

**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: March 27, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED]
Jean O'Hearn, 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:

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: [REDACTED]

Parties:

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

[REDACTED]

By: Jean O'Hearn, Esq.
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75 Maiden Lane, Suite 603
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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], 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 a custodian, you committed neglect when you failed to provide proper supervision, during which time service recipients were unsupervised while in the bathroom.

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

¹ Allegation 1 was unsubstantiated.

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 for approximately ten years. (Hearing Testimony of Subject)

6. At the time of the alleged neglect, the Service Recipients all resided in [REDACTED]-Hall, which was horseshoe-shaped. The Service Recipients required staff to open the bathroom door for them. The policy of the facility required that only one service recipient be allowed in the bathroom at a time. The Standard of Conduct required that no juvenile be left alone without supervision. (Hearing Testimony of Investigator and Subject; Justice Center Exhibit 16)

7. At the time of the alleged neglect, the Subject was assigned to [REDACTED]-Hall and had opened the bathroom door for Service Recipient [REDACTED]. The Subject then took a seat on side [REDACTED] in the day area where she was not able to see the bathroom where Service Recipient [REDACTED] had entered. A couple of minutes later, Service Recipient [REDACTED] entered the same bathroom and closed the door. A few minutes later, Service Recipient [REDACTED] walked over to the bathroom and also entered. At that time, the Subject had been walking over to the [REDACTED]-Side of the hall to obtain a juice for a service recipient, and was able to observe Service Recipient [REDACTED] enter the bathroom. The Subject proceeded to walk in that direction. (Justice Center Exhibit 10)

8. The Subject tried to open the bathroom door but was unable to. Service Recipient [REDACTED] also tried to help open the bathroom door but suddenly grabbed the radio from the Subject's belt. The Subject turned to run after Service Recipient [REDACTED] and slipped and fell. Shortly thereafter, all of the Service Recipients exited the bathroom. They were all checked for any type of injury and were all unharmed. (Justice Center Exhibits 6, 10, and 14)

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1) 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 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 Service Recipients were unsupervised while in the bathroom.

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 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 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 1-17) The investigation underlying the substantiated report was conducted by OCFS 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 provided no other evidence.

The Justice Center submitted a visual only video of the incident, which was extremely helpful and illuminating evidence with respect to the substantiated allegation. (Justice Center Exhibit 18)

On the day of the alleged neglect, the Subject was employed by [REDACTED] as a Juvenile Counselor and was acting as a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to provide the Service Recipients with supervision, guidance, counseling and security. In accordance with the Standard of Conduct, at no time was any juvenile to be left alone without supervision. The Subject breached her duty to the Service Recipients by positioning herself where her view was obstructed, unable to observe the bathroom door after Service Recipient [REDACTED] entered and unable to observe Service Recipient [REDACTED] enter the bathroom. The Service Recipients were left alone without supervision. (Justice Center Exhibits 10 and 16)

After the Subject opened the bathroom door for Service Recipient [REDACTED], she took a seat in the [REDACTED]-hall. The Subject admitted during her testimony that she could no longer see the bathroom door from where she was seated, but stated that she was not required to stand outside the bathroom door. The Subject testified that there was a lot going on and that she was talking to another service recipient who was threatening to hurt herself. In addition, the Subject testified that she knew there were blind spots but that usually there were mirrors posted to enable her to see. The Subject

admitted that there were no mirrors in the area where she was sitting. (Hearing Testimony of Subject; Justice Center Exhibit 18)

The Subject could have continued to speak with the service recipient and watch the bathroom door to keep track of the Service Recipients at the same time. In fact, the Subject testified that she became aware that there was more than one Service Recipient in the bathroom when she got up to obtain a juice for a service recipient and happened to look that way. The Subject ran to the bathroom to try to open the door, however, at that point all three Service Recipients were in the bathroom at the same time and would not open the door. All of the Service Recipients came out of the bathroom voluntarily a short time later. They were all checked for any type of injury and were all unharmed. (Hearing Testimony of Subject; Justice Center Exhibits 14 and 18)

Although no physical injury was observed, there was a likelihood that the Subject's breach could result in physical injury or the serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients. The Subject testified that █-hall was a very troublesome hall and that only one service recipient was allowed in the bathroom at one time due to safety concerns; that there was a strict policy to have the bathroom locked and that anything could happen if more than one service recipient was in the bathroom at the same time. (Hearing Testimony of Subject)

The evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time Service Recipients were unsupervised while in the bathroom.

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 of neglect 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] 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 9, 2018
Brooklyn, New York


Keely D. Parr, ALJ