

**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 is hereby adopted in its entirety.

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: December 1, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
Nathaniel K. Charny, 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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
4 Burnett Blvd.
Poughkeepsie, NY 12601
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: Kristin Kopach, Esq.

[REDACTED]

By: Nathaniel K. Charny, Esq.
Charny & Wheeler
9 West Market Street
Rhinebeck, NY 12572

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 refused to promptly provide eyes-on supervision to a service recipient, during which time he was not properly supervised.

This allegation had been SUBSTANTIATED as Category 3 neglect pursuant to Social Services law § 493(4)(c).

3. An Administrative Review was conducted and the substantiated report was retained.

4. The facility, located at [REDACTED], is an Individualized Residential Alternative (IRA) for adults, and is operated 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 Investigator [REDACTED])

5. At the time of the alleged neglect, the Subject was employed by OPWDD as a Direct Support Assistant (DSA). His duties included supervising the service recipients living in the IRA, and assisting them in activities of daily living. (Hearing testimony of OPWDD Investigator [REDACTED], Justice Center Exhibit 25)

6. At the time of the alleged neglect, the Service Recipient was 23 years of age, and had been a resident of the facility since 2011. The Service Recipient is a non-verbal, male adult with relevant diagnoses of autistic disorder, obsessive compulsive disorder, and intellectual disability. (Justice Center Exhibits 20 and 22)

7. At the time of the alleged incident, six service recipients resided at the IRA. Five service recipients were downstairs with the Subject and DSA1. The Service Recipient was upstairs in his bedroom, and DSA2 was in another room upstairs. At approximately 6:30 p.m., DSA2 heard banging noises coming from the Service Recipient's bedroom, so she went into the hallway to investigate. The Service Recipient approached DSA2 and spat at her. (Justice Center Exhibits 11 and 25)

8. DSA2 went downstairs into the staff office to inform her supervisor, Developmental Assistant 2 [REDACTED] (DA2), of the Service Recipient's behavior. DA2 went upstairs with DSA1 to attempt de-escalation techniques with the Service Recipient, while DSA2 washed the spittle from her hair. (Justice Center Exhibits 11 and 25)

9. Initially, the Service Recipient responded appropriately, but without warning, he put his hands on DA2's neck and started choking her. She broke free and called to the Subject to come upstairs. The Subject asked for one of the three staff to come downstairs to supervise the five service recipients before he could go upstairs. The DA2 came downstairs with DSA1, and

directed the Subject and DSA1 to perform a restraint on the Service Recipient. They refused, stating that a restraint was not warranted at this point. DA2 then directed the Subject and DSA1 to go upstairs and supervise the Service Recipient. The Subject and DSA1 complied with that directive. DA2 called the Treatment Team Leader (TTL), who directed the Subject and DSA1 to provide eyes-on supervision of the Service Recipient. (Justice Center Exhibits 13 and 25)

10. The staff assignment sheet for the relevant shift showed that DSA2 was assigned to supervise the second floor from 5:00 p.m. until 7:00 p.m., and the Subject was to supervise the second floor from 7:00 p.m. until 9:00 p.m. (Justice Center Exhibit 15)

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 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 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 not 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 several documents and audio recordings on CD obtained during the investigation. (Justice Center Exhibits 1-26) The investigation underlying the substantiated report was conducted by OPWDD Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject provided one document (Subject Exhibit A) and did not testify in his own behalf.

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 Recipient. (SSL § 488[1][h])

The parties do not dispute that the Subject is a custodian as that term is defined in SSL § 488(2). The dispute concerns whether the Subject breached his duty to the Service Recipient when the Subject declined his supervisor’s initial directive to go upstairs and supervise the Service Recipient.

The Justice Center relies on the written statements of DA2 and DSA2, each of whom gave two statements. DSA2’s statements are not very probative because they consist of partial conversations she overheard from a distance, and are interspersed with assumptions and conclusions. (Justice Center Exhibits 10 and 11) DA2 handwrote and signed a statement on [REDACTED] that was extremely detailed. DA2 also signed a typed statement reflecting her interview

with OPWDD Investigator [REDACTED] on [REDACTED]. These statements are consistent in describing how the Service Recipient grabbed DA2's neck, and after she broke free, DA2 and DSA1 went downstairs, leaving the Service Recipient unsupervised upstairs in his room. (Justice Center Exhibits 8 and 9)

The various accounts of what happened after that are not consistent. The Subject and DSA1 reported that DA2 directed them to perform a restraint on the Service Recipient, which they refused to do because they did not believe a restraint was warranted. In DA2's handwritten statement, she denies asking the Subject and DSA1 to perform a restraint; but her statement to the Investigator mentions that DSA1 refused to perform the restraint. At that point, DA2 stated that she would call the TTL, and the Subject and DSA1 went upstairs to supervise the Service Recipient. The TTL directed the Subject and DSA1 to provide "eyes-on" supervision of the Service Recipient, with which they complied. At no time prior to the conversation with the TTL did DA2 indicate in her statements that she had directed the Subject to provide "eyes-on" supervision of the Service Recipient. (Justice Center Exhibits 8, 9, and 25)

In his defense, the Subject contends that he was the only staff downstairs, supervising five other service recipients, when DA2 called to him to go upstairs with the rest of the staff and take care of the crisis involving the Service Recipient. During his interrogation, the Subject explained that he could not leave the other service recipients unsupervised; which was corroborated by DSA1. (Justice Center Exhibit 25) At the time of the incident, the Subject was not aware that DSA2 had come downstairs and was washing her hair after the Service Recipient spat at her. The staff assignment sheet clearly states that DSA2 was assigned to the second floor during this time. All the service recipients in the IRA needed to be supervised, and to the Subject's knowledge, no other staff was on the first floor. It was not unreasonable for the Subject to ask that someone

relieve him before he could go upstairs. Therefore, the record does not support the contention that the Subject breached his duty 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] 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 Jean T. Carney, Administrative Hearings Unit.

DATED: November 20, 2017
Schenectady, New York


Jean T. Carney
Administrative Law Judge