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COURT OF APPEALS

STATE OF NEW YORK

TARA N.P. ,

Appellant ,

-against-

No. 8

WESTERN SUFFOLK BOARD OF COOPERATIVE EDUCATIONAL SEVICES ,

Respondent .

20 Eagle Street
Albany, New York 12207
January 10, 2017

Before :

CHIEF JUDGE JANET DIFIORE
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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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon,
2 everyone. Appeal number 8 on today's calendar, Tara
3 N.P. v. Western Suffolk Board of Cooperative
4 Educational Services.

5 MS. O'BRIEN: May it please the court. I
6 am Mary Ellen O'Brien. With me is Michael C. Levine,
7 of Meyerson & Levine, we are attorneys for the
8 appellant.

9 This appeal raises two issues.

10 CHIEF JUDGE DIFIORE: Counsel, do you care
11 to reserve any rebuttal time?

12 MS. O'BRIEN: Oh, yes - - -

13 CHIEF JUDGE DIFIORE: Excuse me.

14 MS. O'BRIEN: - - - I'm sorry. Three
15 minutes for rebuttal. Thank you.

16 CHIEF JUDGE DIFIORE: Three?

17 MS. O'BRIEN: Three, please.

18 CHIEF JUDGE DIFIORE: You may.

19 MS. O'BRIEN: This appeal raises two
20 issues. Whether or not the County made a prima facie
21 showing that it cannot be held liable as a landlord,
22 and whether or not the County made a prima facie
23 showing that it's entitled to a - - - a governmental
24 immunity.

25 As to the landlord issue, the specific act, so

1 to speak, that - - - giving rise to this, is the failure
2 of the duty as a landlord, the common law duty as a
3 landlord to provide the very basic of rudimentary safety
4 or security procedures, once a recidivist had been
5 referred, assigned, or acquiesced in being present at the
6 site.

7 This is the issue that we had argued below.
8 There is no question that the County was in any
9 landlord/tenant relationship with the NACEC facility,
10 which they knew was an educational facility. There's no
11 question that they had an internal policy that you're
12 never to send someone who is a convicted - - -

13 JUDGE RIVERA: Does the tenant have the
14 final say on whether or not to accept the recommended
15 employee?

16 MS. O'BRIEN: Well, NACEC accepted it - - -
17 accepted the - - - had the - - - had the ability to
18 accept or reject someone.

19 JUDGE RIVERA: Could they have hired
20 someone not referred to them; could that have chosen
21 someone else?

22 MS. O'BRIEN: I'm not following.

23 JUDGE RIVERA: Can you - - -

24 MS. O'BRIEN: If NACEC could hire someone -
25 - -

1 JUDGE RIVERA: Yes. Was there arrangement
2 that you could only hire someone that was referred to
3 you, even if you could turn down one of those
4 referrals?

5 MS. O'BRIEN: There are no facts in the
6 record which indicate that. The - - - the lease
7 provides that NACEC was - - - was responsible for the
8 in - - - interior of the building, under its lease
9 terms. It agreed separately, under a separate
10 agreement, to services agreement, to become a work
11 site or to allow the premises to be used as a work
12 site for the government's work employment program.

13 There is no indication that that was an
14 exclusive arrangement, but there was never - - - there's
15 no facts either that they - - - there was ever anyone else
16 placed. And there was clearly an agreement also between
17 the County and NACEC that NACEC's lease was in - - - in
18 exchange for the services it was offering to young people
19 to get GEDs, and also there was a separate tenant who
20 housed a school.

21 JUDGE STEIN: But don't we have to look at
22 what were the acts that - - - that caused this
23 injury, and decide whether they arose out of that
24 proprietary function as a landlord, versus whether
25 they arose out of the governmental function of the

1 County in administering this SWEP program?

2 Isn't that what we - - - what we have to
3 look at first and foremost?

4 MS. O'BRIEN: That is to the - - - in - - -
5 in the way this - - - the precedents have involved
6 with this continuum of responsibility when you're
7 acting in a dual capacity, both as a landlord. But
8 I'm - - - the reality of this is that as a landlord,
9 they - - - as a landlord, you still have an ongoing
10 and exclusive duty, a common law duty to provide a -
11 - - a safe premises for foreseeable harm. There's no
12 quest - - -

13 JUDGE STEIN: Right. But the question is,
14 is whether the State has - - - has immunity from that
15 liability, because, again, if - - - if the act - - -
16 if the injury arose out of not their landlord "role",
17 but their governmental "role", then - - - then we
18 have a different analysis. Isn't that - - - isn't
19 that correct?

20 MS. O'BRIEN: That's true.

21 JUDGE STEIN: Okay.

22 MS. O'BRIEN: Under the ca - - - that in
23 the referral, where you isolate the event to the
24 referral, saying - - -

25 JUDGE STEIN: Okay.

1 MS. O'BRIEN: - - - the referral is all I
2 am responsible for as - - - as a county. You do have
3 a tenant duty. But I don't think that - - -

4 JUDGE STEIN: No, no, I don't think we have
5 to say that the referral is all that I'm responsible
6 for, I think we have to look at the nature of what
7 happened here.

8 MS. O'BRIEN: So I don't think the referral
9 - - -

10 JUDGE STEIN: In other words, let me - - -
11 let me stop you for a second.

12 MS. O'BRIEN: Okay.

13 JUDGE STEIN: We could, and - - - and I - -
14 - you know, I think one way to look at this is, was
15 the County hiring a maintenance worker because they,
16 you know, this was a position that they needed to - -
17 - to fill in to - - - to maintain their maintenance
18 responsibilities. Or was this person sent there
19 because the County was involved in this SWEP program,
20 and this was one of their placements, so they gave
21 this guy this job.

22 So to me, that - - - you know, that's how I
23 view it. Why - - - why isn't that the right way to
24 view it?

25 MS. O'BRIEN: Well, I think the - - - the -

1 - - it isn't the right way to view it because I think
2 the common law duty is coexistent with the duty of a
3 government and a landlord. You still have a duty as
4 a - - - as a - - - as a landlord to provide for
5 foreseeable harm. Once the County - - - and I think
6 it arises - - - I think the negligent act is the
7 failure to warn NACEC, or to tell NACEC, in any way,
8 that this was a person who might pose foreseeable
9 harm.

10 JUDGE STEIN: How is this different - - -

11 MS. O'BRIEN: They robbed it from the
12 ability to protect itself, or from any other way to
13 provide any means to protect the children on the
14 site.

15 JUDGE GARCIA: But isn't that more of a
16 claim by NACEC against the government then, instead
17 of a claim by the plaintiff directly against the
18 government?

19 MS. O'BRIEN: I think it goes to
20 comparative fault to contribute - - - I mean, both, I
21 think have to have liability here. There's no
22 question - - -

23 JUDGE GARCIA: But not - - - not on a
24 contributory basis, because you can have a claim
25 against a third party when the claim by the plaintiff

1 against that third party may be barred, like workers'
2 comp. Right. So wouldn't this more, given the
3 nature of the failure here, which as I understand it
4 is, we're going to send you a worker under this
5 program, don't worry, we won't send you a felon, the
6 school then relies on that to say, you know, we may
7 not do a check, we're not going to do our own
8 vetting, you've promised, and they send a Level 3 sex
9 offender over, wouldn't that go to, that's why I'm
10 liable to this plaintiff in a claim, though being
11 barred, because there's no special duty by the
12 plaintiff directly against the County?

13 MS. O'BRIEN: I don't think that it does,
14 in the sense that, since the County withheld very
15 vial information which was - - -

16 JUDGE FAHEY: Well - - -

17 MS. O'BRIEN: - - - to allow the - - -

18 JUDGE FAHEY: - - - that doesn't get you
19 around the special duty problem that Judge Garcia
20 just raised.

21 Analytically, it seems like a three-step
22 process once they act as a governmental proprietary.
23 Secondly, if it's governmental, is there a special
24 duty. And then if there is a special day, does the
25 government immunity defense apply.

1 Now, I grant you, I think the government
2 immunity defense, if you got to it, may be a question
3 of fact, on the last prong on that letter, but I'm
4 adding a hard time to see how - - - how you establish
5 a special duty here. You want to touch that? Your
6 case - - -

7 MS. O'BRIEN: Yeah, I - - - I would like to
8 - - -

9 JUDGE FAHEY: - - - your brief does that.

10 MS. O'BRIEN: - - - I would like to - - -

11 JUDGE FAHEY: Yeah, you should talk about
12 that a little, because - - -

13 MS. O'BRIEN: Yeah. I would like to touch
14 the special duty problem.

15 JUDGE FAHEY: It seems to be the nub of it.

16 MS. O'BRIEN: Yeah. I - - -

17 JUDGE FAHEY: Yeah.

18 MS. O'BRIEN: I believe - - - I believe
19 under the scenario of the facts in this case, and
20 relying heavily on the Haddock v. City of New York
21 case, and - - -

22 JUDGE FAHEY: I'm familiar with the case,
23 and Haddock, interestingly enough, it was a referral
24 of - - - there was a rape of a nine-year-old girl,
25 and it was a park employee, similar kind of scenario

1 - - -

2 MS. O'BRIEN: Right.

3 JUDGE FAHEY: - - - a sex offender
4 referred. Except there, I think Judge Kaye's opinion
5 said that - - - that this referral was a governmental
6 function.

7 MS. O'BRIEN: No, she - - - she said - - -

8 JUDGE FAHEY: No, her language, quite
9 specifically said it's governmental function of - - -
10 but that the government immunity offense - - -
11 defense applied, and there was never any analysis in
12 the case of - - - of the special duty problem. And
13 so our cases have evolved, our jurisprudence has
14 evolved, since then, you know, Valdez and McLean.

15 But there it says, "Plaintiff's injury
16 allegedly resulted from" govern - - - "a governmental
17 decision to retain its employee, not any proprietary
18 function in managing a park." It's in Haddock at
19 483, 484.

20 And I think I recognize there is a - - -
21 there's a problem here in our jurisprudence, because,
22 you know, the facts are so similar here, they applied
23 the government immunity defense, but I still see the
24 special duty problem.

25 MS. O'BRIEN: With regard to the special

1 duty, the only two prongs, I think the key thing here
2 is by eliciting NACEC to be a work site.

3 JUDGE FAHEY: Um-hum.

4 MS. O'BRIEN: It was a very special
5 obligation that was assumed. According to the
6 factual record, which was that you were not going to
7 send someone who was a recidivist sexual offender.
8 And I think that the - - - there was clearly
9 knowledge that that person would cause harm.

10 And the two last prongs, which are the direct
11 contact and justifiable reliance, which according to the
12 jurisprudence of this court have - - - have relied heavily
13 on the direct contact between the person who was harmed
14 and the reliance of the person who is harmed.

15 But in a case like this where you have a - - - a
16 school where she is - - - she is the locus parentis.
17 We've got disabled adults, we've got children, this - - -
18 the promises and the justifiable reliance directly to the
19 Rosemarie Dearing of NACEC between the County, I think can
20 be imputed, where for the benefit of the children and the
21 people at this, basically raises a question of fact in my
22 mind, under Florence v. Goldberg and Haddock, because you
23 have a duty here that was assumed.

24 And this is clearly a ministerial act, because
25 for eight months, while the County tracked the hours that

1 he - - - that Mr. Smith worked, and while the County knew
2 he had work restrictions, which meant he was a sexual
3 offender, they may not have known he - - - he was a sexual
4 offender twice of minors, but they certainly knew he was a
5 sexual offender of minors, and they had him there, and
6 nobody ever questioned that assignment.

7 They had an internal policy that said, you're
8 not to assign someone to that - - - to that school, or any
9 educational facility - - -

10 JUDGE ABDUS-SALAAM: Counsel, I - - - I get
11 what you're saying about tracking the hours of - - -
12 of Mr. Smith. But referring him to the program, you
13 think that was a ministerial function, as opposed to
14 no discretion on the government's part?

15 MS. O'BRIEN: Well, the - - - the facts and
16 patter - - - the fact pattern, as developed in the
17 record, was that Elizabeth Trusas says to the
18 counselor who just matched him up with the ZIP Code,
19 and referred him there because he didn't have a car
20 and he could walk.

21 The other thing that she said was, well, you
22 know, he was going to be working outside. She knew he had
23 a work restriction, so there - - - there really was no
24 reason judgment, which is the whole purpose of the - - -
25 the special duty, the - - - the ability to allow county

1 workers to be free to - - - to - - -

2 JUDGE ABDUS-SALAAM: We don't know whether
3 there were other employers who were similarly
4 situated, or perspective employers that Mr. Smith
5 could have walked to work, right, we don't know that.

6 MS. O'BRIEN: We do not know that.

7 JUDGE ABDUS-SALAAM: Yeah.

8 MS. O'BRIEN: We do not. There's no facts
9 in the record - - -

10 JUDGE ABDUS-SALAAM: So - - -

11 MS. O'BRIEN: - - - then that would make -
12 - - mean that you would have to have a question of
13 fact to establish a special duty, if that were the
14 case.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MS. O'BRIEN: Thank you very much.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. JEFFREYS: May it please the court. My
19 name is Christopher Jeffreys, assistant county
20 attorney with the County of Suffolk, for the
21 respondents in this case.

22 I believe the questions on the direct
23 examination point out the problem. And this court's
24 Applewhite decision, I think, solves the first major
25 hurdle.

1 In Applewhite, which is the guiding principle
2 that we're using, it's your most recent decision on the
3 issue of governmental propriety versus governmental
4 function, the test is not whether the same thing is done
5 by a private enterprise, but rather whether the
6 governmental entity is exercising its powers and duties of
7 government conferred by law for the general wellbeing of
8 its citizens.

9 JUDGE GARCIA: Counsel, I'm sorry to
10 interrupt you, but this is a troubling case to me for
11 a number of reasons, but the cost - - - let's say we
12 agree with you and the Appellate Division, and then
13 you have a case where the County specifically
14 represented they wouldn't send a felon, let alone a
15 sex offender to this institution, arguably relied on
16 by the institution, and then you say, but, you know,
17 we have this immunity here.

18 So the message that could be taken from that is,
19 you could enter any agreement you want with the placement
20 of these workers, and say, you know, don't worry, we're
21 not going to send you a - - - we would never send you a
22 sex offender, then you - - - like, sorry, you should never
23 have relied on that, probably because, you know, the Court
24 of Appeals is never going to hold us liable.

25 That troubles me. And - - - and this is

1 somewhat different than a case where this was part of the
2 program, you had your own internal policies, you send
3 someone. I think that's the case with the park that Judge
4 Fahey was referring to. This is different.

5 MR. JEFFREYS: If I could - - -

6 JUDGE GARCIA: I mean, how do you
7 counteract - - -

8 MR. JEFFREYS: - - - if I could help you a
9 little bit with that

10 JUDGE GARCIA: - - - that message?

11 MR. JEFFREYS: In this particular case, we
12 have three contracts that are in the record that form
13 the entire agreement between the County and NACEC.
14 There is the lease, there is the service agreement,
15 and there is the memo of understanding.

16 And in those three documents that sets
17 forth all of the rights and liabilities of the
18 parties. There are merger agreements in it, there's
19 a no oral modification clause agreement, and if there
20 were to be no referral of criminals, it could've been
21 stated in the contracts; it's not. The contracts are
22 absolutely silent about who - - -

23 JUDGE GARCIA: But what is it stated in?

24 MR. JEFFREYS: - - - it should be referred.

25 JUDGE GARCIA: What is that stated in; that

1 representation is made where?

2 MR. JEFFREYS: The serve - - - the lease
3 agreement says that the lessee will equip, operate,
4 and a training facility for citizens of Suffolk
5 County who are unemployed, who are under employable,
6 or economically disadvantaged.

7 JUDGE GARCIA: Right.

8 MR. JEFFREYS: That's what the lease says.
9 There's nothing about the qualifications of the
10 people; they just have to be unemployed or
11 unemployable.

12 The services agreement says, "The contractor, at
13 no cost to the County, shall develop a program to train
14 and educate persons needing and deserving to become
15 employed, will upgrade in skills for employment."

16 There is, again, nothing in there that puts any
17 limitation of any kind on the individuals who get
18 referred.

19 The third written document, which modifies the
20 service agreement, because it could only be modified by a
21 writing, is the memorandum of understanding. And in the
22 memorandum of understanding, "The parties hereto desire to
23 make available for eligible Suffolk County residents, and
24 employment and training program, that includes work
25 experience under the Work Investment Act, WIA, or SWEP."

1 CHIEF JUDGE DIFIORE: So what's the genesis
2 of the agreement not to refer the - - -

3 MR. JEFFREYS: The genesis of agreement
4 comes from the request from NACEC. NACEC requested,
5 through the state system, because we have to
6 understand, the computer system that operates all of
7 these systems are run by the State of New York. When
8 it was run by the County of Suffolk, and all of the
9 individual counties, there were sixty-two different
10 computer systems running the WEP programs under
11 366(C).

12 The State brought it in - - - within its
13 own management, and they made certain determinations
14 of what individual counselors could see. And the
15 determination was that they could not see the
16 negative input that NACEC had a position that they
17 didn't want criminals. That that was the thing that
18 was blocked from our counselor. That is a NACEC - -
19 -

20 JUDGE RIVERA: So what are you saying, that
21 - - - that's in the computer program?

22 MR. JEFFREYS: Yes. It's actually in the
23 record also.

24 JUDGE RIVERA: There was not a negotiation
25 about that?

1 MR. JEFFREYS: No. No. Now, would we, if
2 we had seen that, sent somebody who is a criminal to
3 NACEC? No. We're partners with NACEC, we would do
4 what may NACEC would had - - - would have asked. But
5 it's NACEC's policy, not the County's policy. The
6 County's policy is to get everyone who is in the SWEP
7 program employed, employable, or trained.

8 JUDGE FAHEY: So your - - -

9 JUDGE RIVERA: So you - - -

10 JUDGE FAHEY: - - - your - - -

11 JUDGE RIVERA: - - - never confirmed to
12 them that - - - that what you're saying is in a - - -
13 in the computer program their policy is something
14 that you were in accord with?

15 MR. JEFFREYS: I - - - I - - - you - - -
16 you trailed off at the end. I'm sorry.

17 JUDGE RIVERA: I'm sorry. So the - - -
18 there was never communicate - - - you're saying,
19 there was never any communication that you were
20 acquiescing to this policy?

21 MR. JEFFREYS: Our person says, we told
22 NACEC that there was - - - this person was a
23 criminal. Ms. Dearing, who is the executive
24 director, says, I don't remember that. But he - - -

25 JUDGE GARCIA: I think the judge's question

1 is, did you - - - Judge Rivera's is, did you ever
2 communicate - - - did the County ever communicate to
3 the school, let's call them, that they would not send
4 them a felon?

5 MR. JEFFREYS: No. There's nothing in the
6 record to indicate that. There is - - - there are
7 different individuals who testified, that said, if
8 they had known, they would not have sent this person
9 to NACEC, but they didn't know. The counselors
10 didn't know.

11 And ultimately, NACEC had the
12 responsibility. This is NACEC's limitation, not the
13 County's limitation.

14 So when we look at Haddock v. the City of New
15 York, that is a very similar scenario, but to NACEC. In
16 Haddock v. the City of New York, the claim was negligent
17 retention of an employee. The City of New York had chosen
18 to hire, in that case it was a rep person, it was a former
19 prisoner who is in a SWEP-type program, and the City kept
20 that person as an employee.

21 Now, the City has certain guidelines for
22 criminals in their own program, and they had to do certain
23 things according to their own guidelines, and the City
24 didn't do it. And Judge Kaye, in her decision, criticized
25 the City for not doing that. But the issue in that case

1 came down to the fact, as the justices has said, that this
2 was not a proprietary act - - -

3 JUDGE GARCIA: I'm sorry. I'm having some
4 trouble find - - -

5 MR. JEFFREYS: - - - this was a
6 governmental act.

7 JUDGE GARCIA: - - - following the
8 sequence. So it is the school's requirement that you
9 don't send felons.

10 MR. JEFFREYS: Yes. Well, criminals. They
11 said no - - - nobody with a criminal background.

12 JUDGE GARCIA: And that's only theirs, not
13 yours.

14 MR. JEFFREYS: Correct.

15 JUDGE GARCIA: But somehow, that gets
16 communicated to you, right, because Exhibit L has, as
17 an enrollment requirement, "Do not refer applicants
18 with criminal record."

19 MR. JEFFREYS: Correct. There is a
20 printout that comes from the State of New York that
21 our counselors don't get to see. Our counselors
22 don't see that, it's on the state welfare to workfare
23 program, it is blocked from the counselors, such as
24 Elizabeth Trusas, who actually sent NAC - - - to - -
25 - sent Mr. Smith to NACEC.

1 JUDGE GARCIA: So she wouldn't have seen
2 this Exhibit L.

3 MR. JEFFREYS: No, she did not. And that
4 becomes what the issue was. When - - -

5 JUDGE RIVERA: But I'm a little confused.
6 When you say it's a state printout, it's a state
7 printout of a state form?

8 MR. JEFFREYS: It's a state printout of a
9 state website. The state website is called the WTC
10 website - - - WTW website, excuse me, that is
11 exclusively a WTW state-backed website for all 62
12 counties.

13 The State does all of the input of all of
14 the SWEP representatives. The County's websites,
15 where we used to do it, is no longer in existence.
16 The State has foreclosed us to do that separately.
17 We must use the State's website now. The State's
18 website happens to be significantly different from
19 the County's website. We felt that counselors should
20 know this information. The State decided, no,
21 counselors do not need to know this information.

22 JUDGE ABDUS-SALAAM: During - - - during -
23 - - any time before this incident happened, counsel,
24 did the County know - - - did Ms. - - - counselors
25 like Ms. Trusas know that NACEC - - - or NACEC had

1 asked not to have criminals sent to them?

2 MR. JEFFREYS: In - - - in this record,
3 there's no proof that that exists.

4 JUDGE ABDUS-SALAAM: I - - -

5 MR. JEFFREYS: That - - - that she knew
6 that there was nobody. She searched for individuals,
7 and the notes concerning Mr. Smith's placement shows
8 how hard she searched for him in order to find a
9 place that would take a criminal.

10 When she saw NACEC's particular opening,
11 which was for a maintenance ground assistant for
12 landscaping, painting, and cleaning duties, and then
13 she called NACEC, and there was a conversation that
14 it was supposed to be an exterior job not involving
15 students, so we have no reason why - - - no reason to
16 know why Larry Smith, who was under the control of
17 NACEC at the time, was actually in the GED classroom
18 at all, considering that was not the scope of what
19 the referral was that we were given.

20 So we don't know what NACEC did. If the
21 plaintiff had a claim against NACEC, by all means, that
22 claim could be proffered. But as this court is aware, I
23 made the clerk aware, I made aware in a footnote, the case
24 against NACEC has been dismissed.

25 JUDGE GARCIA: Judge - - - Chief Judge, may

1 I just - - -

2 CHIEF JUDGE DIFIORE: Yes.

3 JUDGE GARCIA: - - - ask one question?

4 So under this - - - the County program, your
5 person making this decision, she knows this is - - - the
6 criminal history of this person.

7 MR. JEFFREYS: Yes, she does.

8 JUDGE GARCIA: She doesn't know, because
9 it's in the State system, but shielded from her, that
10 they have a requirement that says no criminals.

11 MR. JEFFREYS: Correct. She does not know
12 NACEC's limitations on it.

13 JUDGE GARCIA: And then your person, let's
14 call them, makes a decision, given the job
15 description here, to send this - - - place this
16 person in this facility.

17 MR. JEFFREYS: Well, it was a call - - - it
18 always ends up with a call to the potential SWEP - -
19 - I don't want to say employer, because there's not
20 an employment relationship there, but the SWEP
21 trainer, and it went to Elizabeth (sic) Dearing, I
22 believe her name was, and she was the executive
23 director of the NACEC.

24 JUDGE GARCIA: I understand.

25 MR. JEFFREYS: And then ultimately, NACEC

1 agreed to take Mr. Smith, not for a job, it's not
2 like we referred him and he got a job, he went for an
3 interview, and then after the interview, NACEC made
4 their independent decision to hire Mr. Smith into the
5 program. The County had nothing to do with that.

6 Our end of the program was to get him an
7 interview, ultimately, he got a placement, and we had
8 to keep records for timekeeping in order to meet the
9 statutory requirements.

10 CHIEF JUDGE DIFIORE: Thank you, Mr.
11 Jeffreys.

12 MR. JEFFREYS: Thank you, Your Honors.

13 CHIEF JUDGE DIFIORE: Ms. O'Brien.

14 MS. O'BRIEN: I think I really have to
15 correct the record here.

16 First of all, the testimony is not so black and
17 white as to what Elizabeth Trusas new or did not no. It
18 was testimony from a Michael Denningan, who was the person
19 who input, there was - - - this is true, they were
20 changing over the system around the time that she made the
21 referral, but there was testimony from Michael Denningan,
22 who was then the head of Department of Labor overseeing
23 these counselors who placed the work employment people out
24 in the - - -

25 JUDGE ABDUS-SALAAM: He worked for the

1 County, not for the state; is that where you're
2 saying?

3 MS. O'BRIEN: He worked for the Department
4 of Labor in the County.

5 JUDGE ABDUS-SALAAM: Okay.

6 MS. O'BRIEN: And he input the - - - and he
7 - - - he said that he input, I believe, it was in
8 July, before the placement was done in August, and
9 that all Elizabeth Trusas had to do was to hit the -
10 - - the spot, and the second page, which was the
11 offering page, evidencing the restriction, and it was
12 our understanding from Elizabeth Trusas' testimony
13 that that obligation was extracted, and it was a
14 promise that she got from the County when she went
15 into the agreement to - - - to allow the premises to
16 be used as a worksite.

17 JUDGE GARCIA: So it was an oral - - - I'm
18 sorry.

19 JUDGE RIVERA: No, no - - -

20 JUDGE GARCIA: It - - -

21 JUDGE RIVERA: That - - - that was the
22 question here. Go ahead.

23 JUDGE GARCIA: So the oral promise - - -

24 MS. O'BRIEN: Yes. I - - - I think it was
25 an oral promise, but it then appears - - - it then

1 appears in her offering sheet, which describes that
2 this promise was made, and it is - - - it's been
3 memorialized in the - - - the offering sheet.

4 JUDGE GARCIA: And where is that offering
5 sheet in the record, do you know?

6 MS. O'BRIEN: It is - - - if I could find
7 it.

8 JUDGE GARCIA: Perhaps your co-counsel can.

9 MS. O'BRIEN: It is on - - - you can see it
10 in one of them. In several places - - - okay. It's
11 706 in volume 2.

12 JUDGE GARCIA: Great. Thank you.

13 MS. O'BRIEN: But I've got "Do not refer an
14 applicant with a criminal record." That was the - -
15 - that's in the offering sheet. That is right there
16 in 706.

17 JUDGE GARCIA: And clearly, the County had
18 that sheet?

19 MS. O'BRIEN: According to, I think it was
20 - - - there is - - - there is a County - - - a woman
21 by the name of Bailey is her last name, and another
22 young gentleman, kind of a hard name to say, both of
23 whom were deposed, and both of whose testimony appear
24 on the record, all testified - - -

25 JUDGE ABDUS-SALAAM: Were County employees?

1 MS. O'BRIEN: County employees. All
2 counselors, like Mrs. Trusas.

3 JUDGE RIVERA: Could I - - - I'm sorry.
4 Could you just clarify, what is an offering sheet?

5 MS. O'BRIEN: The offering sheet,
6 apparently, was the second page that you - - - when
7 the counselors had it on this computer system, they
8 had the first page which listed work restrictions,
9 which told the counselor that the party they were
10 interviewing was a - - - a person with a - - -

11 JUDGE RIVERA: All right. Let's try it a
12 different way. So you developed the offering sheet,
13 correct?

14 MS. O'BRIEN: No, the County did.

15 JUDGE RIVERA: The County develops this
16 offering sheet - - -

17 MS. O'BRIEN: Yes, coun - - -

18 JUDGE RIVERA: - - - and fills in - - -

19 MS. O'BRIEN: - - - and - - -

20 JUDGE RIVERA: - - - all these parameters -
21 - -

22 MS. O'BRIEN: Based on - - -

23 JUDGE RIVERA: - - - they fill this in
24 themselves.

25 MS. O'BRIEN: Correct. Correct. This was

1 - - -

2 JUDGE RIVERA: And then they upload it into
3 the computer.

4 MS. O'BRIEN: Right. They - - - they're
5 the ones who put this information into the system
6 based on their conversation with Rosemarie Dearing,
7 and this is why I think there's a question of fact
8 here as to - - - to - - -

9 JUDGE FAHEY: The prob - - - the problem
10 is, is that just let's take a - - - excuse me, Judge.
11 I just want to go through this for a second.

12 MS. O'BRIEN: Okay.

13 JUDGE FAHEY: Recognizing here - - - to
14 create a special duty here, you're going under the
15 voluntary assumption of a duty, right, that's your
16 theory. And we all recognize it's a four-part test,
17 and you've got to meet all four parts.

18 MS. O'BRIEN: Right.

19 JUDGE FAHEY: And going through them,
20 there's assumption, knowledge, direct contact, and
21 justifiable reliance. Where's the direct contact?

22 MS. O'BRIEN: Well, there's no direct
23 contact with Tara, but there is direct contact with
24 Rosemarie Dearing, who was the one who - - -

25 JUDGE FAHEY: Doesn't - - - let me just

1 finish. Doesn't there have to be direct contact
2 between the County's agents and the plaintiffs, in
3 order to create that special duty?

4 MS. O'BRIEN: But that - - - there have
5 been minor exceptions in a very narrow realm, and
6 that is the Florence v. Goldberg - - - there was no
7 direct contact - - -

8 JUDGE FAHEY: It's the Second Department
9 case, is you're talking about, is that the - - -

10 MS. O'BRIEN: The Florence v. Goldberg case
11 is - - -

12 JUDGE FAHEY: I don't - - - I don't
13 remember. I'll look at it again, though.

14 MS. O'BRIEN: I think maybe you - - -

15 JUDGE FAHEY: Yeah, I know what you're
16 talking about. Yeah.

17 MS. O'BRIEN: Yeah. It - - - I mean - - -

18 JUDGE FAHEY: There seems to be - - - let
19 me just finish the point, and I recognize your time
20 is up, but maybe the Chief Judge will allow you to
21 respond.

22 That seems to be the weakest link in - - - of
23 the four prongs for you.

24 MS. O'BRIEN: Well, I think the - - - when
25 you're dealing with somebody who is disabled, I don't

1 think - - - I think you've got to look at the reality
2 - - - this is a person - - -

3 JUDGE FAHEY: Listen, I've looked at the
4 reality of this case, these cases are very hard,
5 because they involve a limitation of a duty, usually,
6 where something really bad has happened. Something
7 that - - - that any normal person wouldn't reflect
8 on. So it's - - - I - - - we recognize that, I
9 think, honestly.

10 It's more a question of trying to apply
11 some awful facts, almost always in these kind of
12 cases, to a rather rigorous rule. So that's why I
13 ask it that way.

14 MS. O'BRIEN: Well, I agree.

15 JUDGE FAHEY: Yeah.

16 MS. O'BRIEN: There's no direct contact to
17 Tara, but I think you have to consider direct contact
18 to the NACEC.

19 CHIEF JUDGE DIFIORE: Thank you, Ms.
20 O'Brien.

21 JUDGE FAHEY: To NACEC. Okay. All right.

22 (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 Tara N.P. v. Western Suffolk Board of Cooperative Educational Sevices, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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