

**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: November 18, 2020
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Gary Kropkowski, 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:

Mary B. Rocco
Administrative Law Judge

Held at:

Video Conference Hearing
New York State Justice Center for the Protection of
People with Special Needs
125 East Bethpage Road
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: Gary Kropkowski, 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 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 or about [REDACTED], while away from [REDACTED], located at [REDACTED], you committed Neglect against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Neglect pursuant to Social Services Law § 493(4)(c).

The investigation revealed the subject failed to use approved techniques to deescalate the service recipient and/or had inappropriate contact with him.

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.
4. The facility, [REDACTED], located at [REDACTED], is a residential program for emotionally troubled youth, ages seven through sixteen. Pleasantville is operated by [REDACTED] and certified 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 had been employed by [REDACTED] and assigned to [REDACTED] for approximately one year and seven months. The Subject held the title of Residential Youth Counselor (RYC) and her duties included the overall care and safety of the service recipients, including assistance with activities of daily living and providing emotional support and guidance. The Subject was assigned to Cottage [REDACTED] which, at the time of the incident, had approximately eight boys present. (Justice Center Exhibit 24: audio interview of the Subject; Hearing testimonies of Justice Center Investigator [REDACTED] (Investigator) and the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a fifteen-year-old male with relevant diagnoses of persistent adjustment disorder with disturbance of conduct and oppositional defiant disorder. The Service Recipient required the use of a full leg brace as a result of a previous knee injury. The Service Recipient had a history of eloping from the facility. The Service Recipient's Individual Crisis Management Plan (ICMP) required staff, upon the Service Recipient's escalation of agitation, manifested by yelling and cursing, to immediately remove the trigger of the Service Recipient's agitation. Upon further escalation, warning signs of which included pacing, clenched fists, verbal aggression and threats directed at the target, staff were directed to remove the target and provide emotional support. Staff were further instructed, that upon persistent escalation of agitation, manifested by physical aggression toward the target, to remove any items nearby that could be used as a weapon and advised that the Service Recipient may require a therapeutic restraint. (Justice Center Exhibits 8, 9 and 10; Hearing testimony of the Investigator)

7. At approximately 5:00 p.m. on the evening of the alleged neglect, the Subject was walking in and out of the kitchen distributing food and drinks to various individuals. The kitchen was usually locked for safety reasons, requiring services recipients to request staff assistance for

anything food related. The Service Recipient requested something to eat from the Subject. The Service Recipient was told what was for dinner and expressed his extreme unhappiness with the menu. The Service Recipient was then offered an alternative by the Subject. Agitated, the Service Recipient forcefully pushed the kitchen door open and entered the pantry with the RYC 1 following behind. The Subject and RYC 2 then followed into the pantry. The Service Recipient emerged from the pantry, visibly agitated, and began touching and pushing things off the counter in the kitchen. The Subject and the Service Recipient continued to engage verbally as both RYC 1 and RYC 2 physically placed themselves between the Subject and the Service Recipient attempting to verbally calm the Service Recipient. The Service Recipient, after a physical interaction with RYC 1's attempted redirection, walked out of the kitchen and into another room pacing and cursing. The Service Recipient then picked up a full water jug and charged back toward the Subject who had followed the Service Recipient out of the kitchen. RYC 1 grabbed the jug, emptied the water on the floor and removed it from the Service Recipient's possession as the Subject continued a verbal exchange with the Service Recipient. (Justice Center Exhibit 23: video footage camera 11 at 17:08:08 to 17:11:23; Justice Center Exhibit 24: audio interviews of RYC 1, RYC 2 and the Subject; Hearing testimonies of the Investigator and the Subject)

8. The Service Recipient then pushed the kitchen door open again, wherein he and the Subject entwined together as the Subject wrapped her arms around his waist and used her body to physically block him from entering the kitchen. RYC 2 placed herself in the doorway between the Subject and the Service Recipient as RYC 1 stood behind the Subject trying to speak over the Subject and directly to the Service Recipient. The Service Recipient then pushed the Subject, who was continuing to speak to him despite RYC 2 standing between them. The Service Recipient walked toward the exit, pulled the fire alarm and left the facility. RYC 1 followed the Service Recipient, deescalated him and returned him to baseline. No injuries were noted, nor was the Service Recipient medically evaluated. (Justice Center Exhibit 23: video footage camera 11 at

17:10:46 to 17:11:20 and camera 9 at 17:11:24 to 17:11:29; Justice Center Exhibit 24: audio interviews of RYC 1, RYC 2 and the Subject; Hearing testimonies of the Investigator and the Subject)

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 allegations constitute 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 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..." (14 NYCRR § 700.3(f))

The neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as follows:

(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 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 of neglect alleged in the substantiated report that is the Subject of the proceeding and that such act constitutes the category of neglect as set forth in the substantiated report. (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 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 in "Allegation 1" in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1 through 24) The investigation underlying the substantiated report was conducted by the Investigator, who was the only witness to testify at the hearing on behalf of the Justice Center. The Justice Center submitted visual only video footage of the incident, which was extremely probative evidence with respect to

[REDACTED]

the substantiated allegation. (Justice Center Exhibit 23)¹

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

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))

The Subject denied the allegation testifying that, not only did she follow the Service Recipient's ICMP by attempting to verbally calm him throughout his outburst, she adhered to his plan when she removed herself from the situation. The Subject testified that the Service Recipient was agitated prior to the incident in the kitchen because he was told he would not be getting a weekend pass. The Subject testified that because she was the individual who told the Service Recipient the bad news, he directed his anger towards her. The Subject testified that she was "targeted" by the Service Recipient but that she was not the target. The Subject testified that despite her efforts to offer an alternative dinner and to try to reason with him explaining that he could hurt his previously injured knee further, the Service Recipient continued to curse and yell. The Subject testified that she continued her attempts at verbal de-escalation. The Subject further denied any inappropriate contact, testifying that placing her hands around the Service Recipient's waist to prevent him from entering the kitchen was a crisis prevention technique she was trained in. The Subject stated that she was not supported by RYC 2 during the incident [REDACTED]

[REDACTED]

[REDACTED]. (Justice Center Exhibits 16 and 24: audio

¹ Justice Center Exhibit 23 contained numerous video footage angles identified as cameras 1 through 13. Despite repeated discovery demands made prior to the hearing by the Subject and the Administrative Law Judge, the Justice Center failed to disclose all the camera footage except cameras 9 and 11. As a result, all other video footage was precluded and any reference made during the hearing to footage other than cameras 9 and 11 was stricken from the record.

interview of the Subject; Hearing testimony of the Subject) The Subject's arguments were unpersuasive and overtly contradicted by the video evidence.

RYC 1 stated in his interview that he heard yelling between the Subject and the Service Recipient coming from the kitchen. RYC 1 stated that the Subject was attempting to offer the Service Recipient food alternatives but that the Service Recipient was growing in agitation and escalating quickly, which was usual for him. RYC 1 stated that the Subject and the Service Recipient were "getting in each other's faces" and that the Service Recipient was cursing and yelling. RYC 1 stated that the Subject could have removed herself from the area and allowed either himself or RYC 2 to deescalate the situation. (Justice Center Exhibit 24: audio interview of RYC 1)

RYC 2 stated in her interview and in the [REDACTED] Final Critical Incident Report that she witnessed the Service Recipient and the Subject engaged in a heated argument regarding the Service Recipient's food choices. RYC 2 stated that the Service Recipient began yelling and cursing at the Subject and that RYC 1 stepped in and attempted to assist in deescalating the situation. RYC 2 stated that the Subject and Service Recipient became aggressive with one another. RYC 2 stated that she believed that the Subject was the target and that she should have removed herself from the situation. (Justice Center Exhibits 13 and 24: audio interview of RYC 2) Additionally, in his interview, Service Recipient 1, a twelve-year-old male, stated that he heard the Service Recipient and the Subject arguing back and forth, with the Service Recipient yelling for the Subject to stop screaming at him. (Justice Center Exhibit 24: audio interview of Service Recipient 1)

The Service Recipient's ICMP provided clear comprehensible directives to staff on how to recognize and respond to the Service Recipient's increasing agitation. The Service Recipient's ICMP unambiguously required the removal of the target of the Service Recipient's agitation as the principal de-escalation technique to be utilized during intensifying agitation. The Subject was

admittedly familiar with the Service Recipient's ICMP and trained in de-escalation techniques. (Justice Center Exhibits 10 and 21; Hearing testimonies of the Investigator and the Subject)

The Subject semantically admitted, RYC 1 and RYC 2 confirmed, and the video footage clearly established, that she was the target of the Service Recipient's agitation. RYC 1, RYC 2 and Service Recipient 1 all described an intense and continued argument between the Subject and Service Recipient that escalated quickly, which again, was demonstrably evident from the video footage. The video evidence clearly established, and the record supported, that at no time during the approximate three-minute incident did the Subject remove herself, walk away or even disengage from conversation with the Service Recipient. In fact, although void of sound, the video evidence depicted an on-going incensed exchange between the Subject and Service Recipient. Additionally, it is clear from the video evidence, and the Investigator confirmed, that the Subject had inappropriate contact with the Service Recipient when she entangled him, holding him around his waist, physically preventing his entrance into the kitchen. The Subject failed to use the Service Recipient's ICMP approved de-escalation techniques and therefore breached her duty. (Justice Center Exhibits 23 and 24; Hearing testimonies of the Investigator and the Subject)

Having established that the Subject did breach her duty, the remaining issue is whether the Subject's breach of duty 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)) The Subject's continued engagement with the Service Recipient resulted in his escalation, the very behavior his ICMP was designed to address, and his eventual elopement from the facility. Moreover, considering that the Service Recipient was a fifteen-year-old placed in the facility specifically for a therapeutic program and that he was in a full leg brace with an injured knee, the Subject's breach of duty was likely to result in a serious and protracted impairment of the Service Recipient's physical, mental and/or emotional condition.

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.

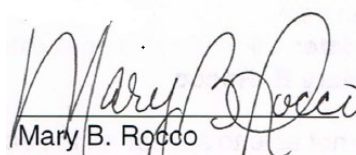
The report will remain substantiated, therefore, the next question to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act. A substantiated Category 3 finding of 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). This 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 Mary B. Rocco, Administrative Hearings Unit.

DATED: October 29, 2020
Schenectady, New York


Mary B. Rocco
Administrative Law Judge