

**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**

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: Christopher Mirabella, Esq.

[REDACTED]

By: John N. Clo, Esq.
32 Spring Street
Gloversville, New York 12078

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 the Subject, that the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied in part and granted in part. The Subject has been shown by a preponderance of the evidence to have committed neglect as alleged in Allegation 3.

It is agreed that the substantiated report should be categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated and 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: January 9, 2017
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
UPON STIPULATED
FACTS**

Adjud. Case #:

[REDACTED]

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

Upon written stipulation,
Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305

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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New York State Justice Center for the Protection
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161 Delaware Avenue
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By: Christopher Mirabella, Esq.

[REDACTED]

By: John N. Clo, Esq.
32 Spring Street
Gloversville, New York 12078

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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED], an allegation was reported to the VPCR that [REDACTED] (the Subject), an employee of the [REDACTED] (the "Facility") located at [REDACTED], a facility licensed by the Office of Children and Family Services, which is an agency that is subject to the jurisdiction of the Justice Center, had engaged in conduct constituting abuse or neglect of a person receiving services under her care. The Justice Center classified this report as a neglect case, and assigned [REDACTED] to the report.
2. This report was investigated by the Justice Center.
3. On [REDACTED], the Justice Center substantiated the report against the Subject for neglect. The Justice Center concluded that:

Allegation 2

It was alleged that between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to destroy narcotic medication in accordance with agency instructions, and as a result a service recipient stole eight oxycodone pills that he ingested after gaining access to the staff office and medicine cabinet.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to

Social Services Law § 493(4)(c).

Allegation 3

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to complete a thorough search of the premises for missing narcotics.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

Allegation 4

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to obtain medical attention for a service recipient after he disclosed he had ingested multiple oxycodone pills, a controlled substance.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

4. An Administrative Review was conducted and as a result the substantiated report was retained.

5. Notwithstanding that the Subject was entitled to a full evidentiary hearing, the Subject elected to waive her rights to an evidentiary hearing on the relevant issues and instead the Subject elected to proceed to a hearing decision based upon stipulated facts. The parties have entered into a Stipulation of Facts, which is attached hereto and incorporated into this decision. As part of the Stipulation of Facts, it was agreed and it is understood that, subject to the approval of the Executive Director of the Justice Center, the report will be maintained within the VPCR as a Category 3 finding of neglect ("Allegation 3"), and that the two remaining Category 3 findings of neglect ("Allegation 2" and "Allegation 4") will be unsubstantiated and sealed.¹

¹ Allegation 1 of the Report of Substantiated Finding was unsubstantiated for lack of jurisdiction.

ISSUE

Whether the resolution of this substantiated report proposed in the Stipulation of Facts is both legally correct and consistent with the public policy expressed in the Protection of People with Special Needs Act (PPSNA) (Ch. 501, L. 2012) that the primary focus of the Justice Center will be on “the protection of vulnerable persons” and that workers found responsible for abuse or neglect are held accountable.

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 in relevant part by SSL § 488 (1)(h), as follows:

(h) "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 neglect are categorized into categories pursuant to SSL § 493(4), including Category 3 abuse or neglect, which is defined, as relevant here, 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.

DISCUSSION

The stipulated facts agreed to by the parties, namely that the Subject, while acting as a custodian, committed neglect when she failed to complete a thorough search of the premises for missing narcotics, establish by a preponderance of evidence that the Subject committed the neglect that was alleged in the substantiated report as contained in Allegation 3. On [REDACTED], the Subject became aware that eight Oxycodone pills were missing from the Facility's medical cabinet. After the discovery, the Subject conducted a search of the premises, including the Facility's common area and offices. However, the Subject committed neglect as she failed to search the service recipients' rooms and the Service Recipient was later found in possession of the missing pills. The Stipulation to substantiate the finding of neglect pursuant to Allegation 3 and the dismissal of Allegation 2 and Allegation 4 of neglect, under these circumstances, is not inconsistent with the public policy set forth in the PPSNA.

Accordingly, it is recommended that the Executive Director accept so much of the stipulated outcome as would uphold the finding of neglect based upon the allegation that the Subject committed neglect when she failed to complete a thorough search of the premises for missing narcotics.

The parties also have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect remain a Category 3 finding. Based upon the facts

contained in the parties' stipulation, it is determined that the substantiated report of neglect is properly categorized as a Category 3 act. Substantiated Category 3 findings of 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 the Subject, that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is denied in part and granted in part. The Subject has been shown by a preponderance of the evidence to have committed neglect as alleged in Allegation 3.

It is agreed that the substantiated report should be categorized as a Category 3 act.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: July 29, 2016
Schenectady, New York



Administrative Law Judge

STATE OF NEW YORK – NYS JUSTICE CENTER
ADMINISTRATIVE HEARINGS UNIT

In the Matter of:

STIPULATION OF FACTS

Adjudication Case No. [REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the "Subject"), for three separate Category 3 offenses for neglect under [REDACTED]. The Subject requested that the Justice Center amend the report to reflect that the category findings are not supported by a preponderance of the evidence. The New York State Justice Center for the Protection of People with Special Needs ("Justice Center"), after review, declined to do so, and a pre-hearing conference was scheduled in accordance with the requirements of Social Services Law ("SSL") § 494 and Part 700 of 14 New York Code of Rules and Regulations.

A hearing in this matter has not yet been held as the parties have agreed to enter into this Stipulation of Facts. The purpose of a full evidentiary hearing in this matter is to determine:

1. 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?
2. Whether the substantiated allegations constitute abuse or neglect?
3. Pursuant to SSL § 493(4), the category level of abuse or neglect that such act or acts constitute.

Notwithstanding that the Subject is entitled to a full evidentiary hearing, the Subject has elected to waive her right to an evidentiary hearing on the aforesaid issues and instead the Subject has elected to proceed to a hearing decision based upon the following stipulation of facts and it is further understood by the parties that the report will be maintained in part and amended in part to

reflect that one Category 3 finding of neglect ("Allegation 3") will upon consent remain substantiated, while the two remaining Category 3 findings of neglect ("Allegation 2" and "Allegation 4") will be unsubstantiated and sealed.¹

The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the stipulation of facts. However, the ultimate authority to approve the hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be issued based upon this stipulation is subject to the approval of the Executive Director of the Justice Center. The Subject also agrees, after having had an opportunity to consult with counsel, and upon the receipt of the approval of the recommended decision by the Executive Director, that Allegation 3 of the report will continue to be maintained within the VPCR as a Category 3 finding of neglect, and that the Subject is waiving any rights that she may have for an appeal of this proceeding.

In the event that the Executive Director shall not approve a recommended decision based upon the stipulation of facts, a full evidentiary hearing will be scheduled and the existence of this stipulation and any facts admitted herein will not be admitted into the hearing record and this document shall not be used for any purpose whatsoever, at the evidentiary hearing.

STIPULATION OF FACTS

The Subject, hereby authorizes her attorney, John N. Clo, Esq., to enter into this Stipulation of Facts on her behalf.

Christopher Mirabella, Esq. is an Assistant Counsel of the Justice Center's Administrative Appeals Unit, and has the authority to enter into this Stipulation of Facts on behalf of the Justice Center.

The parties hereby agree to the following facts:

¹ Allegation 1 of the Report of Substantiated Finding was unsubstantiated for lack of jurisdiction.

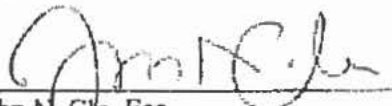
1. At all times relevant herein, the [REDACTED] (the "Facility"), located at [REDACTED], was operated, licensed and/or certified by the Office for Children and Family Services, which is an agency that is subject to the jurisdiction of the Justice Center.
2. At all times relevant herein the Subject was employed as a House Manager at the Facility and was a custodian pursuant to Social Services Law § 488(2).
3. At all times relevant herein, the Subject's work assignment, among others, included providing services at the Facility to the residents thereof.
4. At all times relevant herein, the service recipient "[REDACTED]" was a resident at the Facility.
5. At all times relevant herein, [REDACTED] had a history of drug use and an Individual Crisis Management Plan (the "Plan") that called for abstaining from illicit substances, including prescription pills.
6. On or about [REDACTED], the Subject was working and became aware that eight Oxycodone pills were missing from the Facility's medicine cabinet.
7. The Subject conducted a search of the premises which included a search of the Facility's common areas and offices, but did not include a search of the residents' rooms.
8. On or about [REDACTED], [REDACTED] was found to have been in possession of the missing Oxycodone pills.
9. The subject had a duty to cause a search of the residents' rooms to be initiated upon discovery that the Oxycodone pills were missing and she was aware of [REDACTED] Plan.

10. The subject acknowledges that her conduct outlined above constitutes a breach of her duty of care as to [REDACTED].


11. That given [REDACTED] Plan, the foregoing conduct was likely endanger the health, safety, or welfare of [REDACTED].

12. Based on the above, the parties have agreed that the report will be maintained in part and amended in part to reflect that the Allegation 3 finding of neglect will be substantiated, while the Allegation 2 finding of neglect and the Allegation 4 finding of neglect will be unsubstantiated and sealed.


Dated: June 01, 2016


John N. Clo, Esq.
Counsel for [REDACTED]

Dated: 6/7/16


Christopher Mirabella, Esq.
NYS Justice Center

Approved for recommendation:


Elizabeth M. Devane
Administrative Law Judge
New York State Justice Center for the Protection of People with Special Needs

Dated: 6/7/16, 2016