

**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 [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 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: December 8, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

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 the report against the Subject. The Justice Center concluded that:

Allegation 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed neglect when you breached a duty and/or violated agency policy by covering the window of [the Service Recipient's] room with paper and/or allowing two service recipients to cover the window.

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, the [REDACTED] located at [REDACTED] [REDACTED] is a residential facility for male youth who have been removed from

¹ Allegation 1 was unsubstantiated prior to the hearing.

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

(Hearing testimony of Justice Center Investigator ██████████)

5. At the time of the alleged neglect, the Subject was employed by ██████████ as a Youth Development Aide III (YDA III) and had been employed by the facility since ██████████ 2013. The Subject was assigned to Unit █ of the facility. (Justice Center Exhibit 13: audio recording of Justice Center interrogation of the Subject; and 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, the Service Recipient was a fourteen year old resident of Unit █ of the facility. (Justice Center Exhibits 6 and 8, and Hearing testimony of the Subject)

7. The area of Unit █ where the alleged neglect occurred was a wide common area that contained some lounge furniture. The entrances to service recipients' bedrooms and a common bathroom were located around the common area perimeter. The bedroom doors each had a transparent glass window which was located approximately four feet above the floor with a height of approximately ten inches and a width of approximately fifteen inches. (Justice Center Exhibit 12)

8. On ██████████ at approximately 8:36 p.m., the Service Recipient was in his bedroom with the bedroom door closed after obtaining permission from the Subject to be there. The Subject was monitoring other service recipients who were outside the Service Recipient's bedroom door in the common area. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

9. From approximately 8:36 p.m. until approximately 8:39 p.m., the Service Recipient taunted the other service recipients through his bedroom window, and the other service recipients

taunted the Service Recipient in return. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

10. At approximately 8:39 p.m., the Subject took a clipboard that was hanging on a wall of the common area and attempted unsuccessfully to hang it on the Service Recipient's bedroom door, over the window, in an attempt to place a barrier between the Service Recipient in his bedroom and the other service recipients in the common area in an effort to quell the taunting. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

11. While the Subject was walking away from the Service Recipient's bedroom door, service recipient A grabbed a poster from the wall, walked to the Service Recipient's bedroom door and placed the poster over part of the bedroom door window. Immediately following this, service recipient B took some paper towels and wetted them using a water fountain located across the common area from the Service Recipient's bedroom door. While service recipient B was wetting the paper towels, service recipient A removed the poster from the Service Recipient's bedroom door window. Then service recipient B walked to the Service Recipient's door and placed the wet paper towels over the Service Recipient's bedroom door window. During this timeframe, the Subject was in the common area watching the service recipients' conduct. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

12. While service recipient B was placing the wet paper towels over the Service Recipient's bedroom door window, Staff A walked into the common area and noticed what service recipient B was doing. Staff A told service recipient B to stop and to remove the paper towels from the window. Then the Subject told Staff A that she told the service recipients to put the paper towels over the Service Recipient's bedroom door window. Staff A then told the Subject that she needed to take the wet paper towels down. Service recipient B then proceeded to put more wet paper towels over the window, which the Subject allowed. The Subject then walked to the Service

Recipient's bedroom door, took all the wet paper towels down and walked away from the door. (Justice Center Exhibit 12 and Hearing testimonies of Staff A and the Subject)

13. [REDACTED] policy provides the following concerning a service recipient's bedroom: "door and bedroom window to remain totally uncovered." (Justice Center Exhibit 9) [REDACTED] policy also states that staff shall "maintain appropriate supervision of all facility residents at all times" and defines such supervision as service recipients being "visible to staff at all times." [REDACTED] policy also states that "Facility staff are to prevent themselves from any situation which hinders their ability to maintain direct supervision of residents assigned to them" and cites as an example: "situating oneself in any program area where some residents are not entirely visible." (Justice Center Exhibit 10)

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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1) (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 (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 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 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 through 11 and 14) The Justice Center also presented audio recordings of the Justice Center Investigator’s interview of witnesses and interrogation of the Subject. (Justice Center Exhibit 13) The Justice Center also presented video only recording of the incident. (Justice Center Exhibit 12) The investigation underlying the substantiated report was conducted by Justice Center Investigator [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 presented no other evidence.

The facts relevant to the issues in this hearing are mostly undisputed.

The Justice Center proved by a preponderance of the evidence that the Subject breached her duty to the Service Recipient by attempting to cover the Service Recipient’s bedroom door window and by allowing other service recipients to cover the Service Recipient’s bedroom door window, both in violation of [REDACTED] policy.

The record reflects that the Subject attempted to cover the Service Recipient’s bedroom door window with a clipboard because the Service Recipient, who was in his bedroom, requested that his window be covered, and for the purpose of limiting the ability of the Service Recipient and other service recipients to taunt each other through the bedroom door window. When the clipboard failed to remain over the window, two other service recipients placed wet paper towels over the window, which the Subject admittedly allowed. (Justice Center Exhibit 13: audio

recording of Justice Center interrogation of the Subject; and Hearing testimony of the Subject)

The Subject contends that she had no knowledge of the [REDACTED] policy which requires that the door and bedroom windows are to remain totally uncovered. (Justice Center Exhibit 13: audio recording of Justice Center interrogation of the Subject; and Hearing testimony of the Subject) The Subject's contention is not credible given evidence in the record that Staff A, who had only worked at [REDACTED] for four months, knew about the policy. Furthermore, the Subject was familiar with the [REDACTED] policy that required direct supervision of the Service Recipient at all times, and nonetheless allowed visibility of the Service Recipient to be obscured.

The Justice Center also proved by a preponderance of the evidence that the Subject's conduct was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The expressed purpose of the [REDACTED] policy, which requires that door and bedroom windows remain totally uncovered, is to "ensure that all individual rooms are free from potential fire and safety hazards", among other things. (Justice Center Exhibit 9) The expressed purpose of the [REDACTED] policy, which requires direct supervision of service recipients at all times, is to "ensure that safety and security for facility residents and staff is maintained" and to "avoid the risk of injuries, behavior problems, AWOLS and other various incidents." (Justice Center Exhibit 10)

By covering and/or allowing the Service Recipient's bedroom door window to be covered, the Subject placed the Service Recipient at risk of physical injury from fire and other potential safety hazards as envisioned by the [REDACTED] policy.

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 dated [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 is properly categorized, as a Category 3 act.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: December 2, 2016
Schenectady, New York



John T. Nasci, ALJ