt to seek some type of civil
14 action against the District, claiming that they were
15 negligently put on the FAR track, but it would not be
16 a lawsuit involving OCFS, because OCFS, in the first
17 instance, is not the entity that either investigates,
18 or notifies, or talks with the family; they have no
19 contact with the family.

20 JUDGE RIVERA: So their remedy, here, if -
21 - - if they want to pursue - - - in your opinion, if
22 they want to pursue this notice question, as your
23 saying, it's to go against - - -

24 MS. FIGUEREDO: Westchester DSS.

25 JUDGE RIVERA: - - - the Westchester

1 County. Okay.

2 JUDGE FAHEY: So you said they're expunged
3 after ten years on the FAR track, but they really
4 aren't. There's no provision to expunge at all, is
5 there?

6 MS. FIGUEREDO: There are two separate
7 provisions in 427-a. I would refer the court to 427-
8 a, subsection (4)(C)(i), and that one says, sealed
9 reports shall be - - - shall be maintained for ten
10 years, and after that they are expunged. And then
11 there are some - - - there is Social Services Law - -
12 -

13 JUDGE ABDUS-SALAAM: Well, that's what
14 you're saying practically happens, after the ten
15 years, they get expunged - - -

16 MS. FIGUEREDO: Right.

17 JUDGE ABDUS-SALAAM: - - - not that the
18 statute says that they will be expunged.

19 MS. FIGUEREDO: The statute only says
20 they're maintained for ten years. So the - - -

21 JUDGE FAHEY: It doesn't say they are
22 expunged.

23 MS. FIGUEREDO: It doesn't actually say
24 they are expunged - - -

25 JUDGE FAHEY: Right. That's my point.

1 MS. FIGUEREDO: - - - but the logical
2 inference - - -

3 JUDGE FAHEY: So my point is, we're dealing
4 with what the statute says. It does not say that
5 it's - - - it's expunged. Unlike 422, which actually
6 does say that the records are expunged after ten
7 years.

8 MS. FIGUEREDO: But 420 - - - 422 does also
9 have the same provision that says they are maintained
10 for ten years - - -

11 JUDGE FAHEY: Right.

12 MS. FIGUEREDO: - - - and then has a
13 separate provision that permits early expungement.
14 That's what's missing in 427-a. 427-a also has
15 subsection (5)(C), which says, the records are
16 maintained for ten years. So in two separate places,
17 the legislature made it clear that they shall only be
18 maintained for ten years.

19 JUDGE ABDUS-SALAAM: Only be maintained - -
20 -

21 MS. FIGUEREDO: Right.

22 JUDGE ABDUS-SALAAM: - - - you mean they
23 could conti - - - they could not, after year ten,
24 keep those records - - -

25 MS. FIGUEREDO: The OCF - - -

1 JUDGE ABDUS-SALAAM: - - - or that they
2 wouldn't have any effect after ten years?

3 MS. FIGUEREDO: After ten years, OCFS
4 understands that the statute does not require the - -
5 - does not authorize them to be maintained.

6 JUDGE RIVERA: How may - - - how can a
7 parent confirm, things happen, that it gets expunged?
8 Do they have to start an action; what do they have to
9 do?

10 MS. FIGUEREDO: So for early expungement,
11 if you are - - - if you choose to have an
12 investigation, and you have a finding that the report
13 is unfounded, then you could submit a request, it
14 must be in writing, you would ask - - - you would set
15 forth clear and convincing evidence that
16 affirmatively refutes - - -

17 JUDGE RIVERA: If - - - but if it's not on
18 the early expungement, if it's just the ten years,
19 I've waited for the clock to tick on that tenth - - -
20 the tenth year, tenth year has come and gone.

