

**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]

██████████

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 received and dated ██████████, ██████████, be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse and/or 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 4, 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:

Gerard D. Serlin
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection of
People with Special Needs
333 East Washington Street
Syracuse, New York 13202
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

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By: Todd Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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], on [REDACTED], while acting as a custodian employed by [REDACTED], you committed neglect when, in violation of agency policy, you failed to confirm the address where you left a service recipient for a home visit and failed to confirm, by verbal communication, the presence of his personal representative, which allowed the service recipient to be absent without leave for approximately a day, during which time he engaged in risky behaviors.

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 campus based residential program for challenged youth, and is operated by [REDACTED]

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

5. At the time of the alleged neglect, the Subject was employed as a Residential Counselor by ██████████ ██████████ (Hearing testimony of the Subject) and had been so employed since ██████████ 2012. (Justice Center Exhibit 2)

6. At the time of the alleged neglect, the Service Recipient was fifteen years of age and had been a resident of the facility for an unspecified period. The Service Recipient is a young person with a number of diagnoses primarily influencing interpersonal and family relations, as well as academic success. (Justice Center Exhibit 15) The Service Recipient first came to the facility as a person in need of supervision (PINS) placement from Family Court. Previously, the Service Recipient had been placed in another facility that was operated by another provider agency. However, because of his persistent pattern of running away from the other provider agency facility, the Service Recipient was moved ██████████ ██████████. (Justice Center Exhibit 15)

7. During the early portion of ██████████, while in the placement of the provider agency, the Service Recipient absconded during weekend home visits and during those times, he was unsupervised and unaccounted for. During his hiatuses, the Service Recipient generally stayed at his girlfriend's home. (Justice Center Exhibit 15)

8. The facility provides residential services to young service recipients with a number of issues including a history of family neglect, PINS, chemical dependency or other behaviors, which render a home environment unsafe or unsuitable for them. (Hearing testimony of OCFS CAS-1 ██████████)

9. On [REDACTED], the Subject transported three service recipients, including the Service Recipient from the facility to their homes for weekend home visits. One service recipient was transported to [REDACTED], another to an unspecified location, and the Service Recipient was transported to [REDACTED]. (Justice Center Exhibit 8)

10. Upon arriving in the area where the Service Recipient's grandmother resided, the GPS navigation device in the automobile indicated that the Subject had arrived at the correct address. (Hearing testimony of the Subject) The Service Recipient intentionally misled the Subject and verbally confirmed that they had arrived at the correct address, when in fact they had not. (Justice Center Exhibit 6 and Hearing testimony of the Subject)

11. The residence where the Service Recipient disembarked was actually two houses down and across the street from his grandmother's home, which is the location where he was supposed to be dropped off. (Justice Center Exhibit 6 and Hearing testimony of OCFS CAS-1 [REDACTED] and Hearing testimony of the Subject) The residence where the Subject stopped the vehicle had no numeric address displayed on the structure. (Hearing testimony of the Subject) Upon exiting the vehicle, the Subject observed the Service Recipient walk down what she believed to be a driveway. (Justice Center Exhibit 8) A female between forty and fifty years of age was standing nearby and waved to the Subject, who assumed the female to be the Service Recipient's grandmother. The Subject did not interact with the female other than to wave. (Hearing testimony of the Subject and Justice Center Exhibit 7)

12. The driveway on which the Subject observed the Service Recipient walk was actually an alleyway between two homes. The Service Recipient followed the alleyway to a nearby street where he then ran to a friend's home. Several hours later, the Service Recipient took a cab from his friend's home to his girlfriend's home. (Justice Center Exhibit 6)

13. The vehicle that the Subject and the service recipients travelled in was equipped with a GPS recording device. (Hearing testimony of OCFS CAS-1 [REDACTED]) The provider agency GPS monitoring records illustrate that the vehicle was at the location for six minutes and four seconds. (Hearing testimony of OCFS CAS-1 [REDACTED] and Justice Center Exhibit 5) The location was determined, after review of GPS monitoring records to be within sixty-six feet of the correct address. (Justice Center Exhibit 5)

14. The Service Recipient remained unaccounted for until the following day, when he was located by law enforcement. During that period, the Service Recipient had unprotected sex and consumed alcohol. (Justice Center Exhibit 5)

15. At the time of the incident, the provider agency had no written policy addressing transportation of a service recipient for visitation, and transition to a suitable supervisor at the destination location. (Hearing testimony of OCFS CAS-1 [REDACTED]) After completion of an internal investigation, the provider agency concluded that the Subject did not violate a provider agency policy pertaining to "Home Visit Drop Offs." (Justice Center Exhibit 2) However, during training provided before the incident, facility personnel were advised to confirm both verbally and visually, the presence of appropriate caregiver at the drop point. (Hearing testimony of OCFS CAS-1 [REDACTED] and Hearing testimony of the Subject)

16. At the time of the incident, the provider agency did not supply personnel charged with transporting service recipients to their home, or other locations, the name of the appropriate caregiver who was to receive the service recipient. (Hearing testimony of the Subject) On the date of the incident, the Subject was provided with the address of and a map to the home of the Service Recipient's grandmother. (Hearing testimony of the Subject) The provider agency did not advise Subject of the Service Recipient's history of running away, or absconding. (Hearing

testimony of Subject)

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 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 (h) to include:

(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 three which is defined as follows:

(a) 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 of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act constitute the category of abuse and/or 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 prohibited act described in “Allegation 1” of the substantiated report. In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-15) OCFS Child Abuse Specialist-1 (CAS-1) [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center, conducted the investigation underlying the substantiated report.

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

The Subject had a duty to ensure that an appropriate caregiver assumed custody of the Service Recipient. There are a number of factors in the record, which suggest that the provider agency did not provide sufficient guidance or policies to ensure an appropriate transition. Nonetheless, the unrefuted evidence in the record is that the Subject failed to follow the protocol outlined during training provided by the provider agency, which included the requirement that the Subject verbally and visually confirm that an appropriate caregiver is present at the drop point. In this case, the Subject did neither. Because of the Subject's omission, the Service Recipient was unaccounted for and unsupervised for a significant period, during which he engaged in risky behaviors.

The Justice Center proved by a preponderance of the evidence that the Subject's inaction and/or lack of attention breached her duty to the Service Recipient, and that the likely result of such breach was physical injury, or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. 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. 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.

DECISION:

The request of [REDACTED] that the substantiated report received and dated [REDACTED], [REDACTED], be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse and/or neglect.

The substantiated report is properly categorized, as a Category 3 act.

This decision is recommended by Gerard D. Serlin, Administrative Hearings Unit.

DATED: January 20, 2016
Schenectady, New York


Gerard D. Serlin
Administrative Law Judge