

**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]

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 granted.

The Subject has not been shown by a preponderance of the evidence to have committed neglect.

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).

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 20, 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:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People With Special Needs
4 Burnett Boulevard, Second Floor
Poughkeepsie, New York 12601
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
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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], [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 acting as a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient was left unattended in the agency van.

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 center that is operated by [REDACTED], a non-profit corporation that is 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. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject)

5. [REDACTED] provides social and recreational activities for individuals with developmental disabilities including community outings and opportunities for social integration. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 5)

6. At the time of the alleged neglect, the Subject had been employed by [REDACTED] for 15 years and had been working at [REDACTED] for six months as a Program Coordinator. As a Program Coordinator, the Subject's duties included daily coordination of the service recipients' program plans and facilitation of program activities. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of the Subject; Subject's Exhibit A)

7. The Service Recipient is an ambulatory adult female with diagnoses including Down syndrome with apraxia. The Service Recipient's Individualized Service Plan (ISP) notes that she cannot be left alone at home or in the community and that she requires supervision when out in the community. (Justice Center Exhibits 5 and 8)

8. At the time of the alleged neglect, at approximately 12:50 p.m. on [REDACTED], the Subject, along with Staff A, who was employed at [REDACTED] as a Community Assistant, returned to [REDACTED] in the facility van with seven service recipients. They had just completed a community outing where they participated in a Meals on Wheels program. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 5

and 6)

9. While a visual sweep of the van was often completed after service recipients disembarked, [REDACTED] van policy did not require a sweep. After the incident, the policy was amended to require a sweep of the van to ensure all service recipients exited. (Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 10)

10. Staff A was the van driver and was also responsible for completing the trip sheet with the names of the service recipients on the trip and their destinations. Staff A parked the van outside of the entrance to [REDACTED]. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2, 5 and 6)

11. The routine upon return to [REDACTED] at lunch time was for each service recipient to enter the building, go to the bathroom for toileting, then go to the kitchen to eat lunch. (Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 5 and 6)

12. The Subject exited the van and was assisting four of the seven service recipients out of the van. One of those four was service recipient 1. Service recipient 1 got out of the front passenger seat and went into the facility toward the bathroom. (Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2 and 5)

13. Service recipient 1 had a history of sexually acting out and was not allowed to enter the [REDACTED] bathroom without a visual sweep of the bathroom first being completed. Staff was to remain outside of the bathroom while service recipient 1 was in the bathroom. (Hearing testimony of [REDACTED] and Hearing testimony of the Subject)

14. As service recipient 1 went into [REDACTED], the Subject asked staff A to

“get the rest of the ladies” remaining in the van so that the Subject could supervise service recipient

1. (Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 5)

15. Staff A exited the van and assisted two service recipients out of the van and into the facility. Staff A then returned to the van and parked it in the lot which was close by and adjacent to the building. (Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibit 5)

16. Staff A went into the building and began to prepare lunches. The Subject was assisting other service recipients with using the bathroom. When Staff A asked the Subject if the Service Recipient was in the bathroom, the Subject asked Staff A if she had gotten the Service Recipient off of the van. Staff A immediately went to the van and found the Service Recipient, hunched over and sleeping, in the back of the van. The Service Recipient had been in the back of the van alone for approximately five minutes. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 2, 5 and 6)

17. Staff A got the Service Recipient out of the van and into the facility then fed her lunch. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 5 and 6)

18. The Subject reported the incident to the Director of Day Habilitation Services and also reported the incident to the Justice Center at 1:30 p.m. Staff A was placed on Administrative Leave. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 5

and 6)

19. The Subject contacted the [REDACTED] nursing department, and conducted a body check of the Service Recipient as she was instructed. No injuries were observed, the Service Recipient did not appear upset and the Service Recipient's vital signs were normal. (Hearing testimony of OPWDD Quality Assurance Coordinator [REDACTED]; Hearing testimony of the Subject; Justice Center Exhibits 5, 6 and 7)

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as follows:

"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 neglect shall be categorized into categories including Category 3 pursuant to SSL § 493(4)(c), 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 of neglect alleged in the substantiated report that is the subject of the proceeding and that such act constitutes 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

In support of its substantiated findings, the Justice Center presented a number of documents

obtained during the investigation. (Justice Center Exhibits 1-10) The investigation underlying the substantiated report was conducted by OPWDD Quality Assurance Coordinator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf. [REDACTED], who was employed at [REDACTED] as a Community Assistant and was working with the Subject at the time of the incident, testified on the Subject's behalf. The Subject presented a document detailing her job description. (Subject's Exhibit A)

Allegation 1 - Neglect

The Justice Center has not proved by a preponderance of the evidence that the Subject committed neglect as described in "Allegation 1" in the substantiated report.

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 her 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))

The Subject argued that she was not a custodian of the Service Recipient at the time of the incident as she was not present when the Service Recipient was left in the van, and therefore she was not responsible for the Service Recipient at that moment. This argument is not persuasive. The Subject was a custodian of the Service Recipient by virtue of her employment as the Program Coordinator with [REDACTED] and was a custodian as that term is defined in Social Services Law §488(2).

It is alleged that the Subject breached her duty as a custodian by failing to provide proper supervision for the Service Recipient, during which time the Service Recipient was left unattended

in the agency van. Testimony established that specific safety precautions were in place in regard to service recipient 1, due to his history of sexually acting out against other service recipients. At the time the Subject was helping four of the seven service recipients out of the van including service recipient 1. Service recipient 1 went toward the bathroom, requiring the Subject's immediate attention. The Subject asked Staff A to "get the rest of the ladies" out of the van. Thus, Staff A had primary responsibility for the three service recipients remaining in the van, including the Service Recipient, while the Subject was attending to service recipient 1. Additionally, Staff A was responsible for completing the trip sheet with the names of the service recipients on the trip and their destinations and should have been aware of which service recipients remained in the van. The Subject could have communicated better with Staff A by specifically naming the three remaining service recipients in the van. However, there were exigent circumstances, as the Subject had to attend to service recipient 1 for the safety of others. The Subject's failure to name which service recipients remained in the van does not rise to the level of neglect. Within minutes after parking the van, the Service Recipient's absence in [REDACTED] was noticed and she was retrieved from the van. During the minutes the Service Recipient was in the van, the Subject was attending to service recipient 1 and the other service recipients near the bathroom.

By leaving the Service Recipient in Staff A's care, the Subject did not fail to provide proper supervision to the Service Recipient. The weight of evidence in the record and hearing testimony do not support a finding by a preponderance of the evidence that the Subject breached her duty by failing to provide proper supervision to the Service Recipient.

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.

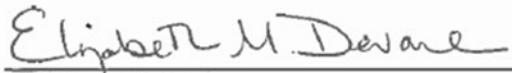
DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], [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 Elizabeth M. Devane, Administrative Hearings Unit.

DATED: March 15, 2017
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge