

**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: Juliane O'Brien, Esq.

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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 should be 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: June 30, 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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
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
Delmar, New York 12054-1310
By: Juliane O'Brien, 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] of neglect by the Subject of a Service Recipient.

2. The Justice Center substantiated Allegation 2¹ of the report against the Subject.

The Justice Center concluded that:

Allegation 2

It was alleged that on unknown dates between [REDACTED]² and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you breached a duty by engaging in inappropriate conversations and conduct with a service recipient, which interfered with his treatment and caused him discomfort.

This allegation has been SUBSTANTIATED as a Category 2 neglect pursuant to Social Services Law § 493(4)(b).

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

¹ Allegation 1 was unsubstantiated.

² On the record at the hearing, the Justice Center moved to amend the allegation in the Report of Substantiated Finding, changing the date from [REDACTED] to [REDACTED] and [REDACTED]". The Subject consented to the change.

4. The facility, the [REDACTED] residence of [REDACTED]³, [REDACTED] located at [REDACTED], was a drug and alcohol inpatient treatment center and was licensed by the Office of Alcohol and Substance Abuse (OASAS), a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged neglect, the Subject was employed by [REDACTED] as a Senior Clinical Coordinator and Certified Alcohol and Substance Abuse Counselor (CASAC). The Subject began her employment at [REDACTED] on [REDACTED]. The Subject was the Service Recipient's primary counselor. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibits 4 and 19)

6. [REDACTED] Ethical Conduct Policy directs that staff shall not knowingly have sexual or other relationships with active clients of [REDACTED]. The Policy also directs that "staff shall maintain appropriate boundaries." The Subject signed her understanding and acknowledgment of the Ethical Conduct Policy on [REDACTED]. (Justice Center Exhibits 4 and 13)

7. [REDACTED] Fraternization Policy directs that sexual and social relationships with clients are prohibited. Employees who allow the appearance of a relationship with a client to exist are subject to disciplinary action. The Subject signed her understanding and acknowledgment of the Fraternization Policy on [REDACTED]. (Justice Center Exhibits 4 and 15)

8. As a CASAC, the Subject is governed by the OASAS Credentialing of Addictions Professionals. OASAS Credentialing mandates that entering into a relationship with a patient outside the boundaries of professional conduct is misconduct. Acting contrary to the interest of a

³ [REDACTED] was closed sometime after this incident.

service recipient is also misconduct. (Justice Center Exhibits 4 and 18)

9. [REDACTED] Client Bill of Rights dictates that service recipients are to be free from any staff coercion, undue influence and intimate relationships. (Justice Center Exhibits 4 and 10)

10. At the time of the alleged neglect, the Service Recipient was an adult and had been a resident of [REDACTED] since May 2014. The Service Recipient had been diagnosed with opioid dependence. The average stay for treatment at [REDACTED] was six to nine months. (Hearing testimony of Justice Center Investigator [REDACTED], Justice Center Exhibit 19)

11. [REDACTED], the Director of [REDACTED] and the Subject's supervisor, told the Subject that the Service Recipient was in her office too much and this needed to stop due to the appearance of impropriety and rumors were circulating regarding their relationship. (Hearing testimony of Justice Center Investigator [REDACTED]; Hearing testimony of Subject; Justice Center Exhibit 19)

12. The Subject was observed spending an excessive amount of time with the Service Recipient outside of their counseling sessions. In addition to the extra time the Service Recipient spent in the Subject's office, on an outing they spent most of the day together away from the others. It appeared as if a "puppy love" relationship was going on. On occasion, the Subject and the Service Recipient performed room checks of the facility which took longer to complete than they should have; and there were occasions when the Subject turned away other service recipients seeking her assistance so that she could spend time with the Service Recipient.

13. The Service Recipient gave two statements to Justice Center investigator [REDACTED]. While much of the information in the Service Recipient's statements was contradictory, both statements consistently state that the Service Recipient spent a lot of time with the Subject during

which they discussed personal matters.

14. The Service Recipient's subsequent counselor reported that the Service Recipient's lack of progress during treatment with the Subject was surprising, given the amount of time they spent together. The Counselor said she had to work with the Service Recipient to get him to the appropriate stage of progress. (Hearing testimony of Justice Center Investigator [REDACTED], Justice Center Exhibits 4 and 19)

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)(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 2, which is defined as follows:

(a) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

(b) 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 abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

If the Justice Center did not prove the alleged 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 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) In addition, the Justice Center presented an audio CD of the Subject’s interrogation, and interviews with witnesses, including the Service Recipient. (Justice Center Exhibit 19) The investigation underlying the substantiated report was conducted by Justice Center Investigator 2 [REDACTED], the Justice Center’s only witness.

