

**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: Thomas C. Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Nicole A. Murphy, Esq.
Fine, Olin & Anderman, LLP
39 Broadway, Suite 1910
New York, New York 10006

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 Allegation 1 of the substantiated report dated [REDACTED], be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

Allegation 1 of the substantiated report is properly categorized, as a Category 3 act.

The request of [REDACTED] that Allegation 2 of 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 abuse (obstruction of reports of reportable incidents).

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 1, shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 2, 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: January 23, 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

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People With Special Needs
Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
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
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New York, New York 10006

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for neglect and abuse (obstruction of reports of reportable incidents). 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 and abuse (obstruction of reports of reportable incidents) 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 the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide proper care and supervision to a service recipient by not properly assisting with his ambulation to the bathroom.

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

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you intentionally made false statements during your interrogation.

The allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) 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 an [REDACTED] for adults with developmental disabilities and is operated by the Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OPWDD Investigator [REDACTED]; Hearing testimony of the Subject)

5. At the time of the alleged abuse and neglect, the Subject had been employed by the OPWDD for nine years and assigned to [REDACTED] for three years. The Subject worked as a Direct Support Assistant (DSA) caring for and assisting the service recipients with daily living needs. (Hearing testimony of the Subject)

6. At the time of the alleged abuse and neglect, the male Service Recipient was 48 years old. The Service Recipient's length of residence at [REDACTED] was not specified, however he had resided at [REDACTED] during the three years that the Subject worked there. (Hearing testimony of OPWDD Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 7 and 13)

7. The Service Recipient functioned within the profound range of intellectual and developmental disabilities and was diagnosed with cerebral palsy. (Hearing testimony of OPWDD Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 7 and 13)

8. The Service Recipient had limited ambulatory skills, an unsteady gait and used a

██████████

wheelchair. The Service Recipient could minimally assist with transfers into and out of his wheelchair if the chair's wheels were locked and if he was closely monitored when doing so. The Service Recipient previously used a walker on occasion, however, walker use was discontinued after the Service Recipient had fallen a number of times while using the walker. (Hearing testimony of OPWDD Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 7 and 13)

9. The Subject worked the night shift from 11:00 p.m. on ██████████, to 7:30 a.m. on ██████████. He had worked the prior shift, 3:00 p.m. to 11:30 p.m. on ██████████, and was scheduled to return to work for the night shift beginning 11:00 p.m. on ██████████. (Hearing testimony of OPWDD Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 7, 9, 10, 11, 15 and 18)

10. ██████████ is a brownstone building with three floors and seven to eight service recipients residing on each floor. The Service Recipient resided on the first floor, which was designated for service recipients who used a wheelchair. The Service Recipient had one roommate. (Hearing testimony of OPWDD Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibit 7)

11. On ██████████, between 5:30 a.m. and 6:30 a.m., the Subject and a DSA Trainee (DSAT) were assigned to care for seven of the eight service recipients residing on the first floor of ██████████. The Subject was showering each service recipient and the DSAT was dressing each service recipient, preparing them for the day. (Hearing testimony of OPWDD Investigator ██████████; Hearing testimony of the Subject; Justice Center Exhibits 7, 10 and 18)

12. At the time of the alleged abuse and neglect, the DSAT entered the Service

Recipient's room to dress his roommate. The DSAT saw the Service Recipient on the floor and the Subject standing at the Service Recipient's bedside telling him to get up and get in his wheelchair. The DSAT offered to help the Subject pick up the Service Recipient. The Subject said that the Service Recipient put himself on the floor and that the Subject was not going to injure himself picking the Service Recipient up. (Hearing testimony of OPWDD Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 7, 8, 10 and 11)

13. While the DSAT dressed the Service Recipient's roommate, she heard the Subject tell the Service Recipient to keep going as the Service Recipient dragged himself from his bed to the bathroom across the hall for his shower. (Hearing testimony of OPWDD Investigator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 7, 8, 10 and 11)

14. Later that day, at 3:45 p.m., the DSAT called [REDACTED] to speak to the Team Leader, who was not available. The DSAT then reported the incident to a Developmental Assistant II-A (DA II-A). The incident was then reported to the Justice Center.

15. A body check was completed of the Service Recipient on [REDACTED] and no new injuries were discovered. (Justice Center Exhibits 7 and 17)

16. On [REDACTED], the Subject was interviewed by OPWDD Investigator [REDACTED] in regard to the incident of [REDACTED]. The Subject said his back was injured when the Service Recipient slid to the ground while the Subject was assisting him out of his bed. The subject said he assisted the Service Recipient off the floor to his wheelchair then showered him. The Subject said he reported his back injury to Developmental Assistant II-B (DA II-B). (Justice Center Exhibit 18)

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) (f) and (h), to include:

(f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.

(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 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 abuse and 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 neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and 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 neglect cited in the substantiated report constitutes the category of abuse and neglect as set forth in the substantiated report.

If the Justice Center did not prove the abuse and neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject

committed an act, described as “Allegation 1”, and 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- 17) as well as an audio recording of the Justice Center Investigator’s interrogation of the Subject. (Justice Center Exhibit 18) The investigation underlying the substantiated report was conducted by OPWDD Investigator [REDACTED]. As Investigator [REDACTED] was unavailable at the time of the hearing, OPWDD Investigator [REDACTED] testified in his stead. Investigator [REDACTED] was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf.

Allegation 1 - Neglect

In order to prove neglect, the Justice Center must prove by a preponderance of the evidence that the Subject’s action, inaction or lack of attention breached a custodian's duty he owed to the Service Recipient, and that the Subject’s breach 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.

At the time of the alleged neglect, the Subject was working in his capacity as a DSA at [REDACTED] and was assigned to the Service Recipient’s floor. There is no question that the Subject was a custodian as defined in SSL § 488(2).

The Justice Center alleges that the Subject committed neglect by failing to provide proper care and supervision to the Service Recipient by not properly assisting with his ambulation to the bathroom.

In contrast to the DSAT's statement, the Subject stated that as he was transferring the Service Recipient from his bed to his wheelchair, the Service Recipient slid himself down to the floor. This caused the Subject to go down to the floor also and suffer a strained back. The Subject informed the DSAT, as well as a DA II-B, of his injury. The Service Recipient crawled only to his bed nearby and used the bed handrail to hoist himself up. The Subject then placed the Service Recipient in his wheelchair and wheeled him to the shower.

The Subject argued that the Service Recipient slid out of his chair regularly and was accustomed to pulling himself up using his bedrail. The Subject denied that the DSAT offered to assist in picking up the Service Recipient, denied that he refused to pick up the Service Recipient and denied that the Service Recipient dragged himself to the bathroom.

The Subject's testimony is not fully credited. The reporter to the Justice Center did not believe that placing himself on the floor was a known behavior for the Service Recipient. Neither the DSAT nor the DAII-B recalled the Subject saying that his back was injured during the incident. The Subject questioned the DSAT's credibility because the DSAT did not report the incident until 3:45 p.m. that day. Reporting an incident upon discovery is ideal. Based on the circumstances presented, a new employee reporting this incident within the same day that it occurred is reasonable. The Subject also argued that, as the DSAT was new, she may have misinterpreted the situation. However, OPWDD Investigator [REDACTED] testified that it is not proper procedure to allow a Service Recipient to pull himself up by a bedrail, and assistance must be provided. Further, the DSAT's statement referred not to the Service Recipient pulling himself up but to the Subject having the Service Recipient crawl across the hallway to the bathroom. Consequently, the Subject's statements in regard to the incident are not credited testimony. The Subject failed to

provide proper care and supervision to the Service Recipient as he did not properly assist the Service Recipient with his ambulation and thereby breached his duty.

The Subject's breach was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Service Recipient was profoundly disabled, had cerebral palsy and limited ambulation skills. The Service Recipient could minimally assist in transfers to and from his wheelchair, however the Service Recipient's ISP directs that he be closely monitored while doing so. OPWDD Investigator [REDACTED] testified that even an attempt by the Service Recipient to pull himself up using a bedrail could likely result in a fall and injury to the Service Recipient.

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. Allegation 1 of the substantiated report will not be amended or sealed.

Allegation 2 – Abuse (obstruction of reports of reportable incidents)

In order to prove abuse (obstruction of reports of reportable incidents) as it is alleged, the Justice Center must prove that the Subject impeded the Justice Center's investigation by intentionally making a false statement. (SSL §488(1)(f)) Social Services Law § 488(16) defines "intentionally" as having the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(1), a person acts "intentionally" with respect to a result or conduct when a person has a "... conscious objective ..." to cause a result or engage in such conduct.

This allegation revolves around the Subject's statement during the interrogation by OPWDD Investigator [REDACTED] on [REDACTED]. The Subject said that he informed the DAII-B that his back was injured when he attempted to transfer the Service Recipient to his wheelchair. Therefore, the Subject could not pick up the Service Recipient and allowed the Service

Recipient to pull himself up using the bedrail. Neither the DSAT nor the DAII-B recall the Subject telling them he was injured on the date of the incident and there was no documentation of such an injury.

However, when OPWDD Investigator [REDACTED] was directly asked “How did that impede your investigation into the allegation?” Investigator [REDACTED] responded “It didn’t impede it at all it was just, just was something additional that was found throughout the investigation.” Consequently, the record contains no evidence that the Subject’s conduct in this regard impeded the discovery, reporting or investigation of the treatment of the Service Recipient.

Accordingly, the Justice Center has not established by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) as it is alleged.

Although Allegation 1 of the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses’ statements, it is determined that Allegation 1 of the substantiated report is properly categorized as a Category 3 act.

Substantiated Category 3 findings 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.

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 but not the abuse alleged.

DECISION:

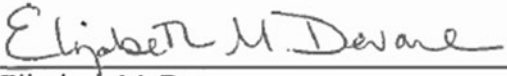
The request of [REDACTED] that Allegation 1 of the substantiated report dated [REDACTED], be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

Allegation 1 of the substantiated report is properly categorized, as a Category 3 act.

The request of [REDACTED] that Allegation 2 of 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 abuse (obstruction of reports of reportable incidents).

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

DATED: January 11, 2017
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge