

**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: Jennifer Oppong, 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 [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 abuse and/or neglect.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

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: November 29, 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

[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, 3rd Floor
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
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By: Jennifer Oppong, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and 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 abuse and 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 between [REDACTED] and [REDACTED] at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) and/or neglect when you became aware of an allegation of physical abuse but failed to report the incident, and/or failed to provide proper supervision to a service recipient by failing to notice her injury.

These allegations have been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) and 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, located at [REDACTED], is an [REDACTED] providing services for adults with developmental disabilities and is

operated by [REDACTED]¹, which is a facility certified by the Office for People With Developmental Disabilities, which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED])

5. At the time of the alleged abuse and/or neglect, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP). The Subject worked the overnight shift from midnight until 8:00 a.m. on [REDACTED] and did not work again until midnight on [REDACTED] after the injury had been discovered. (Justice Center Exhibit 11; Hearing testimony of Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 56 years of age, and had been a resident of the facility for an unknown period of time. The Service Recipient is a verbal, adult female diagnosed with moderate mental retardation, schizophrenia, and personality disorder. (Justice Center Exhibits 5 and 16)

7. The Service Recipient needs minimal assistance in activities of daily living (ADL). She can dress and undress herself independently, as well as feed herself and fix her own snacks. The Service Recipient can do laundry, set the table and load the dishwasher, and clean her room with minimal assistance. She is able to shower, brush her teeth and brush her hair with minimal assistance, preferring a certain amount of privacy when showering. When assisting the Service Recipient in showering, staff will hand her soap and shampoo, and the Service Recipient cleans herself. (Justice Center Exhibits 16 and 17)

8. The Service Recipient is capable of, and has demonstrated, the ability to verbalize her wants and needs. (Hearing testimonies of [REDACTED], [REDACTED] Supervising Investigator [REDACTED] Justice Center Exhibits 16 and 17)

¹ At the time of the hearing the facility's name had changed to [REDACTED]

9. On Monday, [REDACTED] the Service Recipient arrived at her day program and informed the Assistant Manager that her head hurt. The Assistant Manager examined the Service Recipient's head and found a laceration approximately two inches long, shaped in an arc. Blood had dried in the gash, so that it appeared as if stitches had been applied. The Assistant Manager called her supervisor, who called the [REDACTED] to ascertain what had happened, and why no one from the [REDACTED] had informed the day program of the Service Recipient's injury. At that point, it was discovered that no report of an incident involving the Service Recipient had been noted at the [REDACTED] (Hearing testimony of Assistant Manager [REDACTED]; Justice Center Exhibit 5)

10. The Service Recipient reported to the day program Assistant Manager that an [REDACTED] staff person had hit her on the head with a glass cup on Friday evening. The Staff person then cleaned the Service Recipient's injury with a washcloth. After that, the Service Recipient went downstairs to get her medications and then went to bed. (Justice Center Exhibit 17)

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)(f) and § 488(1)(h), to include:

"Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

"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 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.

If the Justice Center did not prove the abuse and/or 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 1-16) In addition, the Justice Center presented an audio CD of interviews with the Service Recipient and several staff members who worked at the [REDACTED] the weekend of the incident. (Justice Center Exhibit 17) The investigation underlying the substantiated report was initiated by Justice Center Investigator [REDACTED] and completed by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. In addition, Justice Center Supervising Investigator [REDACTED] [REDACTED]

Assistant Manager [REDACTED] and [REDACTED] Residential Program Coordinator [REDACTED] testified on behalf of the Justice Center.

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

The evidence establishes that in the early evening of [REDACTED], the Service Recipient was hit in the head with either a glass or acrylic cup, causing a laceration approximately two inches long. After being hit, the Service Recipient went downstairs to get her medications, then went to bed. (Justice Center Exhibit 17: Interview with Service Recipient)

The Subject started her shift at midnight, after the Service Recipient was asleep. The following morning was a Saturday, and it was the Service Recipient's habit to sleep in on Saturdays. She would get her medications between 7:00 a.m. and 8:00 a.m., then go back to bed. The Subject's shift ended at 8:00 a.m. Because the Service Recipient is reasonably self-sufficient, she is able to get up in the morning with minimal verbal prompting. The Subject testified that she did not recall having any conversation with the Service Recipient that morning, nor does the record does reflect any specific duties assigned to the Subject that morning. Therefore, it is more likely than not that the Subject was assisting other service recipients and did not have much contact with the Service Recipient that morning. (Justice Center Exhibit 17; Hearing testimony of Subject)

The Justice Center contends that the Subject should have seen the blood in the Service Recipient's hair, or on her pillow. However, the wound was not noticeable unless a person physically parted the Service Recipient's hair at the spot on her head where the injury occurred. (Justice Center Exhibit 17: Interview of Service Recipient) Because the Service Recipient washes her own hair, and gets herself out of bed in the morning, there would be no reason for the Subject to touch the Service Recipient's head. Additionally, the Subject is several inches shorter than the Service Recipient. In order for her to see the wound, the Subject would have to be standing over

the Service Recipient, looking down at the top of her head. Furthermore, another staff person worked the same shift as the Subject. There is nothing in the record to reflect that the Subject was responsible for attending to the needs of the Service Recipient that shift.

The Justice Center also contends that because the Service Recipient has demonstrated the ability to vocalize her needs and can effectively communicate when she is injured, she would have told the Subject what had happened. However, this is an assumption by the Justice Center that is not corroborated by any proof. The Subject testified quite credibly that if she had seen any sign of an injury, or if the Service Recipient had told her about the incident, then the Subject would have reported it immediately. Furthermore, the Subject's next shift at the [REDACTED] was the overnight shift between Monday, [REDACTED], and Tuesday, [REDACTED]. As a result, the Subject would not have any contact with the Service Recipient during the weekend intervening and therefore was not likely to have known about the injury. (Hearing testimony of Subject) The evidence connecting the Subject to the Service Recipient's actions that morning are too tenuous to rise to the level required in order to substantiate the allegations made against the Subject.

The Justice Center failed to establish that the Subject breached her duty of care to the Service Recipient. Without such a breach, neglect cannot be sustained. Further, the Justice Center failed to establish that the Subject actually discovered a reportable incident. Without such a discovery, abuse (obstruction of a reportable incident) cannot be sustained. 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 abuse and/or 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 abuse and/or neglect.

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

DATED: November 18, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge