

**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 16, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject

**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:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd Floor
Brooklyn, New York 11201
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: Jacqueline Seitz, Esq.

[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], 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 eloped from the residence.

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 an Individualized Residential Alternative (IRA), operated by [REDACTED]¹, and

¹ [REDACTED] was previously known as [REDACTED]

certified by the Office for People With Developmental Disabilities, 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 was employed by [REDACTED] as a Direct Support Professional (DSP) and had worked with the vulnerable population for many years. (Hearing Testimony of Subject; Justice Center Exhibit 6)

6. At the time of the alleged neglect, the Service Recipient was a 22-year old female operating within the mild range of intellectual disability with a diagnosis of impulse control disorder. The Service Recipient was on 1:1 supervision at the IRA due to physical and verbal aggression and a history of elopement. (Justice Center Exhibits 6 and 17)

7. At the time of the alleged neglect, the Subject was assigned 1:1 supervision of the Service Recipient. The Service Recipient was speaking on the telephone in the kitchen and informed the Subject that she wanted privacy. The Subject stepped into the living room, where she turned down the television so she could hear the Subject, although she could not see her. After about five minutes the Subject could no longer hear the Service Recipient and when she stepped into the kitchen, the Subject observed the door wide open and the Service Recipient running down the stairs. The Subject was unable to run down the stairs fast enough to catch the Service Recipient. (Hearing Testimony of Subject; Justice Center Exhibits 2, 8, 10 and 17)

8. The Service Recipient ran outside and hopped into a car, which drove away, at approximately 1:00 a.m. The Service Recipient did not return to the IRA until approximately 7:00 a.m. and refused to be evaluated by medical staff. (Justice Center Exhibit 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 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) to include:

(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 as found in 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 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 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 evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time the Service Recipient eloped from the residence.

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))

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

obtained during the investigation and in preparation for this hearing. (Justice Center Exhibits 1-20) The investigation underlying the substantiated report was conducted by [REDACTED], Quality Assurance Coordinator for [REDACTED], who was not available to testify at this hearing. [REDACTED], Associate Executive Director of [REDACTED], 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.

On the day of the alleged neglect, the Subject was employed as a DSP by [REDACTED] and was clearly a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to maintain 1:1 supervision of the Service Recipient by keeping the Service Recipient at arm's length at all times. The Subject breached that duty by stepping into the living room where she could no longer see the Service Recipient and was no longer an arm's length away from the Service Recipient. (Justice Center Exhibit 17)

The Subject testified that she went into the living room to afford the Service Recipient privacy as it was her birthday and she was talking on the telephone. The Subject also testified that the Service Recipient had become physically aggressive with her in the past when she did not get her way and that the Service Recipient was trying to hit her with the telephone. The Subject testified that she turned down the television in the living room to be able to hear the Service Recipient. However, the Subject could not see the Service Recipient because the living room and the kitchen were separated by a wall. (Justice Center Exhibits 6, 19 and 20) When, after a few minutes the Subject could no longer hear the Service Recipient, she returned to the kitchen to find the door wide open and the Service Recipient running down the stairs. The Subject testified that she was not able to run fast enough to catch the Service Recipient. The Service Recipient jumped into a car which drove away.

The Subject also testified that the Service Recipient had a habit of talking with strange men that she met on Facebook and leaving the IRA to meet with them. Accordingly, the Subject by her own admission was on notice of the Service Recipient's behavior and history of elopement and breached her duty by not keeping the Service Recipient within arm's length at all times. The Subject could have stepped far enough away from the Service Recipient to avoid being hit by the telephone yet still maintained arm's length supervision. (Justice Center Exhibit 20)

Although the Service Recipient was not injured, there was a likelihood that the Subject's breach would result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. The Service Recipient jumped into a car with an unknown person at approximately 1:00 a.m. and did not return to the IRA until approximately 7:00 a.m. (Justice Center Exhibit 7) The scenarios that could have transpired within the six hours that the Service Recipient was without supervision are too numerous to name and the likelihood of harm was of great magnitude. The purpose of the 1:1 staffing was to maintain the emotional and behavioral stability of the Service Recipient by following her behavior support plan. (Justice Center Exhibit 17)

The evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time the Service Recipient eloped from the program.

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] 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: August 3, 2017
Brooklyn, New York


Keely D. Parr, ALJ