21 MS. FIGUEREDO: I - - - I think - - -

22 JUDGE RIVERA: How could - - - if I'm the
23 parent, how would I confirm?

24 MS. FIGUEREDO: I - - - I would imagine
25 they would contact the same person at OCFS who is in

1 charge of the - - - of reviewing - - -

2 JUDGE RIVERA: So not - - -

3 MS. FIGUEREDO: - - - the early expungement

4 - - -

5 JUDGE RIVERA: - - - so not the District,
6 OCFS, because it's on the register.

7 MS. FIGUEREDO: Right. OCFS is the one who
8 administers the register.

9 JUDGE STEIN: And - - -

10 JUDGE FAHEY: Do you - - -

11 JUDGE STEIN: And when there is a request
12 for early expungement, what does OCFS actually look
13 at, what does it do to - - - to make that
14 determination as to whether there is clear and
15 convincing evidence?

16 MS. FIGUEREDO: So there's two things the
17 OCFS - - - OCFS would look at. First, it's the clear
18 and convincing evidence, the written evidence the
19 family would set forth, showing why the allegation in
20 the report is affirmatively refuted, and two, it is
21 the records of the investigation, and the findings of
22 the local social services district.

23 And that's why, permitting expungement
24 under FAR would completely undermine the FAR
25 procedure, because there is no investigation, no

1 finding, no determination being made - - -

2 JUDGE STEIN: So it would be one sided - -

3 -

4 JUDGE RIVERA: But wouldn't that just mean
5 there's no clear and convincing evidence? I mean,
6 wouldn't you just come to that conclusion?

7 MS. FIGUEREDO: It - - - it would - - - it
8 would mean that the OC - - -

9 JUDGE RIVERA: Why - - - why can't - - -
10 why can't she have an opportunity to make her case?
11 And if you think the investigation, in this
12 particular case, was enough, you can render a
13 decision. But if not, didn't meet - - - didn't
14 satisfy the burden.

15 MS. FIGUEREDO: Well, one, you would
16 undermine the clear plain text of the statute, which
17 is not provided for that remedy, two, it would only -
18 - - it would only provide OCFS with a one-sided
19 perspective, the - - - whatever the family sets
20 forth. But OCFS would not have anything from the
21 District, no findings, no investigation to then
22 assess the family's claims. So it - - - it would
23 almost be pointless, because they would - - - they
24 wouldn't have the full record you get - - -

25 JUDGE RIVERA: Well, that what I'm saying.

1 Aren't you then left with, she's not met her burden,
2 because you - - - you don't have enough in the record
3 to come to a decision?

4 MS. FIGUEREDO: But again, that would
5 undermine the administrative convenience that the
6 legislature - - - that the legislature set forth when
7 it created 427-a. In exchange for not having the
8 burden and the time-consuming aspects of an
9 investigation, you don't get expungement, but you
10 also don't get a determination of wrongdoing, or any
11 assessment, or finding against you.

12 JUDGE FAHEY: Can - - - can we just go to -
13 - - it seems like the petitioner's arguments really
14 go to a question of fairness in their constitutional
15 arguments. And what's your position on the equal
16 protection arguments and the due process argument?

17 It seems like the petition does not contain
18 any Constitutional argument, but the trial court
19 actually seemed to rule, nonetheless, on equal
20 protection argument, at the Appellate Division, that
21 was a due process argument, and now, we have an equal
22 protection argument again.

23 So you argue it's unpreserved, but how do you
24 get around the fact that the trial court ruled on the
25 equal protection argument?

1 MS. FIGUEREDO: So the Supreme Court, and
2 this is at page 19 of the Appellate record, did reach
3 - - - interpreted the allegations in the petition
4 regarding the denial of administrative review as an
5 equal protection claim. If you want to reach the
6 merits of that claim, it fails because you do - - -
7 it is - - - there is no protective class here.

8 The State does have a legitimate interest,
9 as this court recognized in Lee TT, to protect the
10 child welfare, and that interest is furthered by
11 having this registry.

12 There is - - - it was a reasonable
13 legislative judgment to protect the family's
14 interest, their privacy interest, by sealing these
15 records, they're not publicly available, and in
16 exchange, you have this registry, and you encourage
17 zealous reporting, because you are trying to further
18 a legitimate interest in ensuring that children are
19 protected.

