

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER HEARING**

Adjud. Case #:

████████████████

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

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

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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 substantiated report dated ██████████, ██████████, ██████████ 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.

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: March 8, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before: Jean T. Carney
Administrative Law Judge

Held at: Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977
On: ████████████████████

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived.

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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], [REDACTED] [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:

Offense 3¹

It was alleged that on or about [REDACTED] and [REDACTED], at [REDACTED] [REDACTED], located at [REDACTED] [REDACTED], and [REDACTED] main office, located at [REDACTED], while acting as a custodian, you committed neglect when you engaged in a pattern of conduct that breached your duties as a custodian when you failed to act in accordance with rules and policies governing appropriate interactions with service recipients, including unnecessarily touching them and inappropriately opening the sweatshirt of one service recipient after asking about her breast reduction surgery.

These allegations have 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.

¹ The report alleged three offenses, the first two were not substantiated.

3.

4. [REDACTED] facility is a Group Home for girls who have been placed into foster care, and is operated by [REDACTED], an agency licensed by the Office of Children and Family Services (OCFS), which is a facility or 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] as a Unit Director since [REDACTED] 2007.

6. At the time of the alleged neglect, Service Recipient A was eighteen years old, and had been a resident of the facility for several months. Service Recipient A is a young woman with a diagnosis of depressive disorder, rule out mood disorder. She had been in several foster home and group home placements since she was removed from her mother's care at the age of fourteen due to neglect. (Justice Center Exhibits 19, 20, 21, and 22)

7. Just prior to the time of the first incident, Service Recipient A was recommended for breast reduction surgery in order to alleviate back pain that she was experiencing. (Hearing testimony of [REDACTED], and Justice Center Exhibit 19)

8. At the time of the alleged neglect, Service Recipient B was seventeen years old, and had been a resident of the facility since [REDACTED]. Service Recipient B is a young woman diagnosed with post-traumatic stress disorder, persistent depressive disorder, oppositional defiant disorder, and cannabis abuse. (Justice Center Exhibit 24)

9. Service Recipient B was removed from her mother's custody after allegations arose that the mother's paramour was molesting Service Recipient B. She lived with her father for a brief period of time; but he was a paraplegic suffering from traumatic brain injury and was unable to adequately care for her. (Justice Center Exhibits 24 and 25)

10. The Subject was the Unit Director for the [REDACTED] group home and another [REDACTED]

██████████ facility ██████████. He had an office at the ██████████ main building in ██████████ and divided his time between that office, ██████████, and the other facility that he oversaw. The Subject testified at the hearing and during his interrogation regarding his extensive experience working with troubled youth. (Hearing testimony of Subject and Justice Center Exhibit 26)

11. At the time of the alleged neglect, the Subject was familiar with the Justice Center Code of Conduct for Custodians of People with Special Needs. The Subject had signed an acknowledgement stating that he had received the ██████████ Employee Handbook, which includes a comprehensive Sexual Harassment Prevention Policy and Standard of Conduct. In addition, the Subject was trained in, and certified to teach Therapeutic Crisis Intervention. (Justice Center Exhibits 8, 11, 12, 13, and 27)

12. On ██████████, Service Recipient A disclosed to her social worker that on two occasions the Subject had behaved toward her in a way that made her uncomfortable. On the first occasion, the Subject put his arm around her waist and drew her close in a sort of sideways hug, and asked Service Recipient A what her cup size would be after the breast reduction surgery. This incident was witnessed by another staff person, although the conversation was not overheard. On the second occasion, the Subject unzipped Service Recipient A's jacket and opened it. This incident occurred shortly after her breast reduction surgery, and was observed by at least two other service recipients. (Hearing testimony of ██████████; Justice Center Exhibits 6, and 26)

13. Service Recipient A also disclosed having observed the Subject kiss Service Recipient B on the head. Service Recipient B confirmed this, but said that it did not make her feel uncomfortable. She took it as a fatherly sign of affection, and said that the Subject typically

interacts with the residents that way. Service Recipient B also said that she could understand how that behavior might make someone else feel uncomfortable. (Hearing testimony of Investigator [REDACTED], and Justice Center Exhibit 26)

14. The Subject considered himself to be a father figure to the residents. He admitted to hugging them to the side, and they hugged him as well. The Subject also admitted to holding the zipper on Service Recipient A's jacket on one occasion, but denied unzipping it and pulling it open. The Subject also denied having any inappropriate conversations with Service Recipient A regarding her breast reduction surgery. The Subject also denied any inappropriate behavior toward Service Recipient B. The Subject denied any intent to cause distress, but admitted under cross examination that he could understand how his actions may have made the Service Recipient feel uncomfortable. (Hearing testimony of Subject, 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 allegation 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 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)(h), to include:

"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 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 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.

If the Justice Center did not prove the neglect by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed a prohibited act, described as “Offense 3” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation, as well as an audio recording of several interviews including both Service Recipients, another resident, and the interrogation of the Subject. (Justice Center Exhibits 1-27). The investigation underlying the substantiated report was conducted by Investigator ██████████, who testified at the hearing on behalf of the Justice Center. In addition, ██████████, who was the Service Recipients' Social Worker at the time of the incident, and ██████████, ██████████ Director of Group Homes, testified on behalf of the Justice Center.

