

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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 12, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Rashida R. Smith, Esq.
[REDACTED], Subject
Samuel Rieff, Esq.

**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:

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, Suite 104
Plainview, New York 11803
On: [REDACTED]

Parties:

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Kristin Kopach, Esq.

[REDACTED]

By: Rashida R. Smith, Esq.
97 Opal Street
Elmont, New York 11003

[REDACTED]

By: Samuel Rieff, Esq.
25 Roslyn Road
Mineola, New York 11501

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains reports substantiating [REDACTED] and [REDACTED] (the Subjects) for neglect. The Subjects requested that the VPCR amend the reports to reflect that the Subjects are not subjects of the substantiated reports. 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 "substantiated" reports dated [REDACTED] of neglect by the Subjects of Service Recipients.

2. The Justice Center substantiated the reports against the Subjects. 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 service recipients were on the front porch unsupervised.

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 group home for challenged teenage boys operated by [REDACTED] and 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, Subject [REDACTED] had been employed by [REDACTED] assigned to [REDACTED] group home (“facility”) as a Youth Care Counselor (YCC)¹ and was working a double shift from 11:00 p.m. until 3:00 p.m. the following day. At the time of the alleged neglect, Subject [REDACTED] had been employed as a YCC by [REDACTED] and had been assigned to the facility for approximately 2 weeks prior to the alleged neglect, and was working her regular shift of [REDACTED] (Justice Center Exhibits 2 and 2-a; Hearing testimony of OCFS Child Abuse Specialist [REDACTED])

6. At the time of the alleged neglect, there were seven service recipients residing at the facility with two staff members assigned to each shift. [REDACTED] policy required the Subjects, as YCCs, to keep the service recipients within eyesight at all times. The service recipients were required to attend school as dictated by New York State law, to take public transportation and were encouraged to seek employment, all of which was to be done without staff supervision. (Justice Center Exhibits 6, 7, 23 and 24; Hearing testimony of Child Abuse Specialist [REDACTED])

7. At approximately 2:40 p.m. on the day of the alleged neglect, five service recipients were sitting on the front porch listening to music with Subject [REDACTED] present. Subject [REDACTED] was inside the facility with the remaining two service recipients. At approximately 3:00 p.m., one of the incoming staff (YCC 1) arrived, walked past Subject [REDACTED] and the service recipients on the porch and entered the facility. One of the service recipients (Service Recipient A) then requested that the Subject unlock his bedroom door to allow him to retrieve a pair of socks. Service recipients’ bedroom doors were kept locked during the day. The Subject went inside with

¹ The record was void of any information regarding Subject [REDACTED] employment start date.

Service Recipient A, retrieved the keys from the staff office and saw Subject [REDACTED] speaking with YCC 1 about the earlier shift. After retrieving the socks, the Subject and Service Recipient A returned to the other service recipients still gathered on the front porch. YCC 2, the second incoming staff member, arrived moments thereafter and went directly to the staff office at approximately 3:05 p.m. Subject [REDACTED] clocked out at 3:09 p.m. and Subject [REDACTED] clocked out at 3:10 p.m. (Justice Center Exhibits 2, 2-a, 6, 7, 9, 10, 15, 19, 20 and 21)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act giving rise to the substantiated report.
- Whether the substantiated allegation constitutes neglect.
- Pursuant to Social Services Law § 493(4), the category of neglect that such act constitutes.

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:

(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 Subjects committed the act of neglect alleged in the substantiated reports that are the subject of the proceeding and that such act constitutes 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 reports constitute the category of neglect as set forth in the substantiated reports.

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 Subjects

committed an act, described as “Allegation 1” in the substantiated reports. Specifically, the evidence did not establish that the Subjects breached their 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 1-31) The investigation underlying the substantiated reports was conducted by [REDACTED], OCFS Child Abuse Specialist, who was the only witness who testified at the hearing on behalf of the Justice Center.

Subject [REDACTED] did not testify and provided no further evidence. Subject [REDACTED] did not testify and provided one document that was admitted into evidence. (Subject Exhibit A)

To prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subjects’ conduct breached their duty owed to the service recipients, and that such breach 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. The Justice Center argued that the Subjects breached facility policy regarding supervision of the service recipients.

