

**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: Jennifer Oppong, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Randy I. Siper, Esq.
159 Ward Street, Suite 1
Montgomery, New York 12549

██████████

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 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: November 1, 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**

Adjud. Case #:

[REDACTED]

Before:

Christopher R. Riano
Administrative Law Judge

Held at:

Eleanor Roosevelt State Office Building
4 Burnett Blvd., 2nd Floor
Poughkeepsie, New York 12601
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
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161 Delaware Avenue
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By: Jennifer Oppong, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Randy I. Siper, Esq.
159 Ward Street, Suite 1
Montgomery, New York 12549

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

Allegation 1

It was alleged that on [REDACTED] at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision on the unit, during which time three service recipients were able to enter a fourth service recipient's room while he was wearing only a towel after getting out of the shower, during which time there was an altercation between the service recipients.

These allegations have been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

Allegation 2

It was alleged that on [REDACTED] at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed neglect when, in violation of agency policy, you failed to lock a service recipient's door after he had entered his room.

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] is a secure residential facility for juveniles operated by the Office of Children and Family Services (OCFS), which is an agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was employed by [REDACTED]. The Subject worked as a Youth Division Aide IV.

6. At the time of the alleged neglect, the Service Recipient was an adolescent male under the age of 18. (Justice Center Exhibit 4)

7. On [REDACTED] the Subject was working at [REDACTED] on Wing [REDACTED]. (Justice Center Exhibits 7 and 8) At approximately 1:15 p.m., the Subject was stationed on Wing [REDACTED] when, during a routine hall check, the Subject failed to ensure that all service recipients were secured inside their assigned rooms. (Hearing Testimony of the Subject)

8. After failing to ensure that all service recipients were secured inside their assigned rooms, and while the Subject was still stationed on Wing [REDACTED] the Service Recipient was attempting to get dressed after taking a shower when at least three other service recipients entered his room. While in the Service Recipient's room, three other service recipients "ripped off [the Service Recipient's] robe and towel and [hit] him in the genitals with the towel." Following the incident, the Service Recipient was transported to [REDACTED] Medical Center for evaluation. (Justice Center Exhibit 8)

9. As these events were occurring, the Subject was able to view various service

recipients entering and exiting the Service Recipient's room through the open and unlocked door.
(Justice Center Exhibit 16)

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 neglect.
- Pursuant to Social Services Law § 493(4), the category of neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of 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, and neglect is specifically defined by SSL § 488(1)(h) to include:

"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 neglect shall be categorized into categories pursuant to SSL § 493(4)(c), including Category 3, which is defined as follows:

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 acts 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 acts of 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 two acts of neglect, described as “Allegation 1” and “Allegation 2” 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 - 18) [REDACTED] Internal

Investigator I for the Justice Center, conducted the investigation underlying the substantiated report for the Justice Center, and was the sole witness who testified at the hearing on behalf of the Justice Center.¹

The Subject testified in her own behalf and provided one document as evidence. (Subject Exhibit A)

The Justice Center submitted a visual only video of the incident, which was helpful and illuminating with respect to the substantiated allegations. (Justice Center Exhibit 16)

First, the Justice Center has the burden of showing that the Subject is a custodian as defined in SSL § 488(2). At the time of the alleged neglect, the Subject was working in her official capacity as Youth Division Aide IV at [REDACTED]. (Hearing Testimony of the Subject) As such, the Justice Center has sufficiently established that the Subject was a custodian as defined by the statute.

Next, the Justice Center must prove by a preponderance of the evidence that the Subject committed neglect as described in Allegation 1. The Justice Center has done so, as the evidence and testimony show that the Subject failed 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.” (SSL § 488(1)(h)(i)) This includes, by law, the Subject’s “failure to provide proper supervision” inside a secure residential juvenile facility which allowed for three service recipients to enter into another Service Recipient’s room and “intentionally or recklessly caus[e] ... physical contact” between themselves and another Service Recipient. (SSL § 488(1)(h)(i); SSL § 488(1)(a)) The conduct described in SSL § 488(1)(a), which is defined as neglect by SSL § 488(1)(h)(i), includes when a number of service recipients intentionally physically contact another Service Recipient by

