

**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]

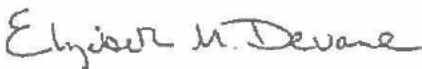
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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: October 24, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Matthew Klimasauskas, Esq.
[REDACTED], Subject, Pro se

**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
4 Burnett Boulevard
Poughkeepsie, New York 12603
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: Matthew Klimasauskas, Esq.

[REDACTED]

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 2¹

It was alleged that on or about [REDACTED], while on an outing in the community and away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision to service recipients.

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 group home for teenage females placed by the department of social services of various New York State counties.

¹ Allegation 1 was unsubstantiated.

It is operated by [REDACTED] and licensed by the New York State Office of Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 17)

5. At the time of the alleged neglect, the Subject had been employed by [REDACTED] as a Youth Counselor for approximately two years. The Subject worked from [REDACTED] and was the only staff on shift at the facility with the four Service Recipients. (Hearing Testimony of Subject; Justice Center Exhibit 16)

6. At the time of the alleged neglect, Service Recipient #1² was approximately 17-years old, diagnosed with post-traumatic stress disorder and bipolar disorder, with a history of self-injurious behaviors, suicidal ideations, and sexual trauma. Service Recipient #1 also had a history of high-risk behaviors including substance abuse and AWOL. (Justice Center Exhibits 17 and 19)

7. At the time of the alleged neglect, Service Recipient #2³ was approximately 15-years old, diagnosed with schizotypal personality and bipolar disorders, with a history of sexual abuse and attempted medication overdose. Service Recipient #2 also had a history of high-risk behaviors including being easily influenced by peers and suspected marijuana use. Service Recipient #2 had no instances of distorting facts. (Justice Center Exhibits 14, 17 and 21)

8. At the time of the alleged neglect, Service Recipient #3⁴ was approximately 15-years old, with a history of high-risk behaviors including suicidal thoughts and self-harm (cutting). (Justice Center Exhibits 17 and 20)

9. At the time of the alleged neglect, Service Recipient #4⁵ was approximately 19-years old, with a history of AWOL and suicidal ideations. Service Recipient #4 also engaged in

sexual conversations with strangers online. (Justice Center Exhibits 17, 18, and 22)

10. At about 11:30 a.m. on the day of the alleged neglect, the Subject drove the facility van, with the four Service Recipients to attend a praise dance rehearsal at her church in the city of [REDACTED]. The dance rehearsal was scheduled for 12:00 p.m. to 2:00 p.m. Upon arriving at approximately 12:00 p.m., all four Service Recipients went into the church with the Subject. At an unspecified time later, Service Recipients #1, #2 and #4 became restless and asked to go outside to the van. The Subject told them no. Service Recipient #3 remained at the dance rehearsal with the Subject. Service Recipients #1 and #2 again asked the Subject to go outside to the van and the Subject said okay, informing them to stay in the van or their recreation would be taken away. Service Recipient #4 told the Subject that she was leaving, and the Subject told her “that going for a walk was not in her best interest of safety” and that she needed to stay where the Subject could see her. (Hearing Testimony of Subject; Justice Center Exhibits 9, 10, 16 and 24)

11. Service Recipient #4 left the vicinity of the church and walked around the city of [REDACTED] for approximately an hour and a half and asked “some random guy” for a cigarette. The Subject did not go after her or notify the facility administration that Service Recipient #4 had gone AWOL. Service Recipients #1 and #2 remained outside in the van without supervision for almost two hours, when the Subject finished the dance rehearsal. (Hearing Testimony of Subject; Justice Center Exhibits 6, 7, 8, 9, 10, and 16)

12. The incident reports filed by the Subject’s supervisor⁶ indicated that Service Recipient #4 “walked around the city of [REDACTED] for 1 hour and a half”. These reports were based upon the statements written by Service Recipients #1, #3 and #4 on [REDACTED]. Service Recipient #1 stated that she “awoled for like a half and hour”. Service Recipient #4 stated

⁶ [REDACTED]

that she “came back to the church with in 1 hour ½”. Service Recipient #3 did not provide a time frame in her statement. (Justice Center Exhibits 7 and 8)

13. The incident reports also stated that the Service Recipients “were both left unattended in the van for 2 hours”. Service Recipient #3 stated that the Subject allowed “the girls to sit in the van during session”, a session that was scheduled from 12:00 pm to 2:00 p.m. (Justice Center Exhibits 7 and 8 and 16)

14. According to the program director⁷, there were no restrictions on Service Recipients going to a church activity, but the expectation was that if a Service Recipient walked away, the Subject was to redirect and follow. In addition, he stated that the Service Recipients should have been inside of the church with the Subject. (Justice Center Exhibit 13)

15. Step 1 to report an incident and maintain safety states that one is to call the supervisor or the on-call person. (Justice Center Exhibit 26)

