

**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
AFTER HEARING**

Adjud. Case #:

[REDACTED]

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Randolph V. Kruman, Esq.
O'Connor & Kruman
15 Court Street
Cortland, New York 13045

██████████

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED: The request of ██████████ that the substantiated report dated ██████████, ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

The substantiated report is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of this report shall be retained by the Vulnerable Persons Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: March 11, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
333 East Washington Street
Hearing Room 115
Syracuse, New York 13202
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived.

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161 Delaware Avenue
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By: Todd Sardella, Esq.

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By: Randolph V. Kruman, Esq.
O'Connor & Kruman
15 Court Street
Cortland, New York 13045

JURISDICTION

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

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

Allegation 1

It was alleged that on [REDACTED], in the lounge of the recreation building at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to maintain close supervision over a service recipient, as required by his behavior plan, and as a result that service recipient was able to subject another service recipient to forcible sexual touching.

This allegation has been SUBSTANTIATED as Category 2 neglect with respect to both service recipients, 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, located at [REDACTED], is a residential treatment center for children, and is operated by the [REDACTED] which is

licensed by the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was employed by the facility as a Teacher Assistant and had been employed as such since [REDACTED] 2010. The Subject also regularly worked additional hours for the facility as a relief staff. (See Hearing Testimony of the Subject)

6. At the time of the alleged neglect, Service Recipient A was seventeen years of age and Service Recipient B was fourteen years of age. Service Recipient A was a resident of [REDACTED] and Service Recipient B was a resident of another facility cottage. The Service Recipients were young persons placed by Family Court in residential treatment at the [REDACTED]. Service Recipient A was placed at the [REDACTED] for juvenile sex offender treatment. (See Hearing Testimony of OCFS Investigator [REDACTED])

7. On [REDACTED], the Subject elected to work as a relief staff after finishing his regular shift as a Teacher Assistant, and was assigned to the [REDACTED] which housed juvenile sex offenders. While working as relief staff at the [REDACTED], the Subject was assigned to supervise Service Recipient A and another [REDACTED] service recipient while the service recipients were at dinner and the Recreation Center. When given the assignment to supervise Service Recipient A, the Subject was told that Service Recipient A was on “close supervision.” (See Justice Center Exhibits 8, 13 and 15, and Hearing Testimony of OCFS Investigator [REDACTED] and the Subject)

8. The term “close supervision” is defined as “never out of eyesight or physical proximity of child care staff” by the [REDACTED] Supervision of Residents Policy. (See Justice Center Exhibits 9, 10, 11, 13, 15 and 23, and Hearing Testimony of OCFS Investigator [REDACTED] and the Subject)

9. While the Subject was at the Recreation Center with the Service Recipients, there were approximately thirty to forty service recipients and ten to fifteen other facility staff present. While they were in the Recreation Center, Service Recipient A and Service Recipient B sat at a table where they played cards and the Subject sat approximately ten feet away. Another facility staff sat between the Subject and the two Service Recipients. At one point the Subject received and responded to a text message on his personal cellular telephone. A short while later, the Subject stood up and walked to the bathroom, which was located about twenty feet away from where the Service Recipients were seated. The Subject was away from and out of eyesight of the two Service Recipients for approximately two to three minutes. The Subject did not tell any other facility staff where he was going and did not leave any other facility staff in charge of supervising Service Recipient A. When the Subject returned from the bathroom, he saw that Service Recipient A had placed one of his hands in the shorts of Service Recipient B and was touching Service Recipient B's penis. The Subject immediately told Service Recipient A to stop and, because it was close to the end of recreation time, he took Service Recipient A back to [REDACTED]. (See Justice Center Exhibits 8, 13, 14 and 15, and Hearing Testimony of OCFS Investigator [REDACTED] and the Subject)

10. As a result of his conduct, Service Recipient A was later arrested for Third Degree Sexual Abuse and Endangering the Welfare of a Child. (See Justice Center Exhibit 12)

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 neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Neglect under SSL § 488(1)(h) is defined as:

"Neglect," which shall mean any action, inaction or lack of attention that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision, including a lack of proper supervision that results in conduct between persons receiving services that would constitute abuse as described in paragraphs (a) through (g) of this subdivision if committed by a custodian; (ii) failure to provide adequate food, clothing, shelter, medical, dental, optometric or surgical care, consistent with the rules or regulations promulgated by the state agency operating, certifying or supervising the facility or provider agency, provided that the facility or provider agency has reasonable access to the provision of such services and that necessary consents to any such medical, dental, optometric or surgical treatment have been sought and obtained from the appropriate individuals; or (iii) failure to provide access to educational instruction, by a custodian with a duty to ensure that an individual receives access to such instruction in accordance with the provisions of part one of article sixty-five of the education law and/or the individual's individualized education program.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject(s) committed the act or acts of neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

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

If the Justice Center did not prove the 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 an act, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-23) The investigation underlying the substantiated report was conducted by OCFS Investigator [REDACTED]¹, who was the only witness who testified at the hearing on behalf of the Justice Center.

¹ At the time of the investigation [REDACTED] was employed by the OCFS as an Investigator, and presently [REDACTED] is employed as an Investigator by the New York State Justice Center for the Protection of People with Special Needs.

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

The Justice Center proved by a preponderance of the evidence that the Subject's conduct was a breach of his custodial duty to the Service Recipients, and that the Subject's breach was likely to result in serious or protracted impairment of the Service Recipients' mental or emotional condition.

To prove neglect, the Justice Center must first establish that the Subject was a custodian of the Service Recipients. The record reflects that the Subject was a relief staff assigned specifically to supervise Service Recipient A while at the Recreation Center in which other residents, including Service Recipient B, were present. This evidence is sufficient to establish that the Subject was a custodian of both Service Recipients.

The Justice Center must next establish that the Subject breached his custodian's duty to the Service Recipients. The record reflects that, having been assigned to supervise Service Recipient A and having been told that Service Recipient A was on "close supervision", the Subject had a duty to follow the [REDACTED] protocol which required that the Subject maintain eyesight supervision of or physical proximity to Service Recipient A. (See Justice Center Exhibit 23, page 2) Additionally, the [REDACTED] policy specific to Service Recipient A's cottage further required that "staff will maintain direct visual and proximity supervision at all times during recreational period." (See Justice Center Exhibit 23, page 5)

The record further reflects that the Subject left the two Service Recipients to go to the bathroom, and that during the two to three minutes he was in the bathroom, the Subject did not maintain eyesight on the Service Recipients and was not in physical proximity to the Service Recipients.

The Subject argues that because there was another facility staff sitting within eyesight

and in physical proximity to the Service Recipients, the [REDACTED] policy was not violated. However, the record establishes that when the Subject went to the bathroom, he did not transition supervisory responsibility of Service Recipient A or communicate anything concerning Service Recipient A to the other facility staff who was sitting next to him or to any other facility staff who was in the Recreation Center at the time. Furthermore, there is no evidence in the record that would establish that any other facility staff who was present in the Recreation Room at the time was aware of Service Recipient A's "close supervision" status. The [REDACTED] policy also requires that staff "effectively communicate with one another in order to insure that this level of supervision is consistently maintained." (See Justice Center Exhibit 23). The Subject clearly did not communicate any information to any other facility staff concerning the "close supervision" status of Service Recipient A. Consequently, it has been sufficiently established that the Subject breached his duty to the Service Recipients by failing to provide proper supervision of the Service Recipients.

The Justice Center must next establish that the Subject's breach of duty was likely to result in physical injury or serious or protracted impairment of the Service Recipients' physical, mental or emotional condition. The uncontested evidence in the record reflects that as a result of the Subject's failure to provide proper supervision of the Service Recipients, Service Recipient A was able to touch Service Recipient B's penis. The record reflects that while the Subject was out of eyesight and out of physical proximity of the Service Recipients, Service Recipient A asked Service Recipient B if he could touch him, to which Service Recipient B responded "no." Service Recipient A then moved his chair closer to Service Recipient B, reached under the table and grabbed Service Recipient B's crotch. (See Justice Center Exhibit 8)

The evidence in the record sufficiently establishes that the Subject's conduct (which

enabled Service Recipient A to act out sexually toward Service Recipient B), together with Service Recipient A's sex offender status, was likely to have resulted in serious or protracted impairment of Service Recipient B's mental and/or emotional condition.

Furthermore, evidence of the opportunity afforded Service Recipient A (as a consequence of the Subject's conduct) to act out sexually on another service recipient, together with Service Recipient A's sexual offender treatment status, sufficiently establishes that the Subject's conduct was likely to have resulted in serious or protracted impairment of Service Recipient A's mental and/or emotional condition.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will not be amended or sealed.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. A report is properly categorized as Category 2 when the conduct of a custodian seriously endangered the health, safety or welfare of a service recipient. (See NYS SSL §493(4)(b)) The Subject's conduct resulted in a child service recipient, who was in residential treatment for sex offenses, sexually touching another child service recipient. Both the commission of the sexual abuse by Service Recipient A and Service Recipient B being the victim of the sexual abuse, clearly constitute an endangerment to the health, safety and welfare of both children. Therefore, based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 2 act.


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 neglect.

The substantiated report is properly categorized as a Category 2 act.

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

DATED: March 9, 2016
Schenectady, New York



John T. Nasci, ALJ