

**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: Laurie Cummings, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Todd L. Crawford, Esq.
6 Catlin Ave.
Roosevelt, New York 11575-1906

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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 ██████████
██████████ of neglect by the Subject of a
Service Recipient 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: August 5, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #:

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

New York State Office of Child and Family
Services
11 Perlman Drive
Spring Valley, New York 10977
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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6 Catlin Ave
Roosevelt, New York 11575-1906

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's Report of Substantiated Finding concluded that:

Allegation 1

It was alleged that on [REDACTED], at [REDACTED] playground, located at [REDACTED], while acting as a custodian, you committed neglect when you failed to maintain the required supervision level for a service recipient, during which time he left the playground unnoticed and went onto the road unsupervised.

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]
[REDACTED], is a residence for developmentally disabled youth that is certified by the New York State Office For People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. At the time of the alleged neglect, the facility also

██████████ operated a school for service recipients who were facility residents that was licensed by the New York State Education Department (NYSED), which is also a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Facility Assurance Coordinator ██████████)

5. The facility has two outdoor playgrounds and one basketball court. The facility's larger playground is located at the back of the facility property line and is surrounded by a chain link fence that has two gates. (Hearing testimony of Facility Assurance Coordinator ██████████)

6. At the time of the alleged neglect, the Service Recipient was ten years of age and had diagnoses that included moderate to severe mental retardation, autism and attention deficit hyperactivity disorder (ADHD). The Service Recipient was admitted to the facility on ██████████. (Justice Center Exhibit 6)

7. The Service Recipient's Individualized Plan of Protective Oversight (IPOPO) dated ██████████, indicates that the Service Recipient's level of supervision required "line of sight" with staff to be within three feet of the Service Recipient due to his hyperactivity, impulsivity and running. His risk level of elopement was designated as "HIGH RISK." The IPOPO further indicates that the Service Recipient was likely to run away, that he wandered, that he had attempted to leave the building, that he had no safety awareness and that he had the ability to independently unlatch and open the gate. (Justice Center Exhibit 7)

8. At the time of the alleged neglect, the Subject had been a teacher at the facility since ██████████ 2009 and was experienced at teaching children with special needs. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

9. ██████████, the Subject's class was comprised of the Service Recipient and five other service recipients. The Subject had three support staff assigned to assist her with

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the supervision of her class, making a total of four staff supervising a total of six service recipients. (Hearing testimony of Facility Assurance Coordinator ██████████)

10. On the morning of ██████████, the Subject and her staff had taken her class outside to the larger playground. The Subject was aware of the necessity for constant vigilance with respect to the Service Recipient, particularly with respect to his strong tendency to wander away. At approximately 9:45 a.m., the Subject, who had been maintaining visual supervision of the Service Recipient, became distracted by two other service recipients and interacted with them. At a point when the Subject did not have the Service Recipient in her line of sight and he was more than three feet away from her, the Service Recipient eloped from the playground. (Hearing testimony of the Subject)

11. Moments after the Service Recipient had fled from the playground, the Subject became aware of his absence and immediately called a “code yellow” to alert all staff that the Service Recipient was missing. After a short search, the Subject located the Service Recipient in the backseat of a parked car on the nearby roadway, where a Good Samaritan had put him when he found the Service Recipient wandering on or near the road. (Hearing testimony of the 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 allegation constitutes 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(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...

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:

(c) 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 abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts 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 abuse and/or 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 abuse and/or 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 act described as Allegation 1 in the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-24) The investigation underlying the substantiated report was conducted by Facility Assurance Coordinator [REDACTED], who testified on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf and provided four documents as evidence. (Subject Exhibits A-D)

A finding of neglect requires that a preponderance of the evidence establishes that the Subject engaged in conduct that breached her duty to the Service Recipient. In this case, the Subject's duty to the Service Recipient included adhering to the supervision level specified in the Service Recipient's IPOPO, that staff keep the Service Recipient within line of sight and that staff to be within three feet of him.

The Subject argued that her failure to ensure that the Service Recipient was kept within the line of sight and within three feet of staff was not a breach of her duty to him. The Subject testified that there was virtually no way she could have adhered to the IPOPO standard of supervision under the circumstances.

The Subject told Facility Assurance Coordinator [REDACTED] during her [REDACTED] [REDACTED] interview that because the Service Recipient's behaviors were so challenging and the other service recipients had similar issues, it was impossible to maintain the level of supervision required under the Service Recipient's IPOPO. (Hearing testimony of Facility Assurance Coordinator [REDACTED])

The Subject testified that, as the nature of the service recipients in her class had evolved

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over time from service recipients with physical disabilities to those with cognitive challenges, she found it increasingly difficult to manage their behaviors and to supervise them. The Subject testified that the Service Recipient's behavior was extremely difficult to manage, as he was always running away, "bouncing off of everything" and climbing on the fences. The Subject testified that she had exerted all of her efforts to gain the cooperation of the Service Recipient, including resorting to spending her own money on prizes that she had hoped would induce him to improve his behavior, all to no avail.

