

**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 Parisi, Esq.

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By: Jean O'Hearn, Esq.
Kreisberg & Maitland, LLP
75 Maiden Lane
New York, New York 10038

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: March 30, 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:

Keely D. Parr
Administrative Law Judge

Held at:

Administrative Hearings Unit
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
161 Delaware Avenue
Delmar, New York 12054-1310
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By: Jean O'Hearn, Esq.
Kreisberg & Maitland, LLP
75 Maiden Lane
New York, New York 10038

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 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 to a service recipient, during which time he was left in his room while the rest of the unit left the hall.

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]¹, [REDACTED], is a secure detention facility for youth, operated by the [REDACTED], and

¹ The facility is located in [REDACTED] and not the [REDACTED], as alleged. Both parties have so stipulated.

licensed by the 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] as a Juvenile Counselor (Counselor) for approximately three years. (Hearing Testimony of Subject)

6. At the time of the alleged neglect, the Service Recipient was 15 years old and had been placed in the facility since [REDACTED] 2015. The Service Recipient's dormitory was located in [REDACTED] Hall. (Justice Center Exhibit 7)

7. At the time of the alleged neglect, the Subject was assigned to [REDACTED] Hall to relieve another Counselor and signed into the logbook at 4:00 p.m. The Service Recipient approached the Subject and asked to be let into his room. The Subject obliged and locked the Service Recipient in his room. At 4:15 p.m., the Counselor came back to the hall and the Subject went off duty. The Subject did not inform any of the staff that the Service Recipient was in his room nor did he make a notation in the logbook. (Hearing Testimony of Subject; Justice Center Exhibits 6 and 15)

8. After the Subject went off duty, two other staff members lined the service recipients up in the hall, performed a head count and took the service recipients to the cafeteria for dinner. At approximately 5:26 p.m., while the case manager was returning to her office on [REDACTED] Hall, she heard banging and tapping. She followed the knocking and saw the Service Recipient's face looking through the window of his bedroom door. The case manager could not locate any staff and went to find the Director of Operations, who unlocked the Service Recipient's door and took the Service Recipient to dinner. (Justice Center Exhibits 6, 7 and 9)

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)(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 (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 as found in SSL § 493(4)(c), 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. Specifically, the evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time the Service Recipient was left in his room while the rest of the unit left the hall.

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 Recipient, that he breached that duty, and that his 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 Recipient. (SSL § 488(1)(h))

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-18) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Specialist [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

On the day of the alleged neglect, the Subject was employed as a Juvenile Counselor by [REDACTED] and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to follow the protocols of the facility by either communicating with other staff or documenting in the logbook that the Service Recipient was in his room. (Justice Center Exhibit 7)

The Subject admitted that he neither communicated to staff nor made any entry in the logbook that the Service Recipient was in his room. The Subject testified that he had been doing a lot of double shifts and that when the Counselor relieved him, he was excited to go home and left in a rush. The Subject breached his duty to the Service Recipient by failing to ensure that the staff knew that the Service Recipient was locked in his room. The Subject testified that the head count performed by the Counselors when they lined up the service recipients in the hall prior to going to dinner should have been verified with the count in the logbook. Whether or not that is true does not relieve the Subject of his responsibility to communicate the whereabouts of the Service Recipient to the staff, either by direct communication or by entry into the logbook. (Justice Center Exhibit 7)

Although the Service Recipient was not injured, there was a likelihood that the Subject's

breach would result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Service Recipient was locked in his room without access to food, water or a bathroom for over an hour. When the Service Recipient awoke, he did not hear anyone in the hall and started banging on his door. When the Service Recipient was found by the Case Manager, she stated that he looked sad and that the Service Recipient said “they left me”. (Justice Center Exhibit 7)

Consequently, the evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time the Service Recipient was left in his room while the rest of the unit left the hall.

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. 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 five 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 Keely D. Parr, Administrative Hearings Unit.

DATED: March 15, 2017
Brooklyn, New York


Keely D. Parr, ALJ