

**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: Peter Zisser, Esq.

[REDACTED]

By: Ronald Rubinstein, Esq.
Rubinstein & Corozzo, LLP
260 Madison Avenue, 22nd Floor
New York, New York 10016

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 found 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: April 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #

[REDACTED]

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
125 East Bethpage Road, Suite 104
Plainview, New York 11803
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
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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 engaged in an altercation with another staff member, during which time service recipients were improperly supervised.

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 Children's Residential Program operated by [REDACTED], which is certified by the New York State Office for People With Developmental Disabilities (OPWDD) and, as a result, 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 the facility as a Direct Support Professional (DSP) for over three years, and had been promoted to the title of supervisor. In addition to performing the routine duties assigned to DSPs, such as supervising service recipients, supervisors' duties included preparing shift assignments and consulting with the Residential Manager to plan service recipients' outings. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. On [REDACTED], the Subject was working her regular shift from [REDACTED] [REDACTED]. The other facility staff who were present at the time were the Residential Manager, the Shift Supervisor, the Registered Nurse, DSP 1, DSP 2, DSP 3, DSP 4, and DSP 5. The Subject prepared the shift assignments for the day, assigning herself to provide 1:1 supervision to the Service Recipient and DSP 1 to provide 1:1 supervision to service recipient A, who was scheduled for a park outing before dinner. (Hearing testimony of the Subject and Justice Center Exhibit 5)

7. 1:1 supervision requires that the staff be within arm's length or three feet and within the line of vision of the service recipient. (Hearing testimony of facility Quality Assurance Coordinator [REDACTED])

8. During the afternoon, prior to the incident, while another staff was providing 1:1 supervision to the Service Recipient, there had been verbal conflict over the telephone between the Subject and DSP 1, during which the Subject hung up on DSP 1. (Hearing testimony of the Subject and Justice Center Exhibits 2 and 8)

9. Later, at approximately 5:30 p.m., in the facility dining room, the Subject, who was performing her 1:1 supervision of the Service Recipient, was standing immediately behind him as he sat at the dining room table with the other facility service recipients waiting for dinner. From where she was standing, the Subject was able to see DSP 1 with service recipient A in the hallway walking towards the dining room. (Hearing testimony of the Subject and Justice Center Exhibits

2, 8 and 11)

10. As DSP 1 entered the room, she told the Subject that she should never hang up on her again and chastised her further. Without moving away from the Service Recipient, the Subject responded by saying, "Excuse me? Don't talk to me like that." DSP 1 then greeted DSP 2, who walked in, and DSP 1 said to the Subject, "Now I see why you're acting like this. You have people around." Both the Subject and DSP 1 had raised their voices. (Hearing testimony of the Subject and Justice Center Exhibits 11 and 12)

11. DSP 1 accused the Subject of trying to have her "charged." DSP 1 then lunged at the Subject and attempted to strike her, but was intercepted by DSP 2, who inserted himself between them and escorted a resisting DSP 1 down the hallway and into a nearby bedroom. (Hearing testimony of the Subject and Justice Center Exhibits 5 and 11)

12. At that point, DSP 3, who came in from the kitchen, and the Residential Manager, who had heard the raised voices from her office, pushed the Subject through the dining room door that led into the facility backyard to protect her from any further threats of violence by DSP 1. Shortly thereafter, upon being told that it was safe to reenter the facility, the Subject and the other staff returned to the dining room, whereupon the Subject telephoned the police to report the incident. (Hearing testimony of the Subject and Justice Center Exhibits 2, 8 and 9)

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 allegation constitutes 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):

"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.

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 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))

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 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 neglect as described in Allegation 1 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-13) The investigation underlying the substantiated report was conducted by facility Quality Assurance Coordinator [REDACTED], who testified on behalf of the Justice Center.

The Subject testified at the hearing in her own behalf.

A finding of neglect requires that a preponderance of the evidence establishes that the Subject engaged in conduct that breached her duty to a service recipient and that the breach of duty 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.

The facts in this case are essentially uncontested and the issue is whether the Subject breached her duty to provide the Service Recipient with 1:1 supervision by engaging in a verbal altercation with DSP 1.

In support of the allegation that the Subject committed neglect, the Justice Center relied on facility Quality Assurance Coordinator [REDACTED] testimony that it was not possible to engage in a verbal altercation and simultaneously provide 1:1 supervision to a service recipient, and DSP 4's interview answer that he "guessed" that 1:1 supervision of the service recipients was not maintained. (Justice Center Exhibit 5)

Of the nine staff who were interviewed, DSP 4 was the only one who stated that the Subject had not maintained 1:1 supervision of the Service Recipient. On [REDACTED], DSP 4 told facility

Quality Assurance Coordinator [REDACTED] that at the time of the verbal altercation between the Subject and DSP 1, when the neglect allegedly occurred, he was in the Residential Manager's office and that by the time he exited the office, the incident was over and DSP 2 was already escorting DSP 1 out of the dining room. When asked if the service recipients were given 1:1 supervision, DSP 4 responded that he thought that DSP 1 was supervising service recipient A, but that he was unsure who was responsible for supervising the Service Recipient. When told that the Subject was to have provided 1:1 supervision of the Service Recipient, DSP 4 responded, "I guess they didn't get their 1:1."

The flaw in DSP 4's evidence is that he was not present at the time of the verbal altercation between the Subject and DSP 1, when the neglect allegedly occurred. As he was not present at the relevant time, his evidence is found to be of little weight.

Counsel for the Justice Center acknowledged that none of the other staff witnesses alleged that, during the verbal altercation, the Subject had moved away from her 1:1 supervision of the Service Recipient. Counsel for the Justice Center asserted that, nonetheless, as there was no way that the Subject could have been concentrating on the Service Recipient during the incident, she must have breached her duty to him. However, the evidence in the record was uncontroverted that during the incident the Subject maintained close proximity to and line of sight supervision of the Service Recipient.

Facility Quality Assurance Coordinator [REDACTED] testified that 1:1 supervision requires only that staff be within arm's length or three feet and within line of vision of the service recipient. There is no requirement that staff be solely focused on the service recipient, nor is there a requirement that staff not engage in conversations with other staff while providing 1:1 supervision.

As there was no evidence adduced that the Subject moved away from the Service Recipient or that she stopped watching him until she was forced to by the actions of DSP 3 and the Residential

Manager, there is no proof that the Subject failed to provide proper supervision to the Service Recipient. Consequently, the Justice Center did not establish that the Subject breached her custodial duty to the Service Recipient.

Accordingly, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed neglect under SSL § 488(1)(h), as specified in Allegation 1 of the substantiated report.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is granted.
The Subject has not been found to have committed neglect.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: April 19, 2017
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge