

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision in its entirety is hereby adopted by the Executive Director.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

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: August 15, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Timothy J. Fallon, Esq.

**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:

Mary B. Rocco
Administrative Law Judge

Held at:

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

Parties:

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: Timothy J. Fallon, Esq.
Simonetti & Associates
144 Woodbury Road
Woodbury, New York 11797

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 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 ensure adequate staffing of the dining room, despite a request from another staff member, and as a result a service recipient was not properly 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, located at [REDACTED] is a day habilitation program for individuals with developmental disabilities and is certified by the Office for People With Developmental Disabilities (OPWDD), 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 the Program Coordinator for thirteen years. As Program Coordinator, the Subject bore the responsibility to ensure proper staffing to maintain required levels of supervision for the service recipients attending the program, in addition to the day-to-day operations of the program. (Hearing testimony of the Subject). The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a sixty-nine year old female diagnosed with profound developmental disabilities. The Service Recipient required full supervision and a special spoon during meal times due to a documented history of choking. (Justice Center Exhibits 5, 14, 15, 16, 23)

7. On [REDACTED], the day of the alleged neglect, there were nine service recipients with varying developmental disabilities attending the day hab program in classroom [REDACTED]. Three of the nine service recipients required full supervision during meal times due to their potential to choke. The facility Habilitation Specialist (HS) and two other Direct Support Assistants (DSA) were assigned to classroom [REDACTED]. The facility occupational therapist usually assisted in classroom [REDACTED] at meal time to aide with appropriate supervision levels but she was not in that day. As the facility did not have written assignment sheets, the Subject assigned staff as needed based on a minimal supervision level of one staff member to every four service recipients. (Justice Center Exhibits 5 and 29; Hearing testimony of the Subject)

8. At approximately 9:30 a.m. the facility HS requested additional staff from the Subject. Without asking why extra staff were needed, the Subject denied the request. (Hearing testimony of the Subject)

9. On the day of the alleged neglect, the facility was undergoing a routine audit by OPWDD. During lunch time meal service, the OPWDD surveyor observed the Service Recipient was not receiving proper supervision, and was utilizing the wrong utensil. The surveyor notified staff present in the lunch area, who immediately replaced the Service Recipient's spoon with the proper utensil and closely monitored the Service Recipient thereafter. (Justice Center Exhibits 5, 7, 8, 10, 12, 13)

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:

(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 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 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

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. Specifically, the record

established that the Subject committed neglect when he failed to ensure adequate staffing during which time a service recipient was not properly supervised.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-29) The investigation underlying the substantiated report was conducted by OPWDD Internal Investigator [REDACTED]; however, acting lead Supervising Internal Investigator [REDACTED] testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided two documents as evidence. (Subject Exhibits A and B)

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 he breached that duty, and that his 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 Recipients. (SSL § 488(1)(h))

The facts in this matter are not in dispute. The Subject was the facility Program Coordinator and as such had the responsibility of ensuring adequate staffing throughout the day hab. The facility had been deficient in staffing for a few months and response to the Subject's request to fill staff vacancies was slow in coming from his supervisors. The facility was undergoing an audit by OPPWD on the day of the alleged neglect and the Subject testified that he was, admittedly, distracted by the process involved in the audit. The facility HS requested additional staff from the Subject that day, which the Subject denied. Additionally, it is uncontroverted that the Service Recipient, who requires close monitoring and a special utensil during meal time due to a history of choking, was observed unsupervised and shoveling food onto

the wrong type of spoon. (Hearing testimony of the Subject; Subject Exhibits A and B; Justice Center Exhibits 5, 6, 7, 8, 10, 12, 13, 14)

In his defense, counsel for the Subject argued that what occurred was a systemic failure and that the Subject did everything he could with the resources he had. The Subject testified that for each of the vacant spots in his staff, he completed the required paperwork to fill the positions and submitted it to his supervisor for processing. (Subject Exhibits A and B) The Subject testified that hiring staff was out of his control. The Subject testified that he made himself available throughout the facility regularly because he knew that there was a staffing deficiency.

Counsel for the Subject further argued that the Subject made a judgement call with the information he was provided. The Subject testified that the facility HS was at fault for not explaining to the Subject exactly why he needed extra staff. However, when questioned further, the Subject stated that he did not inquire as to the need for extra help before denying it. The Subject testified that he assumed the HS's request was for a community outing and that is why he denied the request. The Subject further testified that had the facility HS explained that additional staff were needed for meal time supervision, the Subject would have sent another staff member or he would have instructed the HS to stagger the service recipients' lunch times to avoid too many service recipients eating at one time. (Hearing testimony of the Subject)

While the Subject's testimony on his dedicated career and the affirmative steps he took to fill the empty staff positions is accepted as credible, none of the Subject's arguments abrogate his responsibility to ensure proper supervision of the Service Recipient. Therefore, based on the record, it is determined that the Subject breached his duty by failing to ensure adequate staffing, despite a request from a staff member, which resulted in improper supervision of the Service Recipient.

Despite the fact that there was no evidence in the record that the Subject's breach actually resulted in physical injury, or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient, such evidence is not necessary for a finding of neglect. The likelihood of such resulting injury or impairment was clear, corroborated by the documented history of choking by the Service Recipient and the precautions outlined in her diet plan. (Justice Center Exhibits 5, 14, 22)

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.

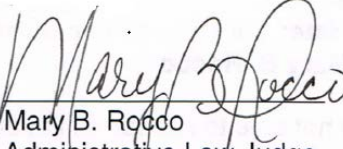
Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse or neglect set forth in the substantiated report. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act. Substantiated Category 3 findings of 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 5 years.

DECISION: The request of [REDACTED] that the substantiated report dated [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 Mary B. Rocco, Administrative Hearings Unit.

DATED: July 20, 2017
Plainview, New York



Mary B. Rocco
Administrative Law Judge