

**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: Jacqueline Seitz, 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], [REDACTED] be amended and sealed is granted.

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

[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
401 State Street
Schenectady, New York 12305
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
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Jacqueline Seitz, 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 3¹

It was alleged that on [REDACTED], at the [REDACTED], while acting as a custodian, you committed neglect when you stepped on the footrest of the recliner a service recipient was sleeping on, causing her to slide and/or fall out of the chair.

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] and is operated by the [REDACTED] Chapter of [REDACTED]

¹ Both allegations 1 and 2 were unsubstantiated.

██████████, which is a facility certified by the Office for People With Developmental Disabilities (OPWDD), 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 by ██████████ as a Plan Facilitator since ██████████, and as such was a custodian as defined by SSL § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a 35 year old female, and had been a resident of the facility since ██████████ 1995. The Service Recipient was diagnosed with severe intellectual disability, impulse control disorder, anxiety disorder, and seizure disorder. (Justice Center Exhibits 7 and 14)

7. During a staff meeting in ██████████ Direct Support Professional (DSP) ██████████ reported an incident that allegedly occurred on ██████████ when the Subject stepped on the footrest of a recliner that the Service Recipient was sleeping on, causing the Service Recipient to fall out of the chair. DSP ██████████ claimed to have witnessed the incident, and gave a nearly identical description as DSP ██████████; but DSP ██████████ did not work that day. (Justice Center Exhibit 7)

8. DSP ██████████ was working that day and denied seeing the incident. However, DSP ██████████ informed the investigator that staff often assisted the Service Recipient in getting out of the chair by pushing the footrest down with their foot while holding the Service Recipient's hands and pulling her up to a standing position. As part of the investigation, OPWDD Investigator ██████████ sat in the Service Recipient's recliner and noted that it would be difficult for her to get out of the recliner without assistance. Investigator ██████████ further noted that he did not see any possibility of the Service Recipient being flung from the chair as described by DSP ██████████. (Justice Center Exhibit

7; Hearing testimony of Associate Executive Director [REDACTED])

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 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, 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 abuse and/or 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 3” 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 1-26) The investigation underlying the substantiated report was conducted by [REDACTED] Associate Executive Director [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center. The

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

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))

The Justice Center failed to prove by a preponderance of the evidence that the Subject breached her duty to the Service Recipient. Associate Executive Director [REDACTED] testified quite credibly that the only witness he believed was DSP [REDACTED], who said that she did not witness any such incident. The other witnesses, DSP [REDACTED] and DSP [REDACTED], both had prior biases against the Subject and he found their accounts to be suspiciously identical. This is particularly true of DSP [REDACTED] who lived with DSP [REDACTED], and did not work the day of the incident, making it impossible for her to have witnessed the alleged incident. Associate Executive Director [REDACTED] further testified that after sitting in the recliner, he could not see how the Service Recipient could have fallen out of it if the footrest had been stepped on as described by DSP [REDACTED] and DSP [REDACTED]. Therefore, the statements given by DSP [REDACTED] and DSP [REDACTED] are not credited evidence. (Justice Center Exhibit 7; Hearing testimony of Associate Executive Director [REDACTED])

Associate Executive Director [REDACTED] testified that he found the Subject credible during the investigation. The Subject's statement taken during the investigation was substantially similar to her testimony at the hearing. The Subject testified that the recliner is big and heavy, whereas the Service Recipient is short in stature, and unable to put the recliner's footrest down by herself. Consequently, staff would assist the Service Recipient in getting out of the recliner by pressing down on the footrest. (Hearing testimonies of Subject and Associate Executive Director [REDACTED])

The record does not reflect that this incident occurred, and therefore the Justice Center has failed to show by a preponderance of the evidence that the Subject breached her duty to the Service Recipient.

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], [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 Jean T. Carney, Administrative Hearings Unit.

DATED: December 27, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge