

**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
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: Todd M. Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

ORDERED:

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).

DATED: Schenectady, New York
December 22, 2015


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:

Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
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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New York State Justice Center for the Protection
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By: Todd M. Sardella, 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/or 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], received and 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 1

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED] while acting as a custodian, you committed neglect when you failed to provide the required 1:1 supervision of a service recipient, which resulting in the service recipient leaving the residence while unattended and being missing for over one hour.

This allegation has been SUBSTANTIATED as Category 2 neglect pursuant to Social Services Law § 493(4)(b).

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

4. The facility, located at [REDACTED], is an [REDACTED] [REDACTED] operated by [REDACTED], and is certified by the Office for

People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and/or neglect, the Subject was employed by [REDACTED] at their Day Habilitation department since [REDACTED]. The Subject worked as a Direct Service Professional (DSP).

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 58 years old, and had been a resident of the facility for approximately 2 years. The Service Recipient is an adult male with diagnoses of functioning in the mild range of intellectual disability, bi-polar disorder, impulsive control disorder, and pedophilia. (Justice Center Exhibit 11)

7. The Service Recipient had a history of elopement. On one occasion he managed to board a plane and fly to London, another time he flew to Miami. Because of this propensity, the Service Recipient wore a GPS tracker on his wrist at all times. At the time of this incident, the tracker had not been working for over a week and was being repaired. (Justice Center Exhibits 21, 6, 11 and Hearing testimony of [REDACTED])

8. [REDACTED] manages a variety programs including several residences, day habilitation programs, vocational programs, and family support services. The Subject normally worked at one of the day habilitation programs, but on [REDACTED], he was called in to work at this [REDACTED] because the Service Recipient's regular counselor had called in sick and the Subject had previously worked with this Service Recipient at the day habilitation center. The Subject was told that he would be assigned to supervise the Service Recipient 1:1. (Hearing testimony of [REDACTED], Hearing testimony of Subject, and Justice Center Exhibit 17)

9. That morning, employee [REDACTED] noticed that the door to the [REDACTED] was not

latching properly. [REDACTED] notified counselors [REDACTED] and [REDACTED] that the door was not working properly; but neither [REDACTED], nor [REDACTED] nor [REDACTED] told the Subject that the door was not working properly. (Justice Center Exhibit 6)

10. The Subject arrived at the [REDACTED] at approximately 9:00 a.m. to begin his shift supervising the Service Recipient. At that time, the only other employees at the [REDACTED] were a cook, and another DSP assigned to a different service recipient upstairs in the residence. About 45 minutes later, the Subject needed to use the bathroom. He asked the other DSP to watch the Service Recipient, but that DSP refused, saying he had his own service recipient to supervise 1:1. The Subject sat the Service Recipient at the kitchen table with a snack while the Subject went down the hall and into the bathroom, leaving the bathroom door open. When the Subject came out of the bathroom, the Service Recipient was not at the table. The Subject searched the residence twice, and then called the manager, who was off-site, and left a message on his voicemail. The manager called the Subject back and advised him to call 911. The manager then called the area coordinator to organize a search. (Hearing testimony of Subject, Justice Center Exhibit 6, and Hearing testimony of [REDACTED])

11. The [REDACTED] Plan for Oversight and Protection (IPOP) for the Service Recipient establishes a procedure for using the bathroom when traveling with the Service Recipient. It states that when out in the community, if a staff person needs to use the bathroom, they must ensure that another staff person is with the Service Recipient. (Justice Center Exhibit 13)

12. The Service Recipient's semi-annual Individualized Service Plan (ISP) review dated [REDACTED] specifies that if the Service Recipient's GPS tracker is not working, the Service Recipient must have a staff ratio of 2:1. (Justice Center Exhibit 10 and Hearing

testimony of [REDACTED]) In addition, the Service Recipient's Behavior Modification Plan dated [REDACTED] also mandates that two staff should be assigned to the Service Recipient when his GPS is not working. (Justice Center Exhibit 15)

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(h), to include:

(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 abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category (2), which is defined as follows:

- (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one 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(s) 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 evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of evidence that the Subject committed a prohibited 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 1-22) The investigation underlying the substantiated report was conducted by Resident Manager [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided four documents (Subject Exhibits A-D). In addition, Senior Counselor [REDACTED] testified in behalf of the Subject.