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 neglect.
- Pursuant to Social Services Law § 493(4), the category of 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 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, 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 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 2" in the substantiated report. Specifically, the evidence establishes 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 1-27) 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 presented one document. (Subject Exhibit A)

On the day of the alleged neglect, the Subject was employed as a youth counselor and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to supervise the Service Recipients, which duty she breached by allowing Service Recipients #1 and #2 to sit in the facility van unsupervised for almost two hours and by allowing Service Recipient #4 to walk around the city of [REDACTED] unsupervised for approximately an hour and a

half. (Hearing Testimony of Subject; Justice Center Exhibits 7, 8, 9, 10, 13 and 16)

The Subject testified that she could not go after Service Recipient #4 because she had to supervise the other Service Recipients. However, Service Recipients #1 and #2 were already sitting in the facility van, so the Subject could have easily left the dance rehearsal with Service Recipient #3 and taken the Service Recipients in the facility van and followed Service Recipient #4. According to the program director, the expectation was that the Subject would have redirected and/or followed Service Recipient #4. (Hearing Testimony of Subject; Justice Center Exhibits 9, 10 and 13)

The Subject additionally testified that Service Recipients #1 and #2 were getting restless and were going in and out of the fellowship hall in the church, however Service Recipients #1's and #2's statements clearly enumerate that they were sitting in the facility van and that the Subject told them that their recreation would be taken away if they did not stay in the van. In addition, the social worker⁸ stated that Service Recipient #1 was insightful, and Service Recipient #2 had no instances of distorting facts. The program director stated that the Service Recipients should have been inside of the church with the Subject. (Hearing Testimony of Subject; Justice Center Exhibits 9, 10, 13 and 14)

The Investigator testified that the Subject should have called the facility administration to alert them that Service Recipient #4 had gone AWOL, however the Subject testified that the policy of [REDACTED] was to telephone after a service recipient had been gone for over one hour and Service Recipient #4 was only gone for 30 minutes. There were conflicting statements presented as to how long Service Recipient #4 was gone. The incident reports filed by the Subject's supervisor indicated that Service Recipient #4 "walked around the city of [REDACTED] for 1 hour and a half".

⁸ [REDACTED]

These reports were based upon the statements written by Service Recipients #1, #3 and #4 on [REDACTED]. Service Recipient #1 stated that she "awoled for like a half and hour". Service Recipient #4 stated that she "came back to the church with in 1 hour ½". Service Recipient #3 did not provide a time frame in her statement. (Hearing Testimony of Investigator and Subject; Justice Center Exhibits 7 and 8)

When the Service Recipients were subsequently interviewed by the Investigator on [REDACTED], they provided the following statements: Service Recipient #1 stated that she "Awoled for 30 mins". Service Recipient #2 stated that "she was gone for a really long time". Service Recipient #3 stated that she "Awoled for approx. 30 mins". As the initial written statements were provided closer to the time of the incident, they are credited. In addition, as Service Recipient #4 was the one who AWOLed, her account of how long she was gone is credited. As Service Recipient #4 was gone for over one hour, the Subject had a duty to telephone the facility administration to report this AWOL. In addition, the steps to report an incident and maintain safety state that one is to call the supervisor or the on-call person. (Hearing Testimony of Investigator and Subject; Justice Center Exhibits 6, 7, 8, 9, 10, 11 and 26)

The Subject additionally testified that she cut the dance rehearsal short, however there is no evidence in the record corroborating this testimony. The incident reports state that the Service Recipients "were both left unattended in the van for 2 hours". Service Recipient #3 stated that the Subject allowed "the girls to sit in the van during session", a session that was scheduled from 12:00 pm to 2:00 p.m. (Hearing Testimony of Subject; Justice Center Exhibits 7, 8 and 16)

Although the Subject's breach did not result in physical injury to Service Recipients #1, #2 and #4, there was a likelihood that it could result in physical injury and/or the serious or protracted impairment of the physical, mental or emotional condition of the Service Recipients. Service

Recipient #1 had a history of self-injurious behaviors and while left unsupervised for almost two hours, could have hurt herself physically, mentally and emotionally. Service Recipient #2 had a history of being easily influenced by peers and would have gone along with Service Recipient #1's actions. Neither Service Recipient #1 nor #2 wanted to go to the praise dance rehearsal and were threatened with their recreation being revoked if they did not stay in the van, clearly impacting their mental and emotional conditions. Service Recipient #4 had a history of suicidal ideations and engaged in sexual conversations with strangers online. Service Recipient #4 did not want to go to the dance rehearsal and stated that she was "getting stressed out". Service Recipient #4 walked around the city of [REDACTED] unsupervised for over an hour and asked a stranger for a cigarette. The likelihood of physical injury and/or serious or protracted impairment of her physical, mental or emotional condition was high. The Service Recipients were placed in the group home because they needed supervision, something that the Subject did not provide. (Justice Center Exhibits 8, 9, 13, 19 and 21)

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]
[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: October 17, 2019
Brooklyn, New York


Keely D. Parr, ALJ