20 As to the due process claim, again, our argument
21 is that it is unpreserved, it was not raised in the
22 Article 78 petition, but even if you want to address the
23 merits, there is no due process violation here, because
24 there is no legally protectable interest that was
25 effected. There's no loss - - - there's no allegation as

1 to a loss of employment or the foreclosure of future
2 employment, and you - - - you don't have a due process
3 claim just based - - -

4 JUDGE RIVERA: Do they have to report this
5 anywhere?

6 MS. FIGUEREDO: I'm sorry?

7 JUDGE RIVERA: Does the parent have to
8 report this anywhere, that they're on the list - - -

9 MS. FIGUEREDO: There's no - - -

10 JUDGE RIVERA: - - - on this registry?

11 MS. FIGUEREDO: There's no requirement in
12 the statute that it - - - that it has to be reported.
13 Again, the report can only be unsealed in a very
14 limited circumstance. And just to make that clear,
15 that's only when a subsequent report comes in - - -

16 JUDGE RIVERA: Um-hum.

17 MS. FIGUEREDO: - - - to the - - -

18 JUDGE RIVERA: If she wanted to get a job
19 as a teacher, would she have to report this?

20 MS. FIGUEREDO: I don't - - - I don't - - -
21 I don't know the answer to that. I don't know what
22 the requirements are for obtaining an educator
23 position. I do know that in - - - unlike reports
24 under 422, where the school district, or a child care
25 - - - a child welfare agency, child care agency would

1 then be able to call the registry and find out if you
2 are on the registry - - -

3 JUDGE RIVERA: Um-hum.

4 MS. FIGUEREDO: - - - that - - - that would
5 not be available here. So an employer, a child - - -
6 childcare agency, foster care agency would not be
7 able to call the registry and confirm whether this
8 family has had a report issued against them, or has
9 had a report assigned to FAR.

10 JUDGE GARCIA: Counsel, just to go back a
11 second to, I think, Judge Fahey's question earlier
12 about the differences between the ten-year
13 expungement between the two statutes. It seems to
14 me, and maybe I'm reading this wrong, but in 422,
15 "which shall be expunged" language, it's ten years
16 from the 18th birthday of the youngest subject,
17 right, of the investigation. But under 427-a, it's
18 ten years after the report initiating the case. Is
19 that right?

20 MS. FIGUEREDO: That's - - - that's - - -

21 JUDGE GARCIA: It's different periods of
22 time, right?

23 MS. FIGUEREDO: Right. And there's also a
24 different period of time for an indicated report,
25 twenty-eight years.

1 JUDGE GARCIA: Right. So under 422, you've
2 got a ten-year "shall be", but it's going to start
3 running later. And under 427-a, it seems you've got
4 a ten year from the initiation of the report, but it
5 doesn't have a mandatory expungement.

6 MS. FIGUEREDO: Except that it still uses
7 the same "shall" language. The statute - - -

8 JUDGE GARCIA: Yeah, but the 422, I think,
9 to Judge Fahey's point, 422(6) says, "shall be
10 expunged ten years after."

11 MS. FIGUEREDO: Right. It - - - it is
12 different language, but it is the practice that under
13 427-a, the reports are maintained for ten years, and
14 they would only be reopened in the event you have a
15 subsequent report, and only then, by the local social
16 services district investigating that subsequent
17 report.

18 JUDGE GARCIA: And going back to the
19 original point, I think that's ten years from the
20 investigation, and their understanding is they
21 expunge them, not ten years from the eighteenth
22 birthday of the subject.

23 MS. FIGUEREDO: Right. Ten years from the
24 date of the report.

25 JUDGE GARCIA: Right.

1 JUDGE ABDUS-SALAAM: Counsel, could you
2 just - - - I'm just curious about expungement
3 process. I know it's not available in 427, the early
4 expungement. So under 422, if a parent is successful
5 in getting expungement, early expungement, what
6 happens to the records? I mean, what - - - are they
7 destroyed, every aspect of the record is destroyed,
8 what - - - what happens?

9 MS. FIGUEREDO: So OCFS does not actually
10 maintain possession of these records, so the 168
11 records claim to be in existence in this case are not
12 in OCFS's possession. OCFS only maintains the
13 computer records that the local social services
14 district inputs into the system.

15 So what OCFS has is just, I think, amounts
16 to about thirty-six or thirty-seven pages of computer
17 printouts in this case. And that's what I believe
18 would be expunged.

19 And then it would be the local social
20 services district's records of the investigation that
21 would also be expunged, but they're not actually in
22 the possession of OCFS.

23 JUDGE ABDUS-SALAAM: What does that mean,
24 expunged? Does it mean they get wiped out of the
25 computer, they get - - - I mean, they're physical

1 records - - - I guess there are no physical records
2 anymore. Would they be shredded, what - - - what
3 exactly - - -

4 MS. FIGUEREDO: So there may be physical
5 records in the possession of the local social
6 services districts; I'm not entirely sure what they
7 would do with those.

8 And in terms of the records at the SCR,
9 they are already legally sealed, so I don't - - - I
10 guess, the answer is, I don't know. They would just
11 delete them from the computer system, but they would
12 - - - they would not even be available in the future.

13 So in the instance that you get a
14 subsequent report after that expungement, you
15 wouldn't - - - you wouldn't have anything to access -
16 - - the SCR wouldn't provide any information to the
17 local social services district.

18 JUDGE RIVERA: Couns - - -

19 JUDGE ABDUS-SALAAM: But what exac - - -

20 JUDGE RIVERA: I'm sorry.

21 JUDGE ABDUS-SALAAM: I understand is no - -
22 - there is no legal right to look at the records, but
23 in this age of hacking and all the rest of that, what
24 if you had some neighbor or some other person who is,
25 you know, just bent on sort of defaming you,

1 essentially, and looking into your life and hacking
2 into systems to find out things about you, might
3 those things get published, if they - - - if they're
4 still in the system, if they were hacked?

5 MS. FIGUEREDO: So it's - - - that might be
6 a potential risk, but the legislature had a
7 reasonable basis for, despite that risk, maintaining
8 these records, and that's because they do - - - over
9 a period of time, they could demonstrate an ongoing
10 pattern of abuse, and there is legitimate State
11 interest here, which is to protect the child welfare,
12 and in order to do that, you need the whole listed
13 family history, and those records are part of that
14 history.

15 JUDGE RIVERA: Counsel, let me just ask
16 you, 422(5)(C), that provides for that expungement
17 doesn't say, "may, in its discretion, grant", so why,
18 or under what circumstances, might the discretion not
19 be exercised, despite meeting the requirements under
20 (5)(C)? Where - - - where would "may not" end up
21 granting this expungement, what would be the reasons
22 for that?

23 MS. FIGUEREDO: So my understanding of the
24 way the agency reads that language - - -

25 JUDGE RIVERA: Um-hum.

1 MS. FIGUEREDO: - - - is it's discretionary
2 whether it can provide the review for early
3 expungement, but if you meet the - - - if you
4 actually provide clear and convincing evidence that
5 affirmatively refutes the allegation, you're granted
6 expungement.

7 In practice, they review all expungement
8 requests. So last year, they got about 237 requests
9 for expungement, they reviewed - - - they reviewed -
10 - - they went through the expungement - - - the early
11 expungement process, and reviewed all of those
12 requests.

13 JUDGE RIVERA: So you're saying, as a
14 practice, they have read "may" as "shall", even
15 though it says it's discretionary and they need not.

16 They need not engage in the review is the
17 discretionary aspect. Once they engage in the review, if
18 the family sets forth clear and convincing evidence that
19 affirmatively refutes the allegation, you are entitled to
20 early expungement. If the family had that evidence and
21 did not get it, they could presumably bring an Article 78,
22 and challenge that as arbitrary and capricious by the
23 agency.

24 JUDGE RIVERA: Okay. I guess I'm not - - -
25 I'm not really clear on how they're reading it that

1 way, because it says, "the Office - - - OCFS may, in
2 its discretion, grant a request to expunge." It
3 doesn't say may grant a request to consider
4 expungement. But - - - but you're saying, this is
5 their practice.

6 MS. FIGUEREDO: What I'm say - - -

7 JUDGE RIVERA: This is what they do.

8 MS. FIGUEREDO: Right. In practice, all
9 requests go through the process - - -

10 JUDGE RIVERA: Um-hum.

11 MS. FIGUEREDO: - - - and if the family
12 were to meet the burden of showing that - - -

13 JUDGE RIVERA: It's granted.

14 MS. FIGUEREDO: - - - it's - - -

15 JUDGE RIVERA: They treat it as - - -

16 MS. FIGUEREDO: - - - then it would be
17 granted.

18 JUDGE RIVERA: - - - mandatory. You - - -

19 MS. FIGUEREDO: And of course, if that - -
20 - if the family thought they were wrong, they could
21 bring an Article 78 in that instance.

22 JUDGE RIVERA: Um-hum. Thank you. Thank
23 you, counsel.

24 MS. FIGUEREDO: If there are no further
25 questions, we just ask that the court affirm the

1 Appellate Division's order.

2 JUDGE RIVERA: Thank you.

3 MR. HOFFMAN: I'm - - - I'm not certain who
4 asked the question, but when - - - as a concerned
5 expungement, this parent did ask for expungement, and
6 there's a letter in the record where she does
7 affirmatively ask for expungement. She also gets a
8 letter back that says that she can't have
9 expungement, exactly on the point that you're making,
10 that they may or they may not.

11 But the more important point is, I think it
12 was Judge Fahey who said that what does the - - -
13 what will they do if the parent asks for expungement,
14 if I'm not mistaken.

15 So in this case, what they told them was, they
16 didn't say anything about going through - - - well, if you
17 want expungement, go through the formal process, go
18 through 422 and have an investigation. Instead, what was
19 said was, you have - - - you have no right to expungement,
20 and we're not going to consider it because there was no
21 founded indication in this case, not unfounded.

22 So I think that's very important, especially in
23 reference to that question.

24 JUDGE FAHEY: I get it backwards sometimes,
25 but I thought it was unfounded and indicated are the

1 - - - is the statutory language, what they use in - -
2 -

3 MR. HOFFMAN: It - - - right.

4 JUDGE FAHEY: I thought that was it.

5 MR. HOFFMAN: Yes.

6 JUDGE FAHEY: Yeah, Okay.

7 MR. HOFFMAN: But - - - but either - - -

8 JUDGE FAHEY: So I misstated before, I
9 think.

10 MR. HOFFMAN: But either way, when - - -
11 when they did ask, when the parent did ask about
12 expungement, the Department didn't come back to them
13 and say, gee whiz, if you want expungement, you have
14 to go through the entire process of investigation.

15 JUDGE STEIN: Well, but is that - - - is
16 that an appropriate result? What if it's - - - you
17 know, what if it's five years later, then going
18 through the investigation that would have been very
19 different around the time that the allegations were
20 made, you know, is no longer possible.

21 MR. HOFFMAN: If I'm not mistaken, and I -
22 - - I could be mistaken, but if I'm not mistaken,
23 under 422(5), the time limit for seeking expungement
24 is either 90 or 120 days, if I'm not mistaken. I - -
25 - some - - -

1 JUDGE STEIN: But even so, you know, again,
2 in the case of 422, there already has been a full and
3 complete investigation that's simultaneous or pretty
4 close to the - - - to the allegation, which is
5 different.

6 MR. HOFFMAN: Your Honor, I - - - I
7 understand that. But really, what you have to look
8 at is what goes on under 427-a, vis-a-vis 422, the
9 investigation versus the assessment. The assessment
10 itself is an investigation. The assessment itself,
11 and if you look at the record that was created from
12 the assessment, 168 pages of records were created out
13 of that "assessment".

14 So to me, the assessment - - - to me, the
15 assessment is an investigation by itself, and it does
16 make findings. It makes findings that, number one,
17 it's not a serious allegation of abuse. Number two,
18 it also finds whether or not the parent is going to
19 cooperate or not. All these things are very similar
20 to 422.

21 JUDGE RIVERA: Why can't you rely on the
22 remedy that she's suggested, that - - - on the notice
23 issue, on the - - - on the notice issue on the - - -

24 MR. HOFFMAN: The remedy - - -

25 JUDGE RIVERA: - - - consent issue.

1 MR. HOFFMAN: The remedy - - -

2 JUDGE RIVERA: I'm sorry. Why - - - why
3 can't you seek relief from the local district? And
4 if they agree that she really wasn't informed, didn't
5 really have consent, maybe there's some relief that
6 way?

7 MR. HOFFMAN: I - - - I don't know that I -
8 - - we couldn't have done that, but the point was is
9 that they took a very absolutist position, which led
10 us to believe that they weren't going to change their
11 mind on two separate occasions, and that - - - that
12 we had a parent that was at risk of - - - in our
13 opinion, at serious risk of having a record kept and
14 created that could be used against you.

15 You were raising the issue of the random hacker,
16 which we all, unfortunately, live with now. In - - - in
17 that context - - - in that context, I don't - - - I don't
18 even - - - I just don't know that that's going to happen
19 or it will happen, but again, it goes back to the fact
20 that the parent is genuinely at risk, even under an
21 assessment track, because the assessment track is an
22 investigation, and - - - and the findings of the
23 assessment track, to allow this parent to participate in
24 FAR, is tantamount to the - - - to the investigation that
25 would be considered under 422.

1 And I really think that - - - I really think
2 that that's - - - that's the crux of where the parent here
3 is at risk for no reason, and at risk in a way - - - at
4 risk in a way that is completely - - - this is a person
5 that, just as - - - just as a scenario, here we have a
6 person who has been wrongly accused of educational
7 neglect, she's put into the FAR track because there are
8 much more serious cases, such as child molestation,
9 physical abuse, whatever, that are investigated, and they
10 are mandatorily - - -

11 JUDGE RIVERA: She's wrongly accused five
12 times. Does that suggest something? Isn't that the
13 point, to see if, perhaps, a pattern develops over
14 time?

15 MR. HOFFMAN: Only - - - but - - - but,
16 Your Honor, with - - - with what goes on with divorce
17 law, and - - - and from my experience, education
18 cases, and that's why we cite the - - - that's why we
19 cite the H.B. the case, and why we cited the A.C.
20 case, the - - - the trouble with that is, is that so
21 five times there's false reports.

22 JUDGE STEIN: But that's exactly the reason
23 why - - -

24 MR. HOFFMAN: And - - -

25 JUDGE STEIN: - - - and it gets back, I

1 think, to the notice in consent issue, is because in
2 - - - in that situation, the parent says, no, no, no,
3 I want to - - - I want to err this whole thing
4 because my ex is just going to keep coming back at
5 me.

6 MR. HOFFMAN: But even, you could - - -
7 they could say, I want an investigation. But if they
8 - - - what's the basis for them understanding that
9 they should ask for an investigation if they're not
10 been provided notice, either the first time, or the -
11 - -

12 JUDGE STEIN: That's why I said, connect to
13 the notice.

14 MR. HOFFMAN: - - - either the first time
15 or the fifth time.

16 JUDGE RIVERA: Thank you, counsel.

17 MR. HOFFMAN: Thank you, Your Honors. I
18 appreciate it.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Corrigan v. New York State Office of Children and Family, No. 4 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: January 10, 2017