There is no dispute between the parties that the Subject is a custodian as defined by the statute. The parties also agree as to the essential facts of the case. The Service Recipient was a known flight risk, and therefore several protocols were put into place in order to minimize that risk. Those protocols either failed or were not implemented on [REDACTED]. However, the Subject complied with his training and his understanding of those protocols. He should not be faulted for matters beyond his control.

Management at [REDACTED] failed to comply with the Service Recipient's ISP and Behavior Modification Plan when assigning the Subject as the only DSP to supervise the Service Recipient on [REDACTED]. The Service Recipient's plans clearly state that when the GPS tracker is not working, two staff need to be assigned to supervise him. The evidence shows that management at [REDACTED] had been experiencing problems charging the tracker for a significant period of time. The manufacturer had replaced the GPS device three times over the course of 10 months. On [REDACTED] a representative from [REDACTED] emailed the manufacturer of the GPS to inform them that the device would not charge. A second email was sent on [REDACTED] asking for a

response to the previous email, and added that the device could not be used. The agency was on notice that the GPS was not working, and therefore two staff should have been assigned to the Service Recipient in order to maintain compliance with his ISP and Behavior Plan. (Justice Center Exhibits 10, 15 and 21)

In order to prove neglect, the Justice Center must prove that the Subject breached his duty to the Service Recipient. The Justice Center's position is that the Subject breached his duty by leaving the Service Recipient at the kitchen table with a snack while the Subject used the bathroom. The Justice Center asserts that instead, the Subject should have taken the Service Recipient into the bathroom with him that morning. In support of this position they cite to the Service Recipient's IPOP which sets forth the procedure for using the bathroom while traveling. However, in this instance, the Service Recipient was in his residence, not out in the community. In addition, the provision in question states that if a staff person needs to use a bathroom, they must ensure that another staff person is with the Service Recipient. On the other hand, if the Service Recipient has to use the bathroom, then the staff person must first check the bathroom for a means of egress. If there is none, the staff may wait outside the bathroom stall for the Service Recipient. If there is a means of egress, the staff person must remain with the Service Recipient. This was not a situation where the Service Recipient had to use the bathroom while out in the community. In any event, the Subject in this matter tried to find another staff person to watch the Service Recipient, as was required in the IPOP, but was refused.

In his defense, the Subject testified that he was extremely uncomfortable having the Service Recipient present while using the bathroom. The Service Recipient had made inappropriate sexual comments to him in the past, and other employees had complained about the Service Recipient touching them inappropriately. (Subject Exhibit C) In addition, the

Service Recipient's IPOP notes that he makes inappropriate comments or gestures to others, and may become fixated on those thoughts and behaviors. Therefore taking the Service Recipient into the bathroom while staff is using it, while not specifically prohibited, is not an approved behavior management technique for this Service Recipient and would be inappropriate. (Justice Center Exhibit 13)

The Justice Center also asserted that the Subject should have called a manager to watch the Service Recipient while the Subject used the bathroom. However, there was no manager on site. In fact, when the Subject called the manager to report that the Service Recipient was missing, the manager had to call another employee who was closer to the [REDACTED] than the manager in order to coordinate a search. Therefore that option simply was not viable. There was another DSP on the premises, but he was upstairs supervising another service recipient 1:1 and therefore was not available to watch this Service Recipient. The only other available person at the time was a cook, and he was not an appropriate person to watch the Service Recipient.

Finally, the Justice Center contends that the Subject should not have relied upon the door alarm and GPS tracker being in working order. However this argument fails to take into consideration the fact that if the GPS tracker is not working, then a second staff person needs to be assigned to supervise the Service Recipient. The provider agency failed to comply with the Service Recipient's ISP and Behavior Plan by not ensuring that two staff people were assigned to the Service Recipient while his GPS was not working.

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 sealed.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] received and 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: December 4, 2015
Schenectady, New York


Jean T. Carney
Administrative Law Judge