

**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]

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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

██████████

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 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a
Category 2 finding not elevated to a Category 1 finding shall be sealed after
five years. The record of these reports shall be retained by the Vulnerable
Persons' Central Register, and will be sealed after five years pursuant to
SSL § 493(4)(b).

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: October 3, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", is written over a horizontal line.

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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street
Brooklyn, New York 11201
On: [REDACTED]

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

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

[REDACTED]
[REDACTED]
[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]¹ [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 [REDACTED], at the [REDACTED] located at [REDACTED] while acting as a custodian, you committed neglect when you failed to maintain a service recipient's one-to-one supervision and/or failed to ensure that she was provided with proper one-to-one supervision, during which time she fell down the stairs and sustained a head injury.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. The facility, also known as the [REDACTED], located at [REDACTED]

¹ The report was initially substantiated on [REDACTED], however that report was returned as undeliverable by the post office. When the Justice Center sent the report to the Subject's current address, the cover letter stated that the Substantiation would begin as of [REDACTED].

██████████ is an ██████████ for adults with developmental disabilities. It is operated by ██████████, and is certified by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of ██████████)

5. At the time of the alleged neglect, the Subject had been employed by ██████████ since 2007 as a Direct Care Counselor (DCC). That position has since been re-titled to Direct Support Professional (DSP). (Hearing testimony of ██████████)

6. At the time of the alleged neglect, the Service Recipient was a 64 year old verbal female, with diagnoses of borderline intellectual functioning and schizophrenia. (Justice Center Exhibit 6)

7. On ██████████ the Subject was working the evening shift at the ██████████. She was assigned one-to-one duty for the Service Recipient. (Justice Center Exhibits 2, 5, 6, 7, and 14)

8. One-to-one duty requires that the assigned staff keep the Service Recipient within the staff's sight, no more than ten feet distant from the staff, and under constant observation by the staff. The Service Recipient required one-to-one supervision due to her history of self-injurious behavior and her history of elopement. (Hearing testimony of ██████████ Justice Center Exhibit 18)

9. That evening, the Service Recipient had repeatedly complained to the Subject that she wanted to go home to her brother. The Subject's previous elopements had all been attempts to go to her brother's home. (Justice Center Exhibit 14)

10. Shortly before 10:00 p.m., the Subject brought the Service Recipient to her bedroom on the second floor of the residence after helping her to shower. Then the Subject decided

to go down to the basement of the residence to get the Service Recipient a glass of water. (Justice Center Exhibits 2, 7, and 14)

11. The Subject asked a co-worker if she would keep an eye on the Service Recipient while the Subject went downstairs. The co-worker was assigned one-to-one duty to another service recipient, who was in a different bedroom on the second floor of the residence. The co-worker agreed, but after the Subject went downstairs, the co-worker realized that she had to use the bathroom. While the co-worker was in the bathroom, the Service Recipient got out of bed to call her brother, and fell down the stairs. (Justice Center Exhibits 7, 14, and 16)

12. The Service Recipient was taken to the hospital where it was determined that she had fractured two ribs, and required sutures to her forehead. In addition, the Service Recipient suffered soft tissue damage to her head, and an abrasion to her left foot. She was given a tetanus shot, prescribed ibuprofen for pain, and discharged that night. (Justice Center Exhibit 21)

13. At the time of the incident, six employees were on duty for the evening shift, and three more employees arrived at 10:00 p.m. for the overnight shift. Eleven service recipients resided in the [REDACTED] and four required one-to-one supervision. (Justice Center Exhibit 7)

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 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 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(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 2, which is defined as follows:

Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that

such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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 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 established by a preponderance of the evidence that the Subject committed an act, described as “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 1-22) The investigation underlying the substantiated report was conducted by [REDACTED] Program Director [REDACTED] who left the agency in [REDACTED]. The current Senior Program Director [REDACTED] was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject did not testify in her own behalf, but two of her former co-workers, [REDACTED] and [REDACTED] testified on her behalf at the hearing.

In order to sustain an allegation of neglect, the Justice Center must show that the Subject acted, or failed to act, or lacked attention in such a manner that it breached her duty to the Service

Recipient. In addition, the Justice Center must show that this breach either resulted in, or was likely to result in either physical injury, or a serious or protracted impairment of the physical, or mental, or emotional condition of the Service Recipient.

The facts of this matter are not disputed by the parties. The Subject admits that she was assigned one-to-one supervision of the Service Recipient. In addition, the Subject admits asking her co-worker to watch the Service Recipient while the Subject went downstairs for a glass of water. The Subject knew that her co-worker was assigned one-to-one supervision of another service recipient. (Justice Center Exhibits 2 and 14) As a result, the Subject should have known that her co-worker was prohibited from watching both service recipients. Therefore, by asking her co-worker to violate policy and watch two service recipients whose respective plans required one-to-one supervision, the Subject breached her duty to the Service Recipient to whom she was assigned.

This breach of duty resulted in the Service Recipient getting out of bed and falling down the stairs to the first floor of the house. It is uncontroverted that the Service Recipient was seriously injured in this fall. She fractured two of her ribs, suffered a cut to her face that required stitches, and soft tissue damage to her head. (Justice Center Exhibit 21)

In her defense, the Subject claims that it was common practice for employees to ask co-workers to keep an eye on service recipients to whom they are assigned one-to-one supervision. This defense has no merit. Even if it was common practice, such behavior violates both agency policy, and the governing statute, and therefore was a breach of the Subject's duty to the Service Recipient. The Service Recipient required one-to-one supervision for reasons pertaining to her safety. This level of supervision was necessary and should not have been disregarded by the Subject.

The Subject also asserted that there was no other staff person available to watch the Service Recipient while she went downstairs to get a glass of water for the Service Recipient. This defense also has no merit. There were five other employees working at that time. Three of them were assigned one-to-one supervision for other service recipients. The Subject could have asked the other two employees to either watch the Service Recipient, or get the glass of water for her. In addition, three more employees arrived at 10:00 p.m. to work the overnight shift. The Subject could have waited a few minutes and asked one of those employees for assistance.

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 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 as a Category 2 act.

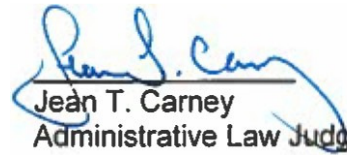
DECISION:

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 2 act.

This decision is recommended by Jean T. Carney, Administrative Hearings
Unit.

DATED: September 26, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge