

**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

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

██████████

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: Thomas C. Parisi, Esq.

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By: Jason Wolf, Esq.
Rutkin & Wolf PLLC
203 East Post Road
White Plains, New York 10601

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 [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] as to Allegation 1, 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.

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] as to Allegation 2, be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 1, shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 2, shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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: February 23, 2017
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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street, 3rd Floor
Brooklyn, New York, 11201
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
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By: Jason Wolf, Esq.
Rutkin & Wolf PLLC
203 East Post Road
White Plains, New York 10601

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for neglect and abuse. 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 and abuse 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 [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision to a service recipient, during which time he eloped from the residence.

This allegation has 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 abuse (obstruction of reports of reportable incidents) when in completing an incident report about a service recipient's elopement, you made a false statement about your location during the incident.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents), pursuant to Social Services Law § 493(4)(c).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. [REDACTED] is part of [REDACTED], located at [REDACTED]. [REDACTED] is a residential facility housing adjudicated youth, and is licensed by the 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 and/or abuse, the Subject had been employed by [REDACTED] as an Advanced Socio-Therapist (ST) for 14 years. (Hearing testimony of Subject)

6. At the time of the alleged neglect and/or abuse, the Service Recipient was an adjudicated youth of 14 years of age, and had been a resident of the facility for two months. (Justice Center Exhibit 7)

7. During the day on [REDACTED], the Service Recipient went AWOL with another service recipient. Later that same day, the Service Recipient was detained by Special Services¹; but the other service recipient was not found. Staff B stayed with the Service Recipient at the Special Services building on one-to-one supervision, until bringing him back to [REDACTED] in time to get ready for bed. The Subject was working her regular shift at [REDACTED], and was in the office typing a report when the Service Recipient and Staff B arrived. (Hearing testimony of Subject; Justice Center Exhibits 7 and 9)

8. The Service Recipient was afraid to go upstairs and shower with the other service recipients because he believed that they would assault him. Staff B left the Service Recipient in

¹ The exact role of Special Services was not explained during the course of the hearing; but it can be inferred from the testimony that Special Services provides security and transportation services for the facility.

the office with the Subject, and indicated that the Service Recipient could go upstairs once the other service recipients had finished showering. (Justice Center Exhibits 7 and 9)

9. Staff A saw the Service Recipient in the office with the Subject, and was told by the Subject that she would bring the Service Recipient upstairs soon. (Justice Center Exhibit 9)

10. Shortly after Staff B left the office, the Subject and the Service Recipient heard a noise outside the office window. The other service recipient was outside, and told the Service Recipient to go to a window in the living room. The Service Recipient went into the living room, opened the window and climbed out head first. The other service recipient had broken the bar on that window. The Subject did not know that the bar had been damaged, but she was aware that other windows in the cottage were not secure. (Justice Center Exhibits 7 and 9)

11. As the Service Recipient was climbing out the window, Staff A came downstairs and noticed that the Service Recipient was no longer in the office with the Subject, so she asked the Subject where the Service Recipient had gone. Staff A turned, saw the Service Recipient partway out of the window, and attempted to stop him. However, the Service Recipient was able to complete his escape and ran off with the other service recipient. (Justice Center Exhibit 7)

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 abuse and 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), to include:

(f)"Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

(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.

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:

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 and/or abuse 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 and/or abuse, 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 and/or abuse 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. The Justice Center has not proved by a preponderance of the evidence that the Subject committed an act, described as “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 1-11) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Specialist [REDACTED]. OCFS

Child Abuse Specialist (CAS) [REDACTED] was the only witness who testified at the hearing on behalf of the Justice Center. The Subject testified in her own behalf and provided no other evidence.

Allegation 1

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that her breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

The Subject was working at the time of the incident, and therefore she was a custodian as that term is defined in SSL § 488(2). In her testimony, the Subject asserted that she was not responsible for the supervision of the Service Recipient at that time, and therefore did not owe a duty to him. However, the record reflects that when an employee is on campus, they are responsible for supervising the service recipients. (Hearing testimony of OCFS CAS [REDACTED]; Justice Center Exhibit 7) Consequently, the Subject owed a duty to the Service Recipient.

The Subject breached her duty to the Service Recipient by allowing him to leave her sight and climb out the cottage window. The Subject was in the office typing a report when Staff B brought the Service Recipient into the room. The Subject was aware that the Service Recipient was on one-to-one supervision because he had been AWOL earlier in the day. (Hearing testimony of Subject) When Staff B left the Service Recipient in the office with the Subject, she knew or should have known that she had assumed supervision of the Service Recipient.

Both Staff A and Staff B reported that the Subject understood that the Service Recipient was under her supervision. (Justice Center Exhibit 7) The Subject admitted that she heard the

service recipient who was still AWOL attempt to contact the Service Recipient she was supervising. (Hearing testimony of Subject; Justice Center Exhibits 7 and 9) However, rather than maintaining her supervision over the Service Recipient, the Subject allowed the Service Recipient to leave the office unsupervised and go into the living room. The Subject's lack of attention and failure to adequately supervise the Service Recipient breached her duty, and resulted in the Service Recipient climbing out of the window.

Although the Service Recipient was not injured, it was likely that he would suffer a physical injury by climbing out the window head first. Further, it was likely that the Service Recipient would suffer either a physical injury or serious or protracted impairment of his physical, mental or emotional condition while he was unsupervised and AWOL.

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 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.

Substantiated Category 3 findings of abuse and/or 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). The report will be sealed after 5 years.

Allegation 2

In order to sustain an allegation of abuse (obstruction of reports of reportable incidents) as alleged herein, the Justice Center must prove that the Subject impeded the investigation by intentionally making a false statement. (SSL § 488(1)(f)) Specifically, the allegation is that the Subject made a false statement about her location during the incident. (Justice Center Exhibit 2)

OCFS CAS [REDACTED] testified at the hearing that while she was not the primary investigator for this incident, she interviewed the Subject and two staff persons as part of the investigation. When asked, OCFS CAS [REDACTED] testified that she did not know what statement the Subject made that was alleged to have been false. In addition, there is no indication in any evidence introduced at the hearing that the Subject made a false statement. Therefore, the Justice Center failed to prove by a preponderance of the evidence that the Subject made a false statement that impeded the investigation.

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

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], as to Allegation 1, 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.

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], as to Allegation 2, be amended
and sealed is granted. The Subject has not been shown by a preponderance
of the evidence to have committed abuse (obstruction of reports of
reportable incidents).

This decision is recommended by Jean T. Carney, Administrative Hearings
Unit.

DATED: February 8, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge