

**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 Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

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 the substantiated report dated [REDACTED], [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.

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: April 17, 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
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Keely D. Parr
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street
Brooklyn, New York 11201
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
Appearance Waived

New York State Justice Center for the Protection
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Thomas Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

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], [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 the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient was left unattended in the bathroom.

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, located at [REDACTED], is a group day habilitation program (day hab), operated by [REDACTED] and certified by the Office for People With Developmental Disabilities (OPWDD), which is a 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 16 years. The Subject worked as a Habilitation Specialist and was the supervisor at the day hab at the time of the alleged neglect. (Hearing Testimony of Subject)

6. At the time of the alleged neglect, the Service Recipient was a non-ambulatory 24 year-old male with diagnoses of severe intellectual disability and seizure disorder, and had been attending the day hab program since [REDACTED]. The Service Recipient was in a wheelchair, but could stand with staff assistance. The Service Recipient drank copious amounts of water to assist with his seizure medication and was under line of sight supervision at the day hab. (Hearing Testimony of Subject; Justice Center Exhibits 24, 26 and 35)

7. At the time of the alleged neglect, two staff members were assigned bathroom duties. At approximately 2:00 p.m., the Subject brought the Service Recipient downstairs to the first floor and instructed both staff to toilet the Service Recipient. The Subject believed that the Service Recipient was to be picked up by the [REDACTED] (bus) shortly thereafter, and the Subject instructed the security guard to inform her when the bus came to pick up the Service Recipient. The Subject returned to her classroom on the second floor. (Hearing Testimony of Subject; Justice Center Exhibit 8)

8. At approximately 3:24 p.m., the Service Recipient's father arrived at the day hab to pick up the Service Recipient as he had cancelled the bus pickup. When he arrived at the day hab he could not locate any staff and was instructed by the security guard to check the bathroom for his son. The Service Recipient's father found his son in the bathroom, alone and crying. (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 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1) as:

(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:

(c) 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 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 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 acts of abuse and/or neglect cited in the substantiated report constitute the category of abuse and 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 established by a preponderance of the evidence that the Subject committed an 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 1-38) The investigation underlying the substantiated report was conducted by [REDACTED] Investigator [REDACTED], 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.

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject

was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that this breach either 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. (SSL § 488(1)(h))

On the day of the alleged neglect, the Subject was employed by [REDACTED] as a Habilitation Specialist and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to ensure that the Service Recipient was in line of sight supervision while at the day hab. (Justice Center Exhibit 27) The Subject breached that duty by failing to provide clear instructions to the two staff who toileted the Service Recipient and by failing to check on the Service Recipient when she was not informed by security that the Service Recipient had been picked up by [REDACTED].

The Subject testified that she brought the Service Recipient downstairs and instructed the two staff members to toilet the Service Recipient and that when finished, to take the Service Recipient to the security desk to wait for [REDACTED]. The Subject further testified that she told security to inform her when the Service Recipient was picked up.

Both staff, in separate statements, reported that they were informed by the Subject to leave the Service Recipient in the bathroom until the bus came. According to both staff members, they did as instructed and returned upstairs, leaving the Service Recipient downstairs and alone in the bathroom. (Justice Center Exhibits 10 and 11) These statements are not credited. The Subject credibly testified that she had been working with the vulnerable population for 16 years and would never have instructed the staff to leave the Service Recipient alone in the bathroom. As the Service Recipient was non-ambulatory there is no way that he would have been able to leave the bathroom without staff assistance. (Hearing Testimony of Subject) The Subject further testified that she had

never worked with these two staff members before as they were from a different program. Accordingly, it was incumbent upon the Subject to provide clear instructions to the staff members to keep the Service Recipient in their line of sight.

In addition, the Subject testified that she had instructed security to inform her when the Service Recipient was picked up. As the Subject never received any notification from security that the Service Recipient had been picked up by the bus, the Subject breached her duty by not checking on the Service Recipient. The Subject brought the Service Recipient downstairs at 2:00 p.m., the bus was scheduled to pick him up at 2:27 p.m. and the Service Recipient was discovered alone in the bathroom by his father at 3:24 p.m. (Justice Center Exhibits 8, 12 and 18) As almost one hour elapsed between the time of the scheduled bus pick up and the discovery of the Service Recipient by his father, the Subject had ample time to check on the status of the Service Recipient. Had the Subject either telephoned security or went downstairs to check on the Service Recipient she would have discovered that he was left alone in the bathroom.

Although the Service Recipient was not physically injured, there was a likelihood that the Subject's breach would result in the serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Service Recipient's father stated that he found the Service Recipient alone in the bathroom, "sweating in tears and shaking from fear". He further stated that one of the Service Recipient's biggest fears was being left alone somewhere. The father additionally stated that the Service Recipient had numerous micro-seizures later that same day. (Justice Center Exhibit 12) As the Service Recipient was non-ambulatory and had a seizure disorder, the likelihood of harm was of great magnitude.

The evidence establishes that the Subject committed neglect when she failed to provide proper supervision, during which time the Service Recipient was left unattended in the bathroom.

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 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 the substantiated report of neglect is properly categorized as a Category 3 act. Substantiated Category 3 findings of abuse and/or 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 [REDACTED] that the substantiated report dated [REDACTED], [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 Keely D. Parr, Administrative Hearings
Unit.

DATED: April 13, 2017
Brooklyn, New York


Keely D. Parr, ALJ