

**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: Thomas C. Parisi, Esq.

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██

By: Jason Wolf, Esq.
Rutkin & Wolf PLLC
203 East Post Road
White Plains, New York 10601

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: February 23, 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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street, 3rd Floor
Brooklyn, New York, 11201
On: ████████████████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
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203 East Post Road
White Plains, New York 10601

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 properly supervise service recipients, during which time a verbal altercation escalated into a physical one, and you failed to intervene.

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. [REDACTED], located at [REDACTED], is a residential facility housing adjudicated youth. The facility is licensed by the Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the

Justice Center.

5. At the time of the alleged neglect, the Subject had been employed by [REDACTED] as an Advanced Socio-Therapist (ST) for 13 years. (Hearing testimony of Subject; Justice Center Exhibit 7)

6. At the time of the alleged neglect, the Service Recipients were adjudicated youth of varying ages, and had been residents of the facility for an undetermined length of time. (Hearing testimony of OCFS Child Abuse Specialist (CAS) [REDACTED])

7. The Subject was working in [REDACTED] Cottage at [REDACTED] on [REDACTED] with another staff, [REDACTED]. At the time of the incident, the Subject was in the kitchen with one Service Recipient making breakfast, and [REDACTED] had left the cottage with four service recipients to go to the medical building. A Service Recipient was doing chores in the bathroom, and another Service Recipient was in the living room. (Justice Center Exhibit 7; Hearing testimony of CAS [REDACTED])

8. Two Service Recipients were in the reception area, arguing over an iPod. The argument escalated, and the Subject came into the reception area, but the two Service Recipients had moved into the living room. The Subject returned to the kitchen and the dispute between the two Service Recipients became physical. Another Service Recipient broke up the fight, and all three Service Recipients moved to the reception area. The Subject went back into the kitchen and returned to the reception area with the Service Recipient who had been helping her cook breakfast. (Justice Center Exhibit 7; Hearing testimonies of CAS [REDACTED] and the Subject)

9. The Subject sat at the reception desk and the fight between the two Service Recipients escalated again with one Service Recipient punching the other. The Subject let the other Service Recipients break up the fight, then [REDACTED] entered the cottage, and attempted to get

between the combatants. The Subject was knocked down in the scuffle, then she went back into the kitchen to finish cooking breakfast, leaving [REDACTED] with all the Service Recipients. [REDACTED] called Special Services for assistance.¹ (Justice Center Exhibit 7; Hearing testimonies of CAS [REDACTED] and 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 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:

"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

¹ The exact role of Special Services was not explained during the course of the hearing; but it can be inferred from the testimony that Special Services provides security and transportation services for the facility.

(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:

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 1” 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 1-11) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Specialist ██████████, 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.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipients, that she breached that duty, and that her breach either 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 Recipients. (SSL § 488(1)(h))

Here, there is no issue as to whether the Subject was a custodian as that term is defined in SSL § 488(2). The subject was charged with supervising the Service Recipients residing in that cottage, and she breached that duty by allowing an argument to escalate into a physical altercation, and by failing to intervene.

During the course of her investigation, OCFS Child Abuse Specialist ██████████ reviewed surveillance video of the incident. She was unable to have the video footage copied to a disc, but she made detailed notes contemporaneously with viewing the footage. These notes corroborate the Subject's statement and testimony to a certain extent. The Subject admits that she was in the kitchen cooking breakfast when she heard two of the Service Recipients get into an argument. The Subject was unable to see the Service Recipients from the kitchen. The Subject went into the reception area and told the Service Recipients to calm down. Then the Subject returned to the kitchen, rather than following through with the Service Recipients to ensure that they had de-escalated. (Hearing testimonies of Subject and OCFS CAS ██████████; Justice Center Exhibit 7) The

Subject's failure to maintain adequate supervision of the Service Recipients allowed a verbal altercation to escalate and become a physical altercation and constitutes a breach of duty.

The Service Recipients took the fight into the living room and another Service Recipient intervened. The Subject came back to the reception area a minute later and sat down. However, when the fight escalated yet again, she did nothing, allowing the other Service Recipients to attempt to break up the fight. (Justice Center Exhibit 7) The Subject's failure to intervene constitutes a breach of duty.

In breaching her duty to the service recipients, it was likely that the Service Recipients would suffer physical injury. Not only the two Service Recipients engaged in the altercation, but also the Service Recipients who attempted to break up the fight.

In her defense, the Subject asserts that pursuant to her training, she was not allowed to restrain the Service Recipients without additional staff. (Hearing testimony of Subject; Justice Center Exhibit 7) That may be true, but there were actions the Subject could have taken well before the situation became physical to de-escalate and maintain the safety of everyone involved. In addition, the Subject could have called for Special Services once the altercation escalated and became physical. However, the evidence shows that [REDACTED] called Special Services upon her return from the medical building, and the matter was already out of control. (Justice Center Exhibit 7)

The Subject further contends that the fight did not become physical until after [REDACTED] returned from the medical building. (Hearing testimony of Subject) However, this argument is not borne out by the record. The witness statements and the video evidence both indicate that the fight commenced prior to [REDACTED] entrance. (Justice Center Exhibit 7)

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 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.

Substantiated Category 3 findings of abuse and/or 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 SSL § 496(2). The report will be sealed after 5 years.

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 Jean T. Carney, Administrative Hearings
Unit.

DATED: January 26, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge