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The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED: The request of █ that the report substantiated on █, █ dated and received on █ be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

Allegation 1 of the substantiated report is properly categorized as a Category 3 act.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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: Schenectady, New York
November 17, 2015



David Molik
Administrative Hearings Unit

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or 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 report substantiated on [REDACTED], [REDACTED] [REDACTED] dated and received on [REDACTED] of abuse and/or 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 [REDACTED], outside [REDACTED] [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect by failing to provide adequate supervision to a service recipient, during which time she engaged in sexually inappropriate behavior with another service recipient.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493.

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.
4. The facility, [REDACTED], located at [REDACTED] [REDACTED], is a residence for youth operated by [REDACTED]

██████████, which is licensed by the New York State Office of Children and Family Services (OCFS) and is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. The facility consists of administrative buildings and three residential cottages on campus-like grounds with a road running through it and parking lots interspersed near the buildings. (Justice Center Exhibit 30)

6. At the time of the alleged neglect, the Subject, ██████████, who had been employed at the facility as Child Care Worker (CCW) for approximately ten years, was assigned to supervise two service recipients, one of whom was the Service Recipient in this matter and was a custodian as that term is so defined in Social Services Law § 488 (2). (Hearing testimony of the Subject and Justice Center Exhibit 6)

7. At the time of the alleged neglect, the Service Recipient was a seventeen year old resident of the facility and was residing at the facility's ██████████. The Service Recipient is a person with diagnoses of moderate mental retardation and multiple behavioral issues. (Hearing testimony of OCFS Investigator ██████████ and Justice Center Exhibits 5 and 31)

8. At the time of the alleged neglect, the Service Recipient was unable to provide consent for sexual contact. (Justice Center Exhibit 8)

9. The level of supervision required of the Subject while responsible for the Service Recipient was constant visual contact. Constant visual contact means that the Subject is to maintain a direct line of vision of the service recipient, free of any obstacles that may block the Subject's line of vision. (Hearing testimony of the Subject and Justice Center Exhibits 14, 21 and 28)

10. On [REDACTED], at approximately 3:30 p.m., the Subject was standing in the doorway of the cottage supervising the Service Recipient. The Service Recipient was outside in the parking lot, riding a scooter. At that time, another staff member requested the Subject's assistance with obtaining petty cash for a vending machine. As a result of this request, the Subject turned his attention away from the Service Recipient and went into the cottage to assist the staff member. The Subject lost view of the Service Recipient for approximately two minutes. (Hearing testimony of the Subject and Justice Center Exhibit 21)

11. In the meantime, a different staff member, who was walking outside in the parking lot, near where the Service Recipient had been riding the scooter, observed the Service Recipient engaged in sexual contact with another service recipient. (Justice Center Exhibits 5 and 12)

12. The sexual contact in which the Service Recipient engaged included the Service Recipient fondling the male service recipient's exposed penis and the male service recipient fondling the Service Recipient's exposed breast. (Justice Center Exhibits 5, 12, 35 and 36)

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 allegation constitutes 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/or 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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488. Under SSL § 488(1)(h) neglect is defined as:

"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.

In this case, the relevant part of subdivision SSL § 488(1)(a) through (g) to which SSL § 488(1)(h)(i) above refers is SSL § 488(1)(b) sexual abuse. Under SSL § 488(1)(b) sexual abuse is defined as:

"Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a

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custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.

SSL § 488(1)(b) refers to Article 130 of the Penal Law for the definitions of sexual offenses. Under New York Penal Law § 130.60(1), sexual abuse is defined as follows:

A person is guilty of sexual abuse in the second degree when he or she subjects another person to sexual contact and when such other person is: 1. Incapable of consent by reason of some factor other than being less than seventeen years old; or 2. Less than fourteen years old. Sexual abuse in the second degree is a class A misdemeanor.

In the definition of “sexual abuse,” New York Penal Law § 130.60(1) uses the term “sexual contact,” which is defined in New York Penal Law § 130.00(3) as:

"Sexual contact" means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493. Under SSL § 493 (4)(c), a Category 3 act is defined as:

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(s) committed the act or acts of abuse and/or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse and/or neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

If the Justice Center proves the alleged abuse and/or 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 abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or neglect as set forth in the substantiated report.

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If the Justice Center did not prove the abuse and/or neglect by a preponderance of 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 the act described as Allegation 1 in the substantiated report. Specifically, the evidence establishes that the Subject committed an act of neglect under SSL § 488(1)(h), as his lack of attention breached his custodial duty and was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. Furthermore, the evidence establishes that the Subject committed an act of neglect under SSL § 488(1)(h)(i), in that the Subject's failure to provide proper supervision to the Service Recipient was a breach of his custodial duty that resulted in conduct between the Service Recipient and another service recipient that would have constituted sexual abuse as defined in SSL § 488(1)(b), had it been committed by a custodian against a service recipient.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-36) The investigation underlying the substantiated report was conducted by OCFS Investigator ██████████, who testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on his own behalf and provided no other evidence.

The Subject's first answer to the allegation was that, because there was no supervisor working during that shift, the Subject was dually responsible for supervising two service recipients (including the Service Recipient) and for supervising the other staff members who were working with him. (Hearing testimony of the Subject and Justice Center Exhibit 21)

To bolster this assertion, the Subject testified that since the time of the incident, his

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superiors have tried to avoid assigning the dual responsibilities of supervising service recipients and supervising other staff members simultaneously, and that his current assignments reflect that effort. (Hearing testimony of the Subject)

The Subject further asserted that when he went into the cottage to assist another staff member, there were other staff members outside, whom he had assumed would watch the Service Recipient temporarily for him, and that they should share the responsibility for the failure to supervise the Service Recipient. (Hearing testimony of the Subject)

Lastly, the Subject claimed in his hearing testimony that he took his eyes off of the Service Recipient for only twenty seconds. In the Subject's statement to OCFS Investigator ██████████, he stated that he had gone into the cottage to help the other staff member for about two minutes. (Hearing testimony of the Subject and Justice Center Exhibit 21)

The Residential Treatment Center Program Procedure Manual (Justice Center Exhibit 28) clearly states and restates the high level of supervision that staff members are required to exercise and that any "hand off" of supervision of service recipients between staff members, must be done explicitly and physically.

The general trainings that the Subject participated in (Justice Center Exhibit 26), the sexual education staff training that the Subject participated in (Justice Center Exhibit 8) and the written facility policies (Justice Center Exhibits 7, 25 and 28), all illustrate that the Subject was aware that he had a duty as a custodian to maintain constant visual contact with the Service Recipient. This prescribed vigilance was an important safeguard to prevent inappropriate sexual contact from occurring between unsupervised service recipients, just as happened in this case.

The Justice Center's theory in this matter was based on SSL § 488(1)(h)(i) in that the Subject's failure to provide proper supervision to the Service Recipient was a breach of his

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custodial duty that resulted in conduct between the Service Recipient and another service recipient that would have constituted sexual abuse as defined in SSL § 488(1)(b), had it been committed by a custodian against a service recipient.

It is clear that under SSL § 488(1)(h) the Subject's lack of attention did breach his custodial duty that was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. His failure to maintain constant visual contact with the Service Recipient, allowed her the opportunity to engage in high risk behavior that, given her intellectual and emotional limitations, may have resulted in a protracted impairment of her mental or emotional condition. On this basis alone, the conduct of the Subject was properly substantiated as neglect.

Furthermore, the high risk sexual activity in which the Service Recipient engaged with another service recipient due to the Subject's failure to maintain constant visual contact with her, meets the test of SSL § 488(1)(h)(i) as well. SSL § 488(1)(h)(i) states that neglect includes "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..."

Sexual abuse as defined in SSL § 488(1)(b) is one of the paragraphs to which SSL § 488(1)(h)(i) refers and it includes "any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty... of the penal law..."

Under New York Penal Law Article 130, sexual abuse includes when a person "subjects another person to sexual contact and when such other person is incapable of consent by reason of some factor other than being less than seventeen years old ..." New York Penal Law § 130.60(1)

In this case, both elements are present. New York Penal Law § 130.00(3) defines the

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term “sexual contact” as “any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor...” By all accounts the Service Recipient touched the other service recipient’s intimate parts and was similarly touched by the other service recipient for sexual gratification. Additionally, the Service Recipient was incapable of consent by reason of some factor other than being less than seventeen years old, as is declared in the facility Sexual Education Staff Training materials. (Justice Center Exhibit 8)

It is clear that the Subject’s conduct meets all of the criteria of SSL § 488(1)(h)(i) in that the inappropriate sexual contact that occurred between the Service Recipient and the other service recipient in this case would have constituted sexual abuse under SSL § 488(1)(b), had the sexual contact been committed by a custodian against a service recipient.

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect as described in Allegation 1 of the substantiated report.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence and testimony presented, it is determined that the category of the affirmed substantiated neglect that such act constitutes was properly substantiated as a Category 3 act. A substantiated Category 3 finding 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 NY SSL § 496 (2). This report will be sealed after five years.

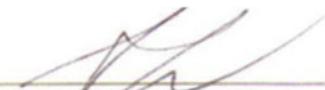
DECISION:

The request of [REDACTED] that the report substantiated on [REDACTED], [REDACTED] dated and received on [REDACTED] be unsubstantiated is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

Allegation 1 of the substantiated report is properly categorized as a Category 3 act.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: November 12, 2015
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge