

**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] [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 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: 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
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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. 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 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], while on an outing in the community and away from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision to three service recipients, during which time they were left alone at a train station and one was transferred to the hospital following a panic attack.

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. [REDACTED], located at [REDACTED], is a residential facility housing adjudicated youth. The facility 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, the Subject had been employed by [REDACTED] [REDACTED] as an Advanced Socio-Therapist (ST) for 14 years. (Hearing testimony of Subject; Justice Center Exhibit 2)

6. At the time of the alleged neglect, the Service Recipients were adjudicated youth of varying ages, and had been residents of the facility for an undetermined length of time. (Hearing testimony of OCFS Child Abuse Specialist (CAS) [REDACTED])

7. On [REDACTED], the Subject was assigned train duty by her supervisor. Train duty consisted of meeting Service Recipients who had gone home over the weekend either at [REDACTED] Station or the [REDACTED] Station on [REDACTED], and escorting them back to the facility. Weekend passes normally ran from Friday to Sunday, except for holiday weekends. The weekend in question was [REDACTED] so the Service Recipients were to be retrieved on Monday evening. (Justice Center Exhibit 7)

8. During a staff briefing early in the Subject's shift, the Subject's supervisor gave her a packet containing the Service Recipients' train tickets. Staff [REDACTED], who was also present during this briefing, saw the Subject at a barbecue on facility grounds after 6:00 p.m., and asked the Subject why she was not on train duty. The Subject replied that she was not assigned train duty, and then attempted to find transportation to the train station to meet the Service Recipients. (Justice Center Exhibit 7; Hearing testimony of the Subject)

9. In the meantime, the Service Recipients had boarded the train at [REDACTED] Station without an escort. When the train stopped at [REDACTED], there was no staff, so the conductor allowed them to stay on the train until [REDACTED] in the [REDACTED]. At that point, the Service Recipients had to exit the train, but there was no one from the facility to meet them. One

of the Service Recipients began to get nervous, and had a panic attack. A Metropolitan Transit Authority officer called an ambulance, and two of the Service Recipients were transported to Hospital. At some point, they were able to reach staff at the facility, and they were picked up at the hospital and brought back to the facility. The third Service Recipient found his way back to the facility by himself, arriving safely at about 11:30 p.m. (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 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) (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 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 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 1-20) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Specialist (CAS) ██████████. OCFS CAS ██████████ 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.

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 Recipients, 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 Recipients. (SSL § 488(1)(h))

Here, there is no issue as to whether the Subject was a custodian as that term is defined in SSL § 488(2). The issue is whether the Subject owed a duty to the Service Recipients, and whether that duty was breached.

The preponderance of the evidence establishes that the Subject was assigned train duty on ██████████. The assignment was confirmed by the Subject's supervisor, and witnessed by Staff ██████████ in a briefing meeting at the beginning of the Subject's shift. (Justice Center Exhibit 7) In addition, the Subject testified that she was given a packet with the return tickets. (Hearing testimony of Subject) Therefore, the Subject owed a duty to the Service Recipients to pick them up at the train station and escort them back to the facility that Monday.

The Subject breached that duty by failing to perform train duty as assigned. Normally, staff would take the 6:20 p.m. train to ██████████ and meet the service recipients with their return tickets. The Subject testified that, on occasion, staff would meet the train at ██████████, and give the conductor the service recipients' tickets when they got off the train. However, on

██████████, the Subject was attending a barbecue in the yard of the facility when Staff █ asked her whether she was still doing train duty. At that time, it was too late to catch the 6:20 p.m. train to ██████████, so the Subject attempted to find transportation to the ██████████ Station. Ultimately, the Subject was only able to get to the ██████████ Station, which is the closest ██████████ Station to the facility. By that point, the Service Recipients had travelled to the ██████████ Station in the ██████████. (Hearing testimony of Subject; Justice Center Exhibit 7) Consequently, the Subject's duty to meet the Service Recipients and escort them back to the facility was breached.

In her defense, the Subject asserts that she was not assigned train duty that day, and in fact, she never had train duty for the return trip. The Subject testified that a supervisor was always assigned train duty at the end of the weekend. (Hearing testimony of Subject) The Subject's assertion is contradicted by both Staff █ and the Supervisor who stated that the Subject was assigned train duty that day, had possession of the return tickets, and was reminded of this duty at the beginning of her shift. Therefore, the Subject's testimony regarding her assignment of train duty is not credited.

Finally, the record reflects that at least one of the Service Recipients suffered a serious or protracted impairment of his physical, mental or emotional condition when he had a panic attack and was transported to ██████████ Hospital. One of the other Service Recipients accompanied him to the hospital, and was eventually able to contact the facility so that staff could transport them back after the Service Recipient was discharged. Consequently, the Justice Center has established that the Subject's conduct resulted in serious or protracted impairment of the physical, mental, or emotional condition of at least one Service Recipient; and was likely to result in serious or protracted impairment of the physical, mental, or emotional condition of the other two Service

Recipients.

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.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [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 3 act.

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

DATED: February 13, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge