

**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]

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 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 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

██████████

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

New York State Justice Center for the Protection
of People with Special Needs
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By: Robert DeCataldo, Esq.

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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] [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] [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper supervision and/or failed to properly transfer supervision, during which time one service recipient inappropriately touched another.

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, also known as the [REDACTED] is located at [REDACTED] [REDACTED] and is an [REDACTED] The facility is operated by [REDACTED] and certified by the Office for People With Developmental

Disabilities, which is a 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 Support Counselor (now known as a Direct Support Professional (DSP)) by [REDACTED] for seven years and was assigned 1:1 supervision of the Service Recipient. The Subject was also assigned to administer medication. (Hearing Testimony of [REDACTED] Senior Director of Quality Assurance [REDACTED] Justice Center Exhibits 2 and 6)

6. At the time of the alleged neglect, the Service Recipient was a 25 year old male functioning within the mild range of intellectual disability. The Service Recipient was placed at the [REDACTED] on [REDACTED] pursuant to Court Order due to an incident of inappropriate sexual behavior towards a young child. In the [REDACTED] the Service Recipient must be in the staff's field of vision at all times. (Justice Center Exhibits 6 and 7)

7. At the time of the alleged neglect, the Subject was upstairs with the Service Recipient and three other service recipients. When it was time for the Subject to go downstairs to administer medicine to two other service recipients, the Subject called downstairs to two DSPs to come upstairs to relieve her. When no DSP came upstairs, the Subject went downstairs and left the Service Recipient unattended. At that time, the other service recipients were in their bedrooms with the exception of the female service recipient who was asleep on the couch. (Hearing Testimony of Subject; Justice Center Exhibit 2)

8. When the Subject returned upstairs, she found the Service Recipient in the corner with the female service recipient. The Subject became suspicious due to the Service Recipient's nervous reaction to her. When she informed the Service Recipient that she wanted to question the female service recipient alone, the Service Recipient began screaming "Why? I didn't do anything wrong." The female service recipient told the Subject that the Service Recipient had

inappropriately touched her. (Hearing Testimony of Subject; Justice Center Exhibit 2)

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 proper supervision and failed to properly transfer supervision, during which time the Service Recipient inappropriately touched another service recipient.

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 a 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 1-22) The investigation underlying the substantiated report was conducted by [REDACTED] Assistant Director of Quality Assurance for [REDACTED], who was not available to testify. [REDACTED] [REDACTED] Senior Director of Quality Assurance 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 Support Counselor by [REDACTED] and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject was assigned 1:1 supervision of the Service Recipient and had a duty to ensure that the Service Recipient was in her field of vision at all times. (Hearing Testimony of Subject; Justice Center Exhibit 7)

The Subject did not dispute that she left the Service Recipient unattended while she went downstairs to administer medication. (Hearing Testimony of Subject; Justice Center Exhibit 2) The Subject was aware of the Service Recipient's Plan of Protective Oversight whereby she was to keep the Service Recipient in her field of vision at all times. (Justice Center Exhibits 7 and 15) The Subject admitted that she should have called her supervisor to tell her that the other DSPs would not come upstairs to relieve her, prior to proceeding downstairs to administer medication. (Justice Center Exhibit 2)

In her defense, the Subject asked for consideration that she did in fact report the incident

and that she requested that the two other DSPs come upstairs so that she could transfer supervision of the Service Recipient. However, the Subject admitted that she should have called her supervisor to inform her that no other DSP would come upstairs to relieve her and that she needed to go downstairs to administer medication. The Subject should have properly transferred supervision of the Service Recipient prior to proceeding downstairs to administer medication. (Hearing Testimony of [REDACTED] Senior Director of Quality Assurance [REDACTED])

The Subject breached her duty to the Service Recipient by not keeping him in her line of sight, during which time he inappropriately touched another service recipient.

The Subject's breach resulted in, or at the very least was likely to result in, the protracted impairment of the physical, mental and emotional condition of both the Service Recipient and the female service recipient. Following this alleged incident, the Service Recipient was informed by his Probation Officer that he had a greater likelihood of serving jail time without probation. (Justice Center Exhibit 22) The female service recipient was sleeping on the couch when the Service Recipient began touching her inappropriately. When she told him to stop, the Service Recipient began screaming and jumping up and down. (Justice Center Exhibit 9)

The evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision and failed to properly transfer supervision, during which time the Service Recipient inappropriately touched another service recipient.

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 27, 2016
Brooklyn, New York


Keely D. Parr, ALJ