

**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
AND ORDER
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: December 28, 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:

Keely D. Parr
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd Floor
Brooklyn, New York 11201
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] 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 when you failed to provide adequate medical oversight for a service recipient after she fell, creating a delay in medical care for a fractured hip.¹

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, located at [REDACTED], is an [REDACTED], operated by [REDACTED]

¹ The allegation does not include the word "neglect". The Subject was on notice, however, as the allegation was substantiated as "Category 3 neglect" and the Subject defended against neglect.

██████████ and certified by the Office for People With Developmental Disabilities, 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 as a Registered Nurse (RN) by ██████████ for 13 years and was assigned as the Nurse-on-call for six facilities, including the ██████████. (Hearing Testimony of Subject)

6. At the time of the alleged neglect, the Service Recipient was a 51 year old female with a diagnosis of osteoporosis of the spine and right hip, a small aneurysm in her heart and hypertension. (Hearing Testimony of Director of Quality Management and Compliance ██████████; Justice Center Exhibit 6)² The Service Recipient's bones of the spine and right hip were weak and she was at risk for sudden fractures and injuries. (ALJ Exhibit A) The Service Recipient was verbal, however her speech was difficult to understand and at times unintelligible. (Justice Center Exhibit 6)

7. At the time of the alleged neglect, the Service Recipient was in her bedroom and near her roommate's closet when she made a sudden turn and lost her balance. Two Direct Support Professionals (DSPs) assisted the Service Recipient into her bed. The Subject was called and provided directions to DSP ██████████ (Justice Center Exhibit 6)

8. The next morning, the Service Recipient could neither stand nor walk and DSP ██████████ telephoned the Subject. The Subject instructed DSP ██████████ to call 911. DSP ██████████ accompanied the Service Recipient to the hospital, where the Service Recipient was diagnosed with a fractured hip. (Justice Center Exhibit 6)

² Director of Quality Management and Compliance ██████████ testified that the Service Recipient's osteoporosis was of the right hip and not the left hip as stated in Justice Center Exhibit 6.

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 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 as found in SSL § 493(4)(c), which is defined as follows:

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 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 established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject committed neglect when the Subject failed to provide adequate medical oversight for the Service Recipient after she fell, creating a delay in medical care for a fractured hip.

In order 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 she breached that duty, and that

her 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 a number of documents obtained during the investigation. (Justice Center Exhibits 1-13) This Administrative Law Judge ordered the production of the Fall Protocol for the Service Recipient. (ALJ Exhibit A) The investigation underlying the substantiated report was conducted by [REDACTED] Consulting Investigator for [REDACTED] who was not available to testify. [REDACTED], Director of Quality Management and Compliance was the only witness who testified at the hearing on behalf of the Justice Center.

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

At the time of the alleged neglect, the Subject was employed as a Registered Nurse (RN) by [REDACTED] and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to ensure that the Service Recipient received adequate medical attention. (Justice Center Exhibit 6)

There was conflicting evidence as to what the Subject was told when DSP [REDACTED] first telephoned the Subject at the time of the alleged neglect. DSP [REDACTED] reported that she saw the Service Recipient fall on her right side and that after telephoning the Subject, the Subject instructed her to apply warm compresses and give the Service Recipient two Tylenols. (Justice Center Exhibit 6) The Subject testified that she perceived the fall as a slide and denied instructing DSP [REDACTED] to apply warm compresses and to give the Service Recipient Tylenol. However, the Subject testified that, given the Service Recipient's diagnosis of osteoporosis, even a slide to the floor could have created a fracture. Accordingly, as the Subject was aware of the Service Recipient's

diagnosis of osteoporosis, the Subject should have either made an onsite assessment of the Service Recipient once she received DSP's [REDACTED] call, or directed DSP [REDACTED] to call 911 and have the Service Recipient taken to the hospital. (Hearing Testimony of Director of Quality Management and Compliance [REDACTED] Justice Center Exhibit 6) The Subject breached her duty to the Service Recipient by failing to provide adequate medical oversight, causing a delay in medical care for the Service Recipient's fractured hip.

The Service Recipient was injured as a result of the fall and the Subject's breach resulted in the protracted impairment of the physical, mental and emotional condition of the Service Recipient. DSP [REDACTED] reported that the Service Recipient could not stand or walk and thought that the Service Recipient was in pain. The Subject's breach resulted in the Service Recipient not receiving proper medical care until nearly twelve hours after the fall, during which time the Service Recipient was in pain.

The evidence establishes that the Subject committed neglect when the Subject failed to provide adequate medical oversight for the Service Recipient after she fell, creating a delay in medical care for a fractured hip.

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 3 act. Substantiated Category 3 findings of abuse and/or neglect 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 SSL § 496(2). The 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 Keely D. Parr, Administrative Hearings Unit.

DATED: December 20, 2016
Brooklyn, New York



Keely D. Parr, ALJ