In both his written request for an amendment and in his interrogation, Subject [REDACTED] stated that he was on the front porch of the facility with five service recipients when one asked to retrieve something from his locked bedroom. Subject [REDACTED] stated that he left the porch momentarily to assist the service recipient with unlocking his bedroom, at which point both incoming staff had arrived. Subject [REDACTED] stated that, after assisting the service recipient and following the arrival of both incoming staff members, he clocked out 10 minutes after the end of his shift. (Justice Center Exhibits 2 and 19)

In her request for an amendment, Subject [REDACTED] stated that she was in the facility supervising the two service recipients who remained inside and she clocked out only after both incoming staff members arrived. Subject [REDACTED] stated that she had only been employed at the

facility for two weeks prior to this incident and that she had performed her duties to the best of her abilities on that day, especially considering it was only herself and Subject [REDACTED] responsible for seven service recipients. (Justice Center Exhibits 2a and 20) Time cards submitted for Subject [REDACTED] indicated that he clocked out at 3:10 p.m. and Subject [REDACTED] indicated that she clocked out at 3:09 p.m. (Justice Center Exhibits 19 and 20) Both Subjects' statements are found to be consistent, credited evidence that are adequately supported by this record.

In addition to the facility policy, the Justice Center proffered statements from both incoming staff members, YCC 1 and YCC 2. In her statement, YCC 1 stated that she arrived at the facility at 3:00 p.m. and noticed five service recipients on the porch unsupervised. YCC 1 stated that Subject [REDACTED] was in the kitchen and Subject [REDACTED] was in the staff office. YCC 1 further stated that YCC 2 arrived shortly after her, at which point Subject [REDACTED] and Subject [REDACTED] clocked out and left for the day. YCC 1 stated that she remained in the facility with two service recipients. (Justice Centers Exhibit 6, 7, and 15) In her statement, YCC 2 stated that when she arrived at the facility at 3:05 p.m., Subject [REDACTED] had left already and Subject [REDACTED] was still in the office. YCC 2 further stated that she went out to the porch, told the service recipients to turn down the music and then she returned inside to the living room, leaving the service recipients unsupervised on the porch. (Justice Center Exhibits 6, 7 and 17) While YCC 1's statement was consistent and corroborated those of both Subjects, YCC 2's statement was unsupported by the record and is therefore not credited evidence.

[REDACTED] policy on the supervision of service recipients required that staff keep direct eyesight supervision of all service recipients at all times. Such a generalized requirement fails to take into consideration the Subjects' duty owed to each individual service recipient, in addition to providing general supervision to all service recipients. Moreover, and in contrast, the policy

██████████ further required that the service recipients attend school, use public transportation and maintain employment all without staff supervision. (Justice Center Exhibits 7 and 23) OCFS Director of Human Resources and Investigative Reviewer, ██████████ stated in her interview (Justice Center Exhibit 7) that because service recipients were not supervised at school and in the community, constant supervision of the service recipients at the facility was not essential, further underscoring the lack of clarity regarding supervision of service recipients.

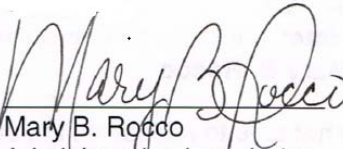
Of interest to note, following this incident, OCFS instituted a Plan of Corrective Action which specifically addressed the existing incongruous supervision policy and stated: “The policy has been changed to reflect that residents can [sic] at the group home without eye observation unless there is a clinical and/or physical need to provide eye observation supervision. (Justice Center Exhibit 24) It is clear from the record that the policy requirements regarding supervision of service recipients were too inconsistent and conflicting to have conveyed a reasonable and realistic expectation of the Subjects and consequently, cannot form the basis of a breach of duty.

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

DECISION: The requests of ██████████ and ██████████ that the substantiated reports dated ██████████ be amended and sealed is granted. The Subjects have 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: November 30, 2017
Plainview, New York



Mary B. Rocco
Administrative Law Judge