¹ Investigator [REDACTED] was married during the course of the investigation, and appears as Investigator [REDACTED] on many of the submitted documents.

ripping off a Service Recipient's robe and towel and subsequently hitting that Service Recipient in the genitals. (SSL § 488(1)(h)(i); SSL § 488 (1)(a))

As is shown in the video evidence provided by the Justice Center, the Subject is seen on Wing ■ while three service recipients entered the Service Recipient's unlocked room and, for a substantial period of time, an altercation occurs between all of the service recipients. (Justice Center Exhibit 16) Furthermore, the Subject did not deny that an incident occurred and, instead, confirmed the details of the incident in her own testimony. (Hearing Testimony of the Subject) There is no question between the parties that the incident occurred as described. (Hearing Testimony of the Subject and Justice Center Exhibit 16)

While the Subject testified that she was unable to see down the hallway and, therefore, was unable to see the three service recipients enter the other Service Recipient's room, that does not abrogate the responsibility the Subject has to ensure the safety and security of service recipients in a secure OCFS facility such as ■. (Hearing Testimony of the Subject) Furthermore, the Subject's testimony does not assist the Subject's theory of the case, as the accusation contained within Allegation 1 is based on the legal theory of neglect. (Hearing Testimony of the Subject) As noted above, the statutory definition of neglect includes "inaction or lack of attention." (SSL § 488(1)(h)) In this matter, the Justice Center has shown by a preponderance of the evidence that the Subject, while on Wing ■, failed to act and/or provide proper attention to the service recipients on the Wing, by definition the "failure to provide proper supervision," which directly led to the abuse of the Service Recipient by other service recipients. (SSL § 488(1)(h)(i) and Justice Center Exhibit 16) The failure to provide proper supervision, leading to abusive conduct between service recipients as we have here, is exactly the type of neglectful behavior described by statute in SSL § 488(1)(h)(i).

Finally, The Justice Center must prove by a preponderance of the evidence that the Subject committed neglect as described in Allegation 2. The Justice Center has done so, as the evidence and testimony show that the Subject's "inaction or lack of attention," in breach of her duty as a custodian, was "likely to result in physical injury... of a service recipient." (SSL § 488(1)(h)(i)) The evidence and testimony further show that the Subject's breach of her duty allowed for three service recipients to enter into another Service Recipient's room and "intentionally or recklessly caus[e] ... physical contact" between themselves and another Service Recipient. (SSL § 488(1)(h)(i); SSL § 488(1)(a))

Specifically, the Subject admitted during the course of her testimony that all doors to service recipients' rooms are locked and secured when service recipients enter and exit their rooms. (Hearing Testimony of the Subject) The Subject admitted during the course of her testimony that she and her fellow Youth Division Aide on Wing ■ would jointly walk up and down the hallway to ensure that all doors are locked and unlocked in compliance with the requirements of an OCFS secure juvenile facility such as ■ (Hearing Testimony of the Subject) Furthermore, the Subject specifically testified that, while she expected her fellow Youth Division Aide on Wing ■ to double check that all doors were locked and unlocked according to facility policy, they were each individually responsible for ensuring that doors were locked and unlocked in compliance with OCFS policy, to ensure the safety and protection of all service recipients. (Hearing Testimony of the Subject) Finally, the Subject admitted during her testimony that she was unsure of why, during the course of these particular events, this important policy was not followed. (Hearing Testimony of the Subject) As a direct result of the Subject's lack of attention, in breach of her duty to keep the doors locked, three service recipients intentionally caused physical contact with another Service Recipient, conduct that was likely to result in physical injury to that same Service

Recipient. As the Subject admitted during the course of her sworn testimony to the substance of Allegation 2, the Justice Center has shown by a preponderance of the evidence that the Subject committed the neglect alleged within Allegation 2.

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 in Allegation 1 and Allegation 2. 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 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 both acts of neglect contained within the substantiated report are properly categorized as Category 3 acts.

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 Category 3 act.

This decision is recommended by Christopher R. Riano, Administrative Hearings Unit.

DATED: October 24, 2016
Brooklyn, New York



Christopher R. Riano, ALJ