The Subject testified in her own behalf, and provided a letter of character reference. (Subject’s Exhibit A)

The Justice Center proved by a preponderance of the evidence that the Subject’s conduct breached her custodial duty to the Service Recipient, and that the Subject’s breach was likely to result in serious or protracted impairment of the Service Recipient’s physical, mental or emotional condition. The credible evidence supports that the Subject spent an excessive amount of time with the Service Recipient, that personal issues were discussed and that the Service Recipient’s treatment progress was impeded as a result.

To prove neglect, the Justice Center must first establish that the Subject was a custodian as defined in Social Services Law § 488(2). The record reflects that the Subject was the counselor assigned to work with the Service Recipient, who was receiving inpatient services at [REDACTED]. Therefore, the Subject was a custodian as that term is defined by § 488(2).

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The Justice Center must next establish that the Subject breached her custodial duty to the Service Recipient. The record reflects that the Subject spent an excessive amount of time with the Service Recipient while acting as his counselor and that personal issues were discussed. Another service recipient reported the Subject and the Service Recipient spent an excessive amount of time together in the Subject's office, on an outing, during room checks and that the Subject would turn away other service recipients to spend time with the Service Recipient. The Subject's supervisor, ██████████, counselled her and told her she was spending an inappropriate amount of time with the Service Recipient in her office. Other staff and residents stated that they had heard rumors of an inappropriate relationship between the Subject and the Service Recipient. The Subject violated the Ethical Conduct Policy by failing to maintain appropriate boundaries with the Service Recipient. In addition, the Subject violated the Fraternization Policy by allowing the appearance of an inappropriate relationship to exist. The Subject entered into a relationship with the Service Recipient that was outside the boundaries of professional conduct as mandated by the OASAS Credentialing of Addictions Professionals and the Client's Rights, thereby breaching her duty to the Service Recipient. (Justice Center Exhibits 4, 5, 10, 12, 13, 15, 18 and 19)

The Justice Center must next establish that the Subject's breach of duty was likely to result in a serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. The Service Recipient stated that his relationship with the Subject interfered with his progress. He also said he and the Subject spent too much time talking about personal issues, such as the Subject's family and husband, instead of working on his treatment. He stated that if the Subject were to return to work at ██████████ he would be uncomfortable. As a result, the Service Recipient's progress in his treatment stalled and suffered. (Hearing testimony of Justice Center Investigator ██████████, and Justice Center Exhibit 19)

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The Service Recipient's subsequent counselor reported that his lack of progress in the program was surprising, given the amount of time the Service Recipient spent with the Subject. The Service Recipient required considerable extra work to achieve the appropriate progress within the program. The evidence in the record establishes that Subject's conduct and the relationship between the Subject and the Service Recipient impeded the Service Recipient's progress at ██████████. (Hearing testimony of Justice Center Investigator ██████████, Justice Center Exhibits 4 and 19)

The Subject testified in her defense that while she did spend a lot of time with the Service Recipient, it was to further his treatment. According to the Subject, the Service Recipient was struggling with issues surrounding the death of a friend. The Subject felt that for the Service Recipient to progress, they had to spend that amount of time together to work through those issues. The Subject testified that when Director ██████████ directed her to stop spending so much time in her office with the Service Recipient, she immediately complied. The Subject testified that she never had any physical contact with or made suggestive comments to the Service Recipient. The Subject's testimony is credited. However, the preponderance of the evidence indicates that the Subject allowed herself to be manipulated and, as a result, the Subject spent too much time with the Service Recipient and discussed personal issues. The rumors and appearance of impropriety undermined the Subject's credibility as a counselor, regardless of whether they were true or not. These actions were a breach of the Subject's duty and interfered with the Subject's progress. (Hearing testimony of Subject, Justice Center Exhibits 4 and 19)

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. A report is properly categorized as a Category 2 when the conduct of a custodian seriously endangers the health, safety or welfare of a service recipient. There was no evidence to establish that the conduct of the Subject seriously endangered the health, safety or welfare of the Service recipient.

The Service Recipient observed that other service recipients at [REDACTED] who engaged in inappropriate relationships with their counselors were more likely to be released earlier than the mandated time. Therefore, he was “testing the waters” and would flirt with the Subject to see how far he could push the relationship. The Service Recipient stated that he felt like he was the one in control of the relationship. (Justice Center Exhibit 19) Despite this incident, the Service Recipient received counseling and completed the program within the standard time frame.

[REDACTED] Director [REDACTED] stated that when he told the Subject she was spending too much time with the Service Recipient, his main concern was for the Subject because service recipients could be needy and manipulative and he wanted her to avoid those risks. (Hearing testimony of Justice Center Investigator [REDACTED], and Hearing testimony of Subject) Thus, the record reflects that the safety, health and welfare of the Service Recipient was not seriously endangered by the Subject’s breach.

Based upon the totality of the circumstances, the evidence presented and the witnesses’ statements, it is determined that the substantiated report should be properly categorized as a Category 3 act.

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 should be properly categorized as a Category 3 act.

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

DATED: June 24, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge