

**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]

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: Laurie Cummings, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

██████████

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 ██████████ ██████████ of neglect by the Subject of a Service Recipient 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 3 act.

NOW, THEREFORE, IT IS DETERMINED that 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)(c).

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: October 3, 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #:

[REDACTED]

Before:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
125 East Bethpage Road
Plainview, New York 11803
On: [REDACTED]

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

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

[REDACTED]
[REDACTED]
[REDACTED]

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 a Service Recipient.
2. The Justice Center's Report of Substantiated Finding concluded that:

Allegation 1

It was alleged that on [REDACTED] at the [REDACTED]
[REDACTED], [REDACTED] Unit, [REDACTED]-Area, located at [REDACTED],
while acting as a custodian, you committed neglect when you fell asleep while on duty, during which time you missed a bed check and failed to provide adequate supervision to the service recipients.

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

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.
4. The facility, [REDACTED], located at [REDACTED]
[REDACTED], is a residential facility which provides twenty-four hour supervision for youths ranging in ages from 11 to 17 with psychiatric diagnoses. The facility is operated by the New York State Office of Mental Health (OMH), which is a provider agency that

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is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject had been employed at ██████████ as a Mental Health Therapy Aide (MHTA) for approximately 10 years. (Hearing testimony of the Subject)

6. On ██████████ the Subject was working a voluntary overtime shift from 3:00 p.m. to 11:00 p.m., and was assigned to the █ Unit's █ area. On that evening, the █-area consisted of six adolescent female residents with varying psychiatric diagnoses. (Hearing testimony of Facility Director of Risk Management ██████████)

7. ██████████ Patient Policy required all staff to maintain supervision over the juvenile service recipients at all times, providing their full attention, free from all distractions. Staff were required to perform nightly bed checks, consisting of six checks per hour, performed at irregular intervals. (Hearing testimony of Facility Director of Risk Management ██████████; Justice Center Exhibits 7 and 11)

8. At the time of the alleged neglect, the Subject was responsible for supervising six service recipients confined to five bedrooms. The Subject's duties included being awake and alert and recording bed checks on the facility bed check form. The Subject was seated in a chair positioned in the hallway outside of the bedrooms. At approximately 9:30 p.m., Nurse Administrator (NA) ██████████ began his final rounds, which consisted of periodically checking the █-area, its staff and service recipients. NA ██████████ observed the Subject sleeping upright in the chair and softly called her name twice. Unable to rouse her, he checked to see that each service recipient was in bed. The Subject awoke moments later upon NA ██████████ calling her name for a third time. The Subject denied being asleep. NA ██████████ informed the Administrator On Call (AOC), the night Nursing Staff Supervisor and the Director of Nursing. (Hearing testimony of Facility Director of Risk Management ██████████ Justice Center Exhibits

6, 10, 12 and 13)

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 allegation constitutes 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h):

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

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Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined as follows:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two. Reports that result in a category three finding shall be sealed after five years.

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act or acts of 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 the act described as Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-13) The investigation underlying the substantiated report was conducted by former Facility Director of Risk Management, ██████████, now retired. The Facility's current Director of Risk Management, ██████████ testified regarding the investigation report and was the only witness who testified at the hearing on behalf of the Justice Center.

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The Subject testified at the hearing in her own behalf and provided no other evidence.

The Justice Center has sufficiently established that the Subject was a custodian as defined in SSL §488(2). The Justice Center further proved by a preponderance of the evidence that the Subject breached her duty by failing to provide adequate supervision to the service recipients she was responsible for. Although the Justice Center failed to prove the missing bed check portion of the substantiated report, it is nevertheless immaterial to the analysis of neglect as defined in SSL §488(1)(h). Specifically, the Subject's failure to stay awake and alert, as required of her, placed the service recipients at an unquestionable risk of harm, given their ages and psychiatric diagnoses, and was therefore likely to result in physical injury or serious or protracted impairment of their physical, mental or emotional condition.

The Justice Center proffered compelling evidence in the form of a statement by NA ██████████ who witnessed the Subject asleep during her shift. NA ██████████ statement concretely described his failed attempts at waking the Subject and how he personally checked each service recipient. NA ██████████ further recounted the Subject's groggy state upon awakening. NA ██████████ stated that he informed the Subject that such behavior was against facility policy and reported the incident to the Director of Nursing, ██████████ the Administrator On Call, ██████████, and the night Nurse Staff Supervisor, ██████████ (Justice Center Exhibits 6 and 13)

In her defense, the Subject denied that she was sleeping during her shift. The Subject conceded that the service recipients she was responsible for all had severe psychiatric diagnoses and that she was fully aware of facility policy requiring constant supervision. The Subject also acquiesced to working an average of 70 hours a week, 30 of which were usually voluntary overtime. The Subject further testified that she suffered from insomnia and typically slept about one to two hours a day. The Subject also admitted in her testimony that she was previously

disciplined for falling asleep on duty when she was first employed at the facility. The Subject maintained throughout her testimony her belief that she was being retaliated against for previous calls she had made to the Justice Center to report other facility staff. (Hearing testimony of Subject; Justice Center Exhibit 10)

Upon considering the evidence, it is found that the Subject's testimony is unpersuasive and unsupported. The written statement of NA [REDACTED] contains a high degree of detail as to his observations during his rounds, which sufficiently supports the Justice Center's substantiation against the Subject. Moreover, the record does not reflect any motivation by NA [REDACTED] to be untruthful or to fabricate his statement. The statement provided by NA [REDACTED] is credited evidence.

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.

The next issue to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act. A substantiated Category 3 finding of neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). This report will be sealed after five years.

DECISION:

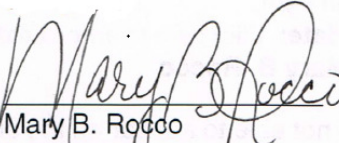
The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] of neglect by the Subject of a

Service Recipient 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 3 act.

This decision is recommended by Mary B. Rocco, Administrative Hearings Unit.

DATED: September 22, 2016
Plainview, New York



Mary B. Rocco
Administrative Law Judge