

**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: Jennifer (DeStefano) Oppong, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, New York 12601

██████████

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 report substantiated on ██████████
██ 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: March 11, 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:

Louis P. Renzi
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
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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] 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 [REDACTED], while acting as a custodian, you committed neglect when you failed to provide adequate supervision to a service recipient during toileting.

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, [REDACTED] located at [REDACTED], is a day habilitation facility and is operated by [REDACTED],

certified by the NYS 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 neglect, the Subject had been employed by [REDACTED] for approximately thirty years, with the most recent two years at [REDACTED]. The Subject worked as a Direct Support Aide (DSA). (Hearing testimony of the Subject; Justice Center Exhibits 2, 4, 6, 30)

6. At the time of the alleged neglect, the Subject was on duty at [REDACTED], admitted that she was acting as a custodian and was charged with the care of the Service Recipient. (Hearing testimony of the Subject; Justice Center exhibit 16)

7. At the time of the alleged neglect, the Subject admitted leaving the Service Recipient alone in the bathroom, on the toilet, for a period of time which was estimated to be approximately two to five minutes. (Hearing testimony of the Subject; Hearing testimony of [REDACTED])

8. As a result of the alleged neglect, the Service Recipient sustained an intertrochanteric hip fracture of the upper right femur. Prior to visiting the bathroom at [REDACTED], the Service Recipient exhibited no signs or symptoms of being in any pain or discomfort. As she was being removed from the bathroom, the Service Recipient exhibited clear and continuing signs of being in significant pain. Finally, despite the lack of any known eyewitnesses to the incident which caused the injury, the treating surgeon stated that the cause of the injury was most likely a fall directly upon the hip area. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 4, 6, 7, 10, 11)

9. The Service Recipient was a 73 year-old female. She resided at [REDACTED], a residential habilitation facility run by [REDACTED]. She lived with four other

female service recipients. She had resided at [REDACTED] since [REDACTED] 2011, and was transported each day to the [REDACTED] facility by [REDACTED] staff. (Hearing testimony of Justice Center Investigator [REDACTED]; Justice Center Exhibits 4, 17)

10. The Service Recipient has diagnoses of profound cognitive disability and osteoporosis. In addition, she is legally blind, non-verbal and requires hands-on care for all her personal hygiene and daily living skills. She is able to make her needs known with facial expressions and body language. She can ambulate with assistance for short distances, and sometimes is able to feed herself, also with assistance. She responds to prompting by staff. Her medical history includes a fractured left femur, which occurred in 2006. The record does not explain or describe the cause of this prior injury. (Hearing testimony of Direct Support Care staff (DSC) [REDACTED]; Justice Center Exhibits 2, 4, 17)

11. The Service Recipient had a Day Habilitation Plan with Safeguards dated [REDACTED] and signed on [REDACTED], an Individual Service Plan (ISP) dated [REDACTED] with an update of [REDACTED], and a residential Individual Plan of Protective Oversight dated [REDACTED], all of which stated that she required total, uninterrupted supervision while toileting. (Justice Center Exhibits 15, 17, 20)

12. The Day Habilitation Plan (the Plan) is kept in a binder in the Dayhab classroom, accessible to staff. It specifies 24-hour staff supervision of the Service Recipient for all activities, defined as permitting her to be left alone for short periods of time with staff checking on her at least every 15 minutes. Nevertheless, the Plan requires uninterrupted supervision when toileting, and clearly states that the Service Recipient should never be left unattended in the bathroom. (Hearing testimony of [REDACTED]; Justice Center Exhibits 4, 15, 16)

13. The Subject received training in the Service Recipient's Day Habilitation Plan on

██████████. The Subject acknowledged receiving the training by signing the staff roster.

14. The Service Recipient had been attending the ██████ program for approximately two years. (Hearing testimony of ██████; Hearing testimony of ██████; Justice Center Exhibits 15, 17, 18)

15. At the time of the alleged neglect, the Service Recipient was a participant in Classroom █. The Subject was assigned to Classroom █, along with one other staff member. The minimum number of staff required for Classroom █ was two. (Hearing testimony of Subject; Hearing testimony of ██████; Hearing testimony of ██████; Justice Center Exhibits 4, 15, 30)

16. The needs of the Service Recipient had not materially changed during the two years she had attended daily programs at ██████. (Hearing testimony of Subject; Hearing testimony of ██████; Justice Center Exhibits 4, 15, 30)

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(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:

(c) Category three is abuse or neglect by custodians that is not otherwise described in categories one and two.¹ 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(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).

¹ Categories one and two are defined in SSL § 493(4)(a) and (b), respectively.

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 established by a preponderance of evidence that the Subject committed a prohibited act, described as “Allegation 1” in the substantiated report. The act committed by the Subject constituted neglect. Specifically, a preponderance of the evidence established that the Service Recipient sustained a physical injury during a time when, while acting as a custodian, the Subject had a duty to supervise her and failed to adequately perform that duty.

In addition, the Justice Center categorized the substantiated offense as Category 3 neglect. There is no basis in the record for disturbing that categorization.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation, along with an audiotape of the interrogations of the Subject and nine other individuals. (Justice Center Exhibits 1-30) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. The Justice Center also called as witnesses [REDACTED], a Direct Support Caregiver (DSC) employed by [REDACTED], [REDACTED], [REDACTED], [REDACTED] Habilitation Specialist 1, and [REDACTED], DSC, employed at [REDACTED].

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

Allegation 1 – Neglect

To establish neglect, the Justice Center must prove, by a preponderance of the evidence, three elements: (1) conduct by a custodian; (2) that breaches a duty owed by the custodian to a service recipient; and which (3) results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the service recipient.

A preponderance of the hearing evidence established that there was conduct by a custodian that likely resulted in a physical injury to a service recipient, and also a serious or protracted impairment of the service recipient's mental or emotional condition due to the pain of the physical injury.

According to the Justice Center exhibits and hearing testimony, the Subject acknowledged assisting the Service Recipient to the bathroom, placing her on the toilet, and then leaving the Service Recipient alone in the room for several minutes while she attended to other service recipients. This fact is uncontroverted, and forms the preliminary basis for the allegation of neglect. (Hearing testimony of the Subject; Hearing testimony of [REDACTED]; Justice Center Exhibit 30)

The Subject further acknowledged that, on [REDACTED], she was acting as a custodian, and was charged with the care of several service recipients, one of whom was the Service Recipient in this matter. The Service Recipient is profoundly disabled and in need of hands-on attention for almost all, if not all, of her daily living activities. As is relevant here, the Service Recipient's individual Day Habilitation Plan, dated [REDACTED], specifies that she requires total supervision while toileting, and is never to be left unattended in the bathroom. (Justice Center Exhibit 15) The written plan was maintained in the assigned classroom [REDACTED],

and was thus available to the Subject during all working hours. The Subject was trained in the provisions of that plan. (Hearing testimony of [REDACTED]) Although she denied knowledge of the specific contents of the plan during her interrogation and her hearing testimony, the Subject signed the "Staff Training Sign-in Sheet" dated [REDACTED], acknowledging receipt of the training. (Hearing testimony of the Subject; Justice Center Exhibits 16, 30)

The Service Recipient suffers from osteoporosis, among her many ailments. Based upon that diagnosis, the record contains some evidence that one possible cause of the fracture could have been a twisting motion by the Service Recipient herself, while standing. Alternatively, the statement of the surgeon ([REDACTED]) as reported by [REDACTED], RN, was that "[the Service Recipient] really smashed it, she must have fallen right on it". This writer credits this explanation by an experienced surgeon, and concludes that it more likely than not describes the proximate cause of the injury. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 4, 7)

Further, the Justice Center proved by a preponderance of the evidence that, up to the time of the alleged neglect, the Service Recipient presented in her usual fashion and displayed no sign or indication that she had suffered any type of injury, accident, abnormal pain or other infirmity. The Justice Center also proved by a preponderance of the evidence that immediately after the bathroom visit, the Service Recipient displayed significant pain and discomfort, and resisted being physically moved, within the means of her limited ability to communicate. Subsequent medical treatment revealed that the Service Recipient had sustained a badly fractured hip. The record does not contain any direct proof of the actual cause of the Service Recipient's fractured hip, as there was no known witness to the incident itself. Nevertheless, the opinion of the surgeon was that the injury had to have been caused by a direct and significant impact on the

bone, causing the fracture. Comparing that neutral opinion to the self-interested testimony of the Subject and other Day Habitation program staff, it is not unreasonable to conclude that it is more likely than not that the Service Recipient fell from the toilet and sustained a fractured hip during the time when she was left alone in the bathroom by the Subject. Further, the need to remove the Service Recipient from the bathroom and transport her to medical facilities for treatment caused her a great deal of additional physical and emotional pain. (Hearing testimony of the Subject; Hearing testimony of [REDACTED]; Hearing testimony of [REDACTED]; Justice Center Exhibits 4, 5, 6, 7, 10, 11, 25, 26)

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 level of abuse or neglect set forth in the substantiated report. This allegation has been categorized by the Justice Center as a Category 3 act, the lowest level of seriousness as set forth in the statute. Category 3 violations are defined in part as those which pose a risk of injury to a service recipient. Here, there is no question that the Subject's actions did pose such a risk to the Service Recipient. Unfortunately, the risk became reality and a serious injury was sustained. The Subject admitted the offending conduct, and in her own defense claimed that she was unaware of the requirement to maintain constant supervision of the Service Recipient during toileting. This writer finds this claim not credible, especially considering Subject's length of time in service with this Service Recipient and the written record of the Subject's training in the care plan for the Service Recipient. Based upon the

totality of the evidence presented, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION:

The request of [REDACTED] that the report substantiated on [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 Louis P. Renzi, Administrative Hearings Unit.

DATED: March 7, 2016
Schenectady, New York


Louis P. Renzi, ALJ