The Subject submitted a Neuro-Developmental Pediatrics Consultation/Summary dated ██████████ (Subject Exhibit C) that states that the Service Recipient required constant 1-to-1 adult supervision. The Subject testified that she had repeatedly notified the facility administration that she needed more support with the management of her class, and specifically in meeting the overwhelming needs of the Service Recipient, by writing daily reports to the administration, the medical staff and the social workers requesting increased assistance. (Hearing testimony of the Subject)

The Subject testified that not only did the facility fail to provide her with the requested and necessary additional support in managing her class, but also that it was the facility's failure to provide proper fencing that allowed the Service Recipient to elope. The Subject testified that at the time that the Service Recipient eloped, one of the facility playground gates did not close properly and that it was being held shut by a bungee cord with a gap between the two fence poles through which, she speculated, the Service Recipient must have slipped. The Subject testified that even in retrospect, she could not have done anything differently that would have prevented the Service Recipient from eloping as he did. (Hearing testimony of the Subject)

The Subject submitted an internet news article to support her argument that the facility was at fault for the Service Recipient's elopement. (Subject Exhibit D) The article recounts a situation

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similar to this case that occurred on or about ■■■■■. Facility Assurance Coordinator ■■■■■ testified that to address facility weaknesses that gave rise to the earlier incident, the facility revised its policies and implemented changes that included the fencing in of the playground from which the Service Recipient had eloped. Facility Assurance Coordinator ■■■■■ testified that another practical modification that was implemented to avoid a repetition of the ■■■■■ incident was a new requirement that each facility service recipient receive an IPOPO, which states the level of supervision that staff are required to provide to the service recipient based on his or her recorded behavior. Facility Assurance Coordinator ■■■■■ testified that she had inspected the playground fence on or the day after the Service Recipient eloped and had found it to be in good working condition. She testified that she thought that the Service Recipient must have climbed over the fence when he fled. In either case, whether it was easier or more difficult for the Service Recipient to have eloped, the important fact is that he did so when he was not being supervised as required by his IPOPO.

The Subject's Request for Amendment (Justice Center Exhibit 2) acknowledges some degree of failure by the Subject to provide proper supervision when it states that the Service Recipient took advantage of the Subject's "temporary distraction" and bolted from the playground through a broken gate. It also states that "[m]aybe" the Subject made a mistake by giving the other service recipients too much attention, but that that error did not rise to the level of neglect. The Subject's Request for Amendment also states that the required level of supervision cannot be unrealistic or impractical, implying that in this case, the Subject's duty was exactly that.

In short, the Subject's position, as stated in her testimony and through the submissions of her counsel, was that because the duty imposed upon her by the Service Recipient's IPOPO was virtually impossible to comply with and because of the facility's lack of support, it was not the Subject's fault that the Service Recipient eloped.

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The Subject's testimony on the issue of her great difficulties in providing adequate supervision to the Service Recipient was credible evidence. However, the fact that the Service Recipient's behavior was tremendously challenging did not excuse the Subject from complying with the provisions of the Service Recipient's IPOPO, as was her duty. Despite the contents of the Neuro-Developmental Pediatrics Consultation/ Summary dated ██████████ (Subject Exhibit C) and the possibility that the Service Recipient slipped through a gap in the gate, the Subject had a duty to adhere to the supervision standards set out in the Service Recipient's IPOPO. The Subject breached her duty to keep the Service Recipient within her line of sight and to be within three feet of him when she looked away from him and allowed herself to be distracted by other service recipients.

A finding of neglect also requires that a preponderance of the evidence establish that the Subject's breach of duty 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. Despite the fact that there was no evidence that the Subject's breach of duty actually resulted in physical injury, or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient, such evidence is not necessary for a finding of neglect.

As a result of the Subject's breach of duty, the Service Recipient was able to leave the facility grounds and was found on or around a nearby busy roadway. The Service Recipient's IPOPO states that the Service Recipient had no safety awareness, a fact that put him at even greater risk when he was able to leave the playground unobserved. Fortunately, the Service Recipient was stopped and detained by someone who recognized that the Service Recipient required intervention to keep him from harm. Under these circumstances, it is clear that the Subject's breach of duty was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

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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.

The report will remain substantiated, the next issue 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. A substantiated Category 3 finding of 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 NY SSL § 496 (2). This report will be sealed after five years.

DECISION:

The request of ██████████ that the substantiated report dated ██████████
██ of neglect by the Subject of a
Service Recipient 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 Sharon Golish Blum, Administrative Hearings Unit.

DATED: July 13, 2016
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge