

**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: Robert DeCataldo, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

ORDERED:

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.


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:

John T. Nasci
Administrative Law Judge

Held at:

West Seneca DDSO
1200 East and West Road
Building 16
West Seneca, New York 14224
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: Robert DeCataldo, 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] 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] in a bedroom, located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision of a service recipient, during which time she tied a pillowcase around her neck.

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, [REDACTED], located at [REDACTED], is a psychiatric in-patient mental health treatment facility that is licensed by the New York State Office of Mental Health (OMH), which is an agency that is subject to the jurisdiction

of the Justice Center. (Hearing testimony of [REDACTED] [REDACTED] Quality Assurance Director)

5. At the time of the alleged neglect, the Subject was employed by [REDACTED] as a Mental Health Technician (MHT) and had been employed by the facility for approximately twelve years. (Hearing testimony of [REDACTED], [REDACTED] Quality Assurance Director and Justice Center Exhibit 2) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a thirty-seven year old female who was voluntarily admitted to [REDACTED] and remained in-patient from [REDACTED] to [REDACTED] for suicidal tendencies. Because of her suicidal tendencies, the Service Recipient was placed on a 1:1 observation and remained on a 1:1 observation at the time of the incident. (Justice Center Exhibits 11, 12 and 14; and Hearing testimony of [REDACTED], [REDACTED] Quality Assurance Director)

7. [REDACTED] policy required that staff assigned to 1:1 observation of a service recipient is never to leave the service recipient alone and must be within arm's length of the service recipient and observe the service recipient at all times. (Justice Center Exhibit 9) At the time of the alleged neglect, the Subject was sufficiently trained in the [REDACTED] 1:1 observation policy. (Justice Center Exhibits 21 and 22)

8. On [REDACTED], the Subject was assigned to 1:1 observation of the Service Recipient from 9:00 a.m. to 10:00 a.m. (Justice Center Exhibits 10 and 11; and Hearing testimonies of [REDACTED], [REDACTED] Quality Assurance Director and the Subject)

9. On [REDACTED], at 9:06 a.m., the Subject arrived at the Service Recipient's hospital room and started 1:1 observation of the Service Recipient. (Justice Center Exhibits 18 and 19, and Hearing testimony of the Subject) Between 9:06 a.m. and 10:00 a.m., the Subject sat in a chair located in the open doorway to the hospital room, facing the Service Recipient who was

lying in a bed in the far corner of the room, several feet (more than arm's length) from the Subject. At least once during that time period, for an undetermined period of time, the Subject sat on a heater unit located against the far wall of the room next to the Service Recipient's bed. While the Subject was performing her 1:1 observation of the Service Recipient, the Service Recipient remained lying in the bed covered with a blanket with only her head and arms exposed. (Hearing testimony of the Subject and Justice Center Exhibits 15, 18, 19 and 20)

10. At approximately 9:30 a.m., Staff A, a Registered Nurse (RN), entered the Service Recipient's hospital room to perform a check of the Service Recipient's vital signs. While checking the Service Recipient's vital signs, Staff A noticed that a pillowcase was wrapped around the Service Recipient's neck and knotted. After removing the pillowcase from the Service Recipient's neck, Staff A noticed redness and an imprint of the pillowcase around the Service Recipient's neck. (Justice Center Exhibits 8, 15, 16, 19 and 20)

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 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)(a), 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(s) committed the act or acts of neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute 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 not 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 through 22) The investigation underlying the substantiated report was conducted by [REDACTED] [REDACTED] [REDACTED] who had since retired from employment with [REDACTED] [REDACTED], [REDACTED] Quality Assurance Director, testified at the hearing in [REDACTED] stead and on behalf of the Justice Center.

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

The Justice Center contends that the Service Recipient placed and knotted the pillowcase around her neck during the timeframe that the Subject was performing 1:1 observation of the Service Recipient. The Justice Center’s contention is based solely on the Service Recipient’s written statement, in which the Service Recipient stated that she put the pillowcase around her neck when she was under 1:1 observation by the Subject. (Justice Center Exhibit 20)

However, the Service Recipient’s statement is internally inconsistent. The Service Recipient stated that she put the pillowcase around her neck while the Subject was talking with

someone in the hallway and that the pillowcase was around her neck for “about an hour.” (Justice Center Exhibit 20) However, the record reflects that the Subject had only been on 1:1 observation of the Service Recipient for approximately twenty-four minutes when the pillowcase was discovered by Staff A. Consequently, either the Service Recipient was incorrect about having put the pillowcase on her neck during the Subject’s 1:1 observation duty or about the timeframe of one hour. This discrepancy is not resolved by any evidence in the record. Therefore, the Service Recipient’s assertion that she put the pillowcase around her neck while the Subject was performing 1:1 observation of her is not credited evidence.

The Subject testified that she was conversing with and watching the Service Recipient from the time she entered the room at 9:06 a.m. until the time the pillowcase was discovered by Staff A at approximately 9:30 a.m., and that during that timeframe the Service Recipient remained lying in bed covered with a blanket with only her head and arms exposed. (Hearing testimony of the Subject) The Subject contends that if the Service Recipient had sat up and turned her back to her to roll the pillow case, she would have seen it. The Subject’s testimony is consistent with and supported by her prior written statements. (Justice Center Exhibits 2 and 19, and Hearing testimony of the Subject) Therefore, the Subject’s testimony is credited evidence.

Considering all of the credited evidence, the Justice Center has not established by a preponderance of the evidence that the Service Recipient placed the pillowcase around her neck while the Subject was performing her 1:1 observation of the Service Recipient, as was alleged.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will be amended and sealed.


DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], be amended and sealed is granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: November 3, 2016
Schenectady, New York



John T. Nasci, ALJ