

**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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: May 28, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kevin McGuckin, Esq.
[REDACTED], Subject
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: Kevin McGuckin, Esq.

[REDACTED]

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 Service Recipients.

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

Allegation 1

It was alleged that on an overnight shift between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to service recipients, during which time they engaged in inappropriate physical contact.

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 [REDACTED]. The facility is operated by the [REDACTED] and licensed by the [REDACTED].

Office of Children and Family Services (OCFS), a provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 6)

5. At the time of the alleged neglect, the Subject had been employed by the facility for almost 30 years and worked as a Congregate Care Specialist (CCS). The Subject and two other staff members were posted in front of Service Recipient #1¹ and #2²'s assigned sleeping cluster, room [REDACTED]. The Subject was responsible for making log book entries which she completed by sitting at her desk facing room [REDACTED]. Service Recipient #3³ was assigned to room [REDACTED]. (Hearing Testimony of Subject; Justice Center Exhibits 6 and 9)

6. At the time of the alleged neglect, around midnight, all three Service Recipients were sitting on Service Recipient #2's bed in room [REDACTED] when Service Recipient #1 suggested that "they have a threesome". Service Recipients #1 and #3 allegedly performed oral sex acts on Service Recipient #2. All three Service Recipients were teenage females. (Justice Center Exhibit 7)

7. At the time of the alleged neglect, the facility's log book evidences that Service Recipient #3 did not return to the facility until 2:00 a.m. At approximately 2:45 a.m., a fight broke out between service recipients. Service Recipient #3 reported that the Subject was writing in the log book documenting this fight, while the alleged acts took place and that another unknown staff was also sitting outside of the room. (Justice Center Exhibit 8; Subject Exhibit A)

8. At the time of the alleged neglect, the Subject witnessed Service Recipients #1 and #3 going in and out of the sleeping cluster. The Subject repeatedly instructed Service Recipient #3 to leave room [REDACTED] and go to her room, as she was moving from bed to bed and grabbing service

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]

recipients' feet. The Subject also instructed Service Recipient #3 to leave Service Recipient #2's bed. Two supervisors also instructed Service Recipient #3 to leave room [REDACTED], and she eventually left of her own accord at about 4:30 a.m. (Justice Center Exhibits 7 and 8)

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 not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence did not establish that the Subject committed neglect.

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))

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-15) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Prevention Specialist [REDACTED] (Investigator), who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf, presented [REDACTED], a supervisor at the facility as a witness and provided a video of the 3rd floor of the facility. (Subject Exhibit A)

When interviewed, Service Recipient #1 and Service Recipient #3 both stated that the alleged “oral sex” took place around midnight, however the facility log book indicates that Service Recipient #3 was out of the facility and did not return until 2:00 a.m. Video footage provided by the Subject evidences that at 2:45 a.m. multiple service recipients ran into the hall as a fight broke out between service recipients. Service Recipient #3 reported that the Subject was writing in the log book documenting this fight, while the alleged acts took place and that another unknown staff was also sitting outside of the room. (Justice Center Exhibits 7 and 8; Subject Exhibit A)

The Subject credibly testified that no sexual activity took place during her shift from [REDACTED] [REDACTED] The Subject was responsible for making log book entries which she completed by sitting at her desk which was directly in front of sleeping cluster room [REDACTED], where the alleged neglect took place. The video depicted that the desk faces the plate glass windows of room [REDACTED], enabling the Subject to see inside even when she is writing. The Subject testified that Service

Recipient #3 was jumping from bed to bed in room [REDACTED], chatting with the service recipients and grabbing their feet. The Subject told Service Recipient #3 to go to her room and to leave Service Recipient #2's bed at approximately 3:35 a.m. (Hearing Testimony of Subject; Justice Center Exhibit 8; Subject Exhibit A)

Supervisor [REDACTED] testified that she worked the [REDACTED] shift and at the time of the alleged neglect did not hear or see anything that suggested this allegation was true. She testified that she was constantly back and forth to the area as Service Recipient #3 was hiding in room [REDACTED]. She additionally testified that no other service recipients in sleeping cluster [REDACTED] had any conversation with her about the allegation. Supervisor [REDACTED] testified that she found out about the allegation the next day from one of her staff members, after Service Recipient #3 reported having had sex in the room. (Hearing Testimony of Supervisor [REDACTED])

The report was substantiated based upon the statements of Service Recipients #1 and #3, however Service Recipient #3 was not in the facility at the time the alleged neglect took place. The investigator's testimony that she believed the Service Recipients got the time wrong is not credited. The video depicts that a fight broke out about 2:45 a.m. Supervisor [REDACTED] identified Service Recipients #1 and #3 in the video as being in the hallway as the service recipients ran out of their rooms to witness the fight. Both the Subject and Supervisor [REDACTED] credibly testified that no sexual activity took place and that both were constantly monitoring room [REDACTED]. (Hearing Testimony of Subject and Supervisor [REDACTED]; Justice Center Exhibit 7)

The evidence did not establish that the Subject committed neglect when the Subject failed to provide proper supervision to the Service Recipients, during which time they engaged in inappropriate physical contact. Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect

alleged. The substantiated report will be amended and sealed.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by Keely D. Parr, Administrative Hearings Unit.

DATED: May 17, 2019
Brooklyn, New York


Keely D. Parr, ALJ