The Subject testified in his own behalf and presented ██████████, House Manager at ██████████, to testify on his behalf as well.

The Justice Center proved by a preponderance of the evidence that the Subject breached his duty of care to both Service Recipient A and Service Recipient B by engaging in a pattern of conduct that was overly familiar, including unwanted touching, in violation of ██████████ policy. Specifically, the evidence establishes that the Subject considered himself a father figure,

often hugging the service recipients in his care. However, the Subject failed to consider the service recipients' level of comfort with such behavior. More particularly, the Subject failed to consider how his behavior could adversely affect a service recipient with a history of abuse; specifically abuse by an authority figure.

Therapeutic Crisis Intervention (TCI) is a model of crisis prevention and de-escalation designed to reduce the need for high-risk intervention, such as restraints. While the focus of TCI is on breaking the cycle of conflict, and resolving tense situations without physical intervention, the training also discusses how the child's background and history influences how that child behaves. The Subject has been training other employees in TCI since 2006. Thus, he should be fully familiar with the sections regarding the therapeutic relationship, body language, personal space, and gender. These sections discuss the importance of maintaining boundaries, and modeling respectful behaviors. The Subject failed to respect the service recipients' boundaries and model respectful behavior when he hugged them. (Justice Center Exhibit 11; pages S9, S40, and S41; Justice Center Exhibit 12; and Justice Center Exhibit 26)

provides each employee with a handbook that contains a sexual harassment prevention policy. This policy prohibits the harassment of a child in the agency's care by any employee. The Subject signed an acknowledgement stating that he had received the handbook, and agreed to abide by its rules. Sexual harassment is determined from the perspective of the person being harassed, not from the perspective of the harasser. When Service Recipient A disclosed to her counselor that the Subject behaved in a manner that made her feel uncomfortable, she was reporting sexual harassment. (Hearing testimony of , and Justice Center Exhibit 8)

Both Service Recipient A and Service Recipient B are fragile young women with a

history of neglect by their families. Service Recipient B has a history of neglect and sexual abuse by her mother's paramour. When faced with removing her paramour from the home or placing Service Recipient B into foster care, the mother chose to keep her paramour and place her daughter. Service Recipient B's biological father is a paraplegic and suffers from traumatic brain injury. These conditions prevent him from adequately caring for his daughter. As a result, Service Recipient B has engaged in attention seeking behavior including wearing inappropriately revealing clothing, and disruptive outbursts. (Justice Center Exhibits 24 and 25) When the Subject hugged and kissed Service Recipient B on the forehead, he risked her emotional well-being. The Subject was in a position of authority. He disregarded his training in an attempt to form an emotional, father-like bond with the young women under his care. He may have had the best of intentions, but his actions were misguided. Hugging Service Recipient B, and kissing her on the forehead crossed the line between administrator and service recipient. His behavior was likely to result in serious or protracted impairment of the emotional condition of the Service Recipient; and he failed to consider the consequences of his actions.

Service Recipient A was voluntarily placed into foster care by her mother because she was either unable or unwilling to manage Service Recipient A's mental health issues and the behaviors arising from her diagnosis of depression. In addition, Service Recipient A was medically recommended for breast reduction surgery. That type of procedure also has emotional and psychological ramifications. Service Recipient A described being shocked when the Subject put his arm around her waist and asked her about her pending surgery. She did not know what to do so she avoided the question. During the second incident, she was again shocked when he invaded her personal space, and opened her jacket without her consent. She described it as not respecting her boundaries. Further, the Subject was a person in authority and she was concerned

about the ramifications of reporting the incident. In fact, both Service Recipient A and B told their counselor that they had been treated differently after making these disclosures. (Justice Center Exhibits 19, 20, 21, 22, 23, 26, and hearing testimony of [REDACTED])

In his defense, the Subject posited that Service Recipient A had fabricated the allegations because she was in danger of being removed from the facility. She and another service recipient were involved in an intimate relationship, and the Subject theorized that both young women conspired to ruin his reputation in an attempt to not be separated. However, one of the witnesses who confirmed Service Recipient A's allegation was Service Recipient B. Service Recipient B was initially reluctant to cooperate with the investigation because she was emotionally close to the Subject, and did not want him to get in trouble. (Hearing testimony of [REDACTED], hearing testimony of Subject, hearing testimony of [REDACTED], hearing testimony of Investigator [REDACTED], and Justice Center Exhibit 26) Therefore, the fact that Service Recipient B confirmed that the Subject unzipped Service Recipient A's jacket and opened it up, lends significant credence to the incident having occurred. Finally, during cross examination, the Subject admitted that he could understand how his actions could make Service Recipient A feel uncomfortable. Thus the Subject's theory does not overcome the evidence presented by the Justice Center.

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 level of abuse or 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 (or should be categorized) as a Category 3 act.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [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 Jean T. Carney, Administrative Hearings Unit.

DATED: October 27, 2015
Schenectady, New York


Jean T. Carney
Administrative Law Judge