

**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: Robert D. DeCataldo, 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 [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons' Central Register, pursuant to SSL § 493(3)(d).

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: April 18, 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:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
125 E. Bethpage Road
Plainview, New York, 11803
On: ██████████

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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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], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision, during which time two service recipients engaged in sexual contact and/or sexual conduct.

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, located at [REDACTED], is a residential treatment center for female youths, 9 to 21 years of age, operated by [REDACTED], and licensed by the New York State Office of

Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject was employed by [REDACTED] and assigned to [REDACTED] for approximately two months. The Subject worked as a Child Care Worker (CCW), with a regular shift of [REDACTED] (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, there were nine service recipients residing at [REDACTED] with the Subject and one other CCW assigned to the facility that evening. Service Recipient A was fifteen years old with diagnoses including Major Depression, Post Traumatic Stress Disorder and noted prior sexual hyperactivity with facility residents. Service Recipient B was eleven years old with diagnoses including Bipolar Disorder, Mood Disorder, Dysthymic Disorder and Post Traumatic Stress Disorder as well as a history of hypersexual behavior in the facility. (Justice Center Exhibits 6, 12, 17, 18, 23, 24, 26)

7. At the time of the alleged neglect, both the facility and [REDACTED] policies required the Subject, as a CCW, to keep the residential service recipients within eyesight and earshot at all times, emphasizing that staff should know the whereabouts and activities of all youths under supervision. (Justice Center Exhibits 6, 29, 30, 31)

8. On [REDACTED] at approximately 9:00 p.m., the Subject was posted at the facility staff desk located in the residence's common area. The staff desk is positioned so that staff members stationed there are able to see down both hallways of the facility and into the living room. At that time, Service Recipients A and B were in the living room watching a movie. While the Subject was attending to another service recipient at the staff desk, both Service Recipient A and B exited the living room and proceeded past the staff desk, down the hallway to the bathroom.

The Subject was redirecting the other service recipient and did not see either Service Recipient A or B pass the staff desk, which is necessary to navigate either hallway. Minutes later, a second staff member noticed Service Recipient A and B were missing from the living room and immediately began a search, finding them together in the bathroom. The Service Recipients later admitted that Service Recipient A had performed oral sex on Service Recipient B while they were in the bathroom. (Justice Center Exhibits 2, 6, 7, 14, 19, 20, 25, 26, 32, 33)

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as follows:

- (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 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 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 not established by a preponderance of the evidence that the Subject

committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence did not establish that the Subject breached her duty to provide proper supervision.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-15; 17-20; 23-33) The investigation underlying the substantiated report was conducted by [REDACTED], OCFS Investigator, 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 two documents that were admitted into evidence. (Subject Exhibits A and B)

The facts in this matter are not in dispute. The Subject admitted in her interrogation and her hearing testimony that during her regular shift and performing her regular duties as a CCW, she was attending to a service recipient at the staff desk, which allowed Service Recipient A and Service Recipient B to leave her line of sight unnoticed. Service Recipient A and Service Recipient B were found minutes later in a bathroom and admitted to a sexual interaction. (Justice Center Exhibits 2, 6, 7, 14, 19, 20, 25, 26, 32, 33; Hearing testimony of the Subject)

To prove neglect, the Justice Center must establish conduct by the Subject that breached the Subject’s duty to the Service Recipients and resulted in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients. The Justice Center’s argument centered on the Subject’s breach of the facilities’ policies regarding supervision of the service recipients.

[REDACTED] policy on the supervision of residential youth required that staff know the whereabouts of, and activities of, all youth under staff supervision at all times. Children must never be left unsupervised at any time. [REDACTED] policy required staff to be mobile and aware of their surroundings and to position themselves in a way that maximizes their view of the service

recipients. (Justice Center Exhibits 29, 30, 31) Neither policy takes into consideration the Subject's duty owed to each individual service recipient in addition to the duty owed to provide general supervision to all the service recipients. In short, these policies are too general and vague to have conveyed a reasonable and realistic expectation of the Subject and consequently, cannot form the basis of a breach of duty under the particular facts in this case.

During her credible testimony, the Subject acknowledged her awareness of the facility's supervision policies and was able to concisely articulate her understanding of the need for that level of vigilance considering the age and histories of the services recipients. In her defense, the Subject asserted that she had only been employed at the facility for two months prior to this incident, and that she had performed her duties to the best of her abilities on that day, especially considering it was herself and one other staff member responsible for nine service recipients. The Subject further testified that she positioned herself at the staff desk in a way that she was able to see down both hallways and partially into the living room where Service Recipients A and B were watching a movie. She testified that she always attempted to keep herself in the best position to optimize her vantage point but obstacles like walls and furniture; and the duty owed to other service recipients, as was evident here, made it difficult. (Hearing testimony of the Subject)

Under the facts presented here, it was simply unreasonable for the Subject to comply with such generalized requirements, and as such, the policy cannot give rise to the breach alleged.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged, specifically that the Subject breached her duty to provide proper supervision. The substantiated report will be amended and sealed.

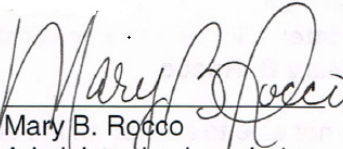
DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by Mary B. Rocco, Administrative Hearings Unit.

DATED: April 10, 2017
Plainview, New York


Mary B. Rocco
Administrative Law Judge