

**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 David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: January 8, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject

**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:

Elizabeth M. Devane
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street
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: Robert T. DeCataldo, 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], [REDACTED] of neglect by the Subject of the 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], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient went AWOL.

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, the [REDACTED], which has since ceased operations, was located at [REDACTED] and was a residential center for adjudicated youth operated by [REDACTED], which was licensed by the Office of Children and

Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject)

5. Service recipients were generally placed at the facility via a juvenile delinquency adjudication. The facility was locked with staff monitoring service recipients at all times. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject)

6. At the time of the alleged neglect, the Subject had been employed at the facility for an undisclosed amount of time and worked as a Youth Care Worker (YCW). The Subject's duties included supervising and caring for service recipients. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7 and 8)

7. At the time of the alleged neglect, the male Service Recipient was 16 years old and had resided at the facility for an unspecified period of time. The Service Recipient had a history of frequent AWOLs from the facility. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 8 and 10)

8. On [REDACTED], the Subject worked the morning shift at the facility, which began at 7:30 a.m. The Subject, along with two other staff, was responsible for supervising, preparing and transporting five service recipients, including the Service Recipient, to school. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 8, 9 and 10)

9. As they were preparing to leave the facility and go to school, the Assistant Family Teacher (AFT) pointed out the presence of the Service Recipient to the Subject and another staff, as the Service Recipient had a history of AWOL. (Hearing testimony of OCFS Investigator [REDACTED]; Justice Center Exhibits 8 and 10)

10. The staff, including the Subject, and the service recipients, including the Service Recipient, went to the parking lot. All staff and service recipients, except for the Service Recipient, got into the vehicle and left the facility at approximately 8:00 a.m. When they were about halfway to the school, one of the service recipients noticed that the Service Recipient was not in the van and asked where he was. The driver stopped the van, staff unsuccessfully searched for the Service Recipient in the van and the facility was notified that the Service Recipient was missing from the van. Thereafter, staff proceeded to transport the rest of the service recipients to school. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 6, 7, 8, 9 and 10)

11. After the facility was searched and the Service Recipient was not found, he was determined to be AWOL and a warrant for the Service Recipient's arrest was placed with the police department. (Hearing testimony of OCFS Investigator [REDACTED]; Justice Center Exhibits 6, 7, 8, 9 and 10)

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 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 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) 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.

Substantiated reports of neglect shall be categorized into categories including Category 3 pursuant to SSL § 493(4)(c), which 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 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. (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 proved by a preponderance of the evidence that the Subject committed neglect as described in “Allegation 1” in the substantiated report.

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))

In support of its substantiated findings, the Justice Center presented several documents obtained during the investigation (Justice Center Exhibits 1 – 10). The investigation underlying the substantiated report was conducted by OCFS Investigator [REDACTED] (Investigator [REDACTED]), who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and called a witness, [REDACTED], to testify. The Subject also presented several documents (Subject Exhibits A – G).

The Subject argued that he was not responsible for the Service Recipient at the time of the incident as he was busy speaking with a different service recipient. The Subject further argued that the investigation was conducted poorly, citing as his basis for this contention that: Investigator [REDACTED] recommended substantiation of the allegation without interviewing him; some of the Investigator’s correspondence to him was addressed with a different name; and although there were cameras at the facility, no video recordings were reviewed or presented at the hearing. The

Subject questioned the Service Recipient's statement which the Subject argued referred to a different AWOL and not the AWOL at issue in the hearing. The Subject also questioned the appropriateness of the Service Recipient's placement at the facility due to his high AWOL risk and the facility's limitations on staff's ability to respond to an AWOL attempt, such as not being permitted to chase a service recipient who is attempting to AWOL.

None of these arguments are persuasive. The Subject admitted that he was working at the facility at the time of the incident and that he was preparing the group, which included the Service Recipient, and transporting them to school. (Hearing testimony of the Subject) Investigator [REDACTED] testified that it was the responsibility of each staff member, including the Subject, to supervise all service recipients in the group, including the Service Recipient, and to make sure that all of them were on the van and taken to school. (Hearing testimony of OCFS Investigator [REDACTED]; Justice Center Exhibits 6, 7, 8, 9, 10) The Subject and both of the other staff present stated that the Service Recipient was not their responsibility as they were each dealing with other matters. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of [REDACTED]; Justice Center Exhibit 10) However, the Subject corroborated the Investigator's testimony by testifying that YCWs were responsible for "all youth." (Hearing testimony of the Subject)

During the investigation, the Subject's attorney, who represented the Subject during the investigation but retired prior to the hearing, and the Subject asked Investigator [REDACTED] not to question the Subject. Consequently, no arrangements were made between the Investigator and attorney for the Subject to be interviewed. (Hearing testimony of OCFS Investigator [REDACTED]; Subject Exhibit A; Justice Center Exhibit 2) Although it may be optimal to interview the subject of an allegation, a subject interview is not always necessary to substantiate an

allegation. Some of the correspondence from the Investigator to the Subject were sent addressed with an incorrect name, [REDACTED], as opposed to the Subject's correct name, [REDACTED]. However, that error was later amended to correct the Subject's name and the Subject did receive all correspondence from the Investigator. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Subject Exhibits A, B, C and D)

The remaining arguments: whether there was any video; the Service Recipient's placement at the facility; the AWOL date referred to in the Service Recipient's statement; and procedures when an AWOL occurs, are irrelevant. The Service Recipient was an adjudicated juvenile at a facility for adjudicated juveniles. There is no question that the Service Recipient went AWOL. The Subject was not even aware that the Service Recipient was not on the van until a service recipient pointed that out about halfway into the trip to school. The Subject failed to establish how any of these arguments mitigates his failure to perform his duty of maintaining proper supervision of the Service Recipient. (Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of the Subject; Hearing testimony of [REDACTED]; Justice Center Exhibits 6, 7, 8, 9 and 10)

The weight of evidence in the record and hearing testimony support a finding by a preponderance of the evidence that the Subject was a custodian as that term is defined in Social Services Law § 488(2) and that he breached his duty by failing to provide adequate supervision to the Service Recipient which allowed the Service Recipient, who was known to the Subject to be a flight risk, to AWOL.

The Subject's breach was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the service recipient. The Service Recipient was specifically placed at the facility as a result of an adjudication and was to be

monitored at all times for his safety, as well as the safety of others. The Service Recipient was able to leave the facility and a warrant was issued for him by the police department. Because of the Subject's failure to provide such close supervision as required, the Service Recipient was likely to have engaged in additional juvenile delinquent conduct which likely would have, in turn, resulted in further legal ramifications to the Service Recipient, thereby impairing his 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 and 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 is properly categorized as a Category 3 act. A substantiated Category 3 finding 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 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 Elizabeth M. Devane, Administrative
Hearings Unit.

DATED: January 3, 2018
Schenectady, New York



Elizabeth M. Devane
Administrative Law Judge