

**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: Theresa Wells, Esq.

[REDACTED]

By: Rachel Flanagan Frost, Esq.  
21 Old Main Street, Suite 200B  
Fishkill, New York 12524

[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 [REDACTED] that the substantiated report 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.

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 24, 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  
4 Burnett Boulevard  
Poughkeepsie, New York 12601  
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  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Theresa Wells, Esq.

[REDACTED]

By: Rachel Flanagan Frost, Esq.  
21 Old Main Street, Suite 200B  
Fishkill, New York 12524

### **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 Service Recipients. The Justice Center substantiated the report against the Subject, concluding that:

#### **Allegation 1**

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you left a room unsupervised twice during which time a male service recipient touched a female service recipient in a sexually inappropriate manner.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

2. [REDACTED] is structured as a school for youth ages 12-18 who are at risk of hospitalization due to mental health issues. [REDACTED] is licensed by the Office of Mental Health (OMH) which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

3. At the time of the alleged neglect, the Subject was employed by [REDACTED] as a Supervisor and Intake Coordinator. She was a Licensed Clinical Social Worker, a licensed Master

[REDACTED]

Social Worker, and had two counselors working under her supervision. Service Recipient A was a female, 12 years of age, had a history of sexual trauma and had been participating in the program for two days. Service Recipient B was a male, 16 years of age, with a history of perpetrating sexual abuse. The Subject was aware of the diagnoses and histories of both Service Recipients. (Hearing testimony of Investigator [REDACTED] and Hearing testimony of Subject)

4. On [REDACTED] the Subject was the only counselor on duty, supervising 12 service recipients. Service Recipient A and Service Recipient B were observed kissing and holding hands during lunch by several other service recipients. After lunch, all the service recipients watched a movie as a group activity. During the movie, Service Recipient A was leaning against Service Recipient B's chest. Service Recipient B's arm was around Service recipient A's stomach or chest. (Hearing testimony of Subject, Hearing testimony of Investigator [REDACTED] and Justice Center Exhibit 6)

5. [REDACTED] policy prohibits fraternization between service recipients, and requires that the service recipients be supervised at all times. (Hearing testimony of Investigator [REDACTED] and 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 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:

- (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:

- (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(s) 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**

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-12) The investigation underlying the substantiated report was conducted by [REDACTED] Services Contract Investigator [REDACTED] [REDACTED] who 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.

The evidence establishes that the Subject breached her duty to the Service Recipients when she failed to adequately supervise them during their lunch period, and subsequently while they were watching a movie after lunch. This breach was likely to result in a serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients.

The Subject testified that she opposed Service Recipient B being admitted to the program because of his prior history of sexual misconduct. Therefore, she should have been vigilant in

supervising him, particularly when he interacted with the female service recipients. The Subject also testified that she was aware of Service Recipient A's history of sexual trauma and therefore should have been vigilant in supervising her interactions with the male service recipients. (Hearing testimony of Subject) Investigator [REDACTED] testified that he interviewed several service recipients who reported observing Service Recipient A and Service Recipient B holding hands and kissing during lunch. (Hearing testimony of Investigator [REDACTED], Justice Center Exhibit 6) The Subject was responsible for supervising the service recipients during lunch, and therefore should have stopped that conduct immediately. Such conduct is expressly prohibited by [REDACTED] policy and therefore constitutes a breach of duty.

In her defense, the Subject testified that while the movie was playing, another service recipient told her that he was having a seizure. The Subject went into the hallway, still in view of the other service recipients, and called down the hall to the receptionist to contact the service recipient's parents. The Subject then observed the service recipient walk down the hallway toward the receptionist to wait for his parents. The Subject testified that she was the only counselor working that day, and being short-staffed, she did the best that she could under the circumstances. None of the other service recipients recalled this incident occurring, yet they all recalled seeing Service Recipient A sitting with her back against Service Recipient B's chest, and Service Recipient B's arm around Service Recipient A. Additionally, no evidence was presented that documents a service recipient being sent home early that day suffering from seizures. Regardless of whether this occurred, the Subject was responsible for supervising the service recipients throughout the day, and therefore she should have noticed the inappropriate behavior both during lunch, and while the movie was playing.

Service Recipient A had a history of being offended against, and Service Recipient B had



[REDACTED]

a history of offending. A criminal investigation was conducted, but was closed due to lack of evidence giving rise to criminal conduct. (Justice Center Exhibit 6) However, the preponderance of the evidence shows that both Service Recipients were vulnerable, and it was likely that the Subject's failure to adequately supervise their interactions would result in a serious or protracted impairment of their emotional condition. The Service Recipients were in the [REDACTED] program due to their risk of hospitalization stemming from mental health issues. Continued physical contact between the Service Recipients may well have led to one or both being hospitalized.

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 abuse and/or neglect alleged. The substantiated report will not be amended or sealed.

Having found that 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.

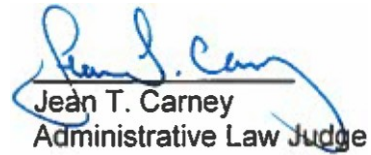
**DECISION:**

The request of [REDACTED] that the substantiated report 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 Jean T. Carney, Administrative Hearings  
Unit.

**DATED:** June 16, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge