

**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

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

██████████

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 Sardella, Esq.

████████████████████
████████████████████
████████████████████

By: Mark C. Curley, Esq.
Leonard and Curley, PLLC
205 West Court Street
Rome, New York 13440


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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
207 Genesee Street, Room 103D
Utica, New York 13501
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
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Esq.

████████████████████

████████████████████

████████████████████

By: Mark C. Curley, Esq.
Leonard and Curley, PLLC
205 West Court Street
Rome, New York 13440

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 Service Recipients.
2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 2¹

It was alleged that on [REDACTED], and on other dates between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when, while administering medications, you combined and placed a number of service recipients' medications together in your hand and taunted the service recipients to "pick the right pill or die," which created risk that a service recipient could ingest the wrong medication, and directed derogatory language toward them.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Service 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

¹ The report consisted of two allegations. Allegation 1 was unsubstantiated.

██████████ for adults with developmental disabilities and is operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimonies of Justice Center Investigator ██████████ and the Subject)

5. At the time of the report, the Subject was employed by the OPWDD as a Licensed Practical Nurse (LPN) and had been working as an LPN in the ██████████ since February 2014. (Justice Center Exhibit 6 and Hearing testimony of the Subject)

6. At the time of the report, four service recipients resided at the ██████████, one of which was not included as a victim of the Subject's alleged neglect. Service Recipient A was a sixty-one year old male, had been a resident of the facility since approximately August 2010, and had a developmental diagnosis of mild range of mental retardation. (Justice Center Exhibit 10) Service Recipient B was a fifty-one year old male, had been a resident of the facility since approximately ██████████ 2012, and had a developmental diagnosis of mild range of mental retardation. (Justice Center Exhibit 11) Service Recipient C was a fifty-one year old male with a developmental diagnosis of moderate range of mental retardation. (Justice Center Exhibit 6)

7. At the time of the report, Service Recipient A was verbal and articulate, and was able to self-administer medication after the medication was set up by staff. Service Recipient B was verbal and articulate, and was able to administer his own insulin injections after the correct injection amount was prepared by staff. Service Recipient C was verbal but less articulate than the other Service Recipients, lacked the cognitive skills to self-medicate and was totally reliant on staff to administer medication to him. (Justice Center Exhibits 13, 14, 15 and 16: Audio recordings of Justice Center interviews of the Service Recipients)

8. At the time of the report, the ██████████ was staffed with one person who

was assigned to work at the [REDACTED] for a multi-day period of time. The staff was assigned to work a regular day shift at the [REDACTED] and then remain overnight at the [REDACTED] while off-duty. While on duty, the staff was responsible for the care of the Service Recipients which included, among other things, the administration of the Service Recipients' medication. (Hearing testimony of the Subject)

9. On [REDACTED], Service Recipient B told Staff A that the Subject plays a game with the Service Recipients' medication in which the Subject places pills in her hand and tells the Service Recipients to pick the right pill or die. When questioned by Staff B about what he had told Staff A, Service Recipient B told Staff B that the Subject plays the game with the medication (which he previously described) and that she tells him and Service Recipient C "fuck you." (Justice Center Exhibit 6 and Hearing testimony of Justice Center Investigator [REDACTED])

10. When the Subject administered medication to the Service Recipients, she put the medication in separate cups for each Service Recipient. On two consecutive occasions, approximately one month prior to the date of the report, the Subject almost dispensed the medication incorrectly. On one of the occasions, the Subject made the comment "pick the person" or "pick a pill" in jest after she caught her mistake. After she made this comment, Service Recipient B added: "or die." There was no medication dispensed incorrectly by the Subject. (Justice Center Exhibit 16: Audio recording of Justice Center interrogation of the Subject and Hearing testimony of the Subject)

11. Approximately two weeks before the date of the report, the Subject was given the responsibilities to inform Service Recipient B that his telephone privileges were revoked and to enforce the restriction. Service Recipient B's telephone privileges were revoked due to inappropriate telephone calls that he was making to women. Service Recipient B was upset at the Subject about the revocation of his privileges and her enforcement of the restriction. (Hearing

testimony of the Subject) The Subject was tasked with implementing the restriction because she was more consistent and less lenient than other staff concerning preference loss (revocation of privileges) enforcement. (Justice Center Exhibit 8)

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 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:

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(s) 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 not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 2” 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 1-15) The Justice Center also presented an audio recording of the Justice Center Investigator's interview of witnesses and interrogation of the Subject. (Justice Center Exhibit 16) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED]², 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.

Mixing the Medication and Taunting the Service Recipients

The Justice Center relied on the statements of the Service Recipients, provided during Justice Center interviews, as evidence that the Subject placed the medications of the three Service Recipients together in her hand and taunted them by saying to them: "pick the right pill or die."

In his interview with the Justice Center Investigator, Service Recipient A stated that, when the Subject administers the Service Recipients' medication, she puts their respective medication in separate cups and sometimes she kids around saying to the Service Recipients "pick a pill." He further stated that the Subject always gives the Service Recipients' their correct medication. (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient A)

In his interview with the Justice Center Investigator, Service Recipient C stated that, when the Subject administers the Service Recipients' medication, she gives the medication to him in a cup and says: "eenie, meanie, minie, moe." He also said that the Subject always gives him his correct medication, and that she gives medication to the other Service Recipients in a cup. (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient C)

In his interview with the Justice Center Investigator, Service Recipient B stated that the Subject was not giving the Service Recipients the correct medication, that she was trying to give

² [REDACTED] was an Investigator employed by the OPWDD at the time of the report and conducted the investigation of the report in that capacity.

them the wrong medication, and that he picked the correct medication for himself and the other Service Recipients because he knew which medication is which. Service Recipient B also told the Justice Center Investigator that the Subject put the pills in her hands and said to the Service Recipients: “If you don’t pick the right pill, you die.” Finally, Service Recipient B stated that the Subject always gives the Service Recipients’ their correct medication. (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient B)

In her hearing testimony and Justice Center interrogation, the Subject admitted to almost having dispensed the Service Recipients’ medication incorrectly on two consecutive occasions, and on the second occasion having said to the Service Recipients: “pick the person” or “pick a pill” in jest after she caught her mistake. However, the Subject denied having played games with the Service Recipients’ medication and specifically having said: “eenie, meanie, minie, moe” or “If you don’t pick the right pill, you die.” (Justice Center Exhibit 16: Audio recording of Justice Center interrogation of the Subject and Hearing testimony of the Subject)

Service Recipient B’s statements lack credibility. The record reflects that Service Recipient B has a history of lying in order to protect himself and to avoid accountability. The frequency of his lying behavior ranges from weekly to monthly. Consequences for Service Recipient B’s lying behavior include preference loss. (Justice Center Exhibit 11)

In addition, Service Recipient B’s allegations being suspect due to his history of lying, the allegations for the most part are not supported or corroborated by the two other Service Recipients. Service Recipient B’s claim that the Subject dispensed the medication to the Service Recipients in her hand, tried to dispense the wrong medication, and that she said: “If you don’t pick the right pill, you die,” were not mentioned by the other Service Recipients.

Additionally, Service Recipient B did not state any specific instances when the Subject did

what he had alleged, only that it had been going on a long time. (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient B)

The record also reflects that Service Recipient B had the motivation and the propensity to fabricate his claims against the Subject. Not long before the report, the Subject was tasked with implementing a preference loss against Service Recipient B in which his telephone privileges were revoked. As a result, Service Recipient B was upset at the Subject. Service Recipient B has a history of behavior which includes avoiding demands of staff by “refusing, manipulating and intimidating.” (Justice Center Exhibit 11) In his Justice Center interview, Service Recipient B indicated his intent when he stated: “I got her terminated” and “she was abusing us and the guys.” Service Recipient B also stated peremptorily to the Investigator and without any prompt or provocation: “I’m not lying [REDACTED], I’m not lying.” (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient B)

Based on Service Recipient’s propensity to lie, the lack of corroboration from the other Service Recipients and other statements he made during his Justice Center interview, it is determined that Service Recipient B’s statements are not credited evidence.

However, there is no evidence in the record upon which to conclude that the statements of the other two Service Recipients were fabricated. Service Recipient C stated that the Subject said: “eenie, meanie, minie, moe” when dispensing medication (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient C), and Service Recipient A stated that the Subject kids around with the pills by putting them in front of him and saying: “pick a pill.” (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient A) Although the Subject denied having done these things, she offered no explanation for the Service Recipients’ statements. On this point, the testimony of the Subject is not credited evidence and

the statements of Service Recipients A and C are credited evidence.

Based on the statements of Service Recipient A and C, together with the other credible evidence in the record, it is concluded that sometime between [REDACTED] 2014 (when the Subject started working at the [REDACTED]) and the date of the report [REDACTED], the Subject joked about the Service Recipients' medication prior to dispensing the medication, but always dispensed the medication in individual cups to the correct Service Recipients. It is also concluded that on two occasions, the Subject almost dispensed the medication incorrectly but caught the error before dispensing the medication to the Service Recipients.

To prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subject's action, inaction or lack of attention breached the Subject's custodian's duty to the Service Recipients and 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 Recipients. (SSL § 488(1)(h))

The record establishes that the Subject had a duty to dispense medication to the Service Recipients in accordance with the Service Recipients' respective Safeguards/Plans Of Protective Oversight. However, the credible evidence in the record does not establish that the Subject breached this duty. While the Subject joked about the medication in the presence of the Service Recipients, the Justice Center did not establish that the Subject ever mixed the Service Recipients' medication together, placed all the medication in the same hand, or otherwise placed the Service Recipients at risk of harm from taking the wrong medication. The only credible evidence in the record of the potential of the Service Recipients taking or being administered incorrect medication is found in the Subject's interrogation statement and her testimony that she almost mistakenly dispensed the medication to the Service Recipients incorrectly. However, she also stated that she

caught her mistake before giving the medication to the Service Recipients, and there is no evidence in the record that the Subject's mistake was the result of her joking with the Service Recipients.

Consequently, the Justice Center has failed to prove that the Subject breached her duty to the Service Recipients by combining and placing the Service Recipients' medications together in her hand and taunting the Service Recipients to "pick the right pill or die."

Directing Derogatory Language Toward the Service Recipients

The only evidence presented by the Justice Center, of the Subject using derogatory language in the presence of or directed at the Service Recipients, is found in Service Recipient B's statement to the Justice Center Investigator. (Justice Center Exhibit 16: Audio recording of Justice Center interview of Service Recipient B) For the reasons stated in the analysis above, the statements of Service Recipient B are not credited evidence. Furthermore, neither of the other two Service Recipients stated in their Justice Center interviews that they had been called derogatory names or heard derogatory language from the Subject.

Consequently, it is determined that the Subject neither called the Service Recipients derogatory names nor used derogatory language in the presence of the Service Recipients. Because the factual allegations underlying the neglect allegation are discredited, it is not necessary to determine if the Subject had a duty to the Service Recipients that she breached.

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], 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 John T. Nasci, Administrative Hearings Unit.

DATED: June 23, 2016
Schenectady, New York

A handwritten signature in blue ink, appearing to be 'J. Nasci', written over a horizontal line.

John T. Nasci, ALJ