

**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: January 3, 2018
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:

Mary B. Rocco
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street
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: Perry Cerrato, 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 2¹

It was alleged that on unspecified dates between [REDACTED], at one of [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you yelled at and/or spoke inappropriately to a service recipient.

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 private home licensed as part of a [REDACTED] program that assists psychiatric patients transition from

¹ Allegation 1 was unsubstantiated.

hospital back into the community. The program is operated by the Office for Mental Health (OMH), 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 licensed as a Family Care Provider for approximately 14 years. The Subject's home was a three-story private house in which three service recipients occupied the main floor and the Subject and her family occupied the floor above. As a family care provider, the Subject was responsible for providing shelter, dispensing and monitoring medication, preparing meals, assisting with hygiene and promoting an overall structured home environment to assist with the service recipients' assimilation into the community. (Hearing testimonies of Justice Center Investigator [REDACTED] and the Subject) The Subject was a custodian as that term is defined in Social Services Law § 488(2).

6. At the time of the alleged neglect, the Service Recipient was a 41 year-old male with relevant diagnoses of schizoaffective disorder and alcohol induced depressive disorder and had resided with the Subject for just under a year. The Service Recipient attended [REDACTED], a day habilitation program, daily, where he was also employed. (Justice Center Exhibits 6 and 16; Hearing testimonies of Justice Center Investigator [REDACTED] and the Subject)

7. The Service Recipient met with a Family Care Specialist at least once a month, both in the home and at his day program. The Family Care Specialist had worked with the Service Recipient since [REDACTED], and he never reported any issues with the Subject during those meetings until [REDACTED]. (Justice Center Exhibits 6 and 16)

8. On [REDACTED], the Service Recipient informed his Family Care Specialist that the Subject had been disrespectful to him over the past year and that he wanted to be removed from the home. The Service Recipient was placed in another home shortly thereafter. (Justice Center Exhibits 6 and 16)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act giving rise to the substantiated report.
- Whether the substantiated allegations constitute neglect.
- Pursuant to Social Services Law § 493(4), the category of 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 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 not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents and recorded interviews obtained during the investigation. (Justice Center Exhibits 1-16) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who was the only witness to testify at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided four videos as evidence. (Subject Exhibit A)

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 Justice Center alleged that at some point during the period of [REDACTED], the Subject yelled at and/or spoke inappropriately to the Service Recipient and told him that “he did not have a home” and that “his family didn’t want him.”

In support of the allegation, the Justice Center relied on the Justice Center Investigator’s report (Justice Center Exhibit 6) and testimony. In his interview, the Service Recipient stated that the Subject was disrespectful and rude to him over the past year. When questioned why he never reported it to his Family Care Specialist with whom he met monthly at the home and at the day habilitation program, the Service Recipient stated that the Subject was always present during these visits and he did not want to speak in front of her. When the Investigator inquired about the many Family Care Specialist’s visits at the day habilitation program or any of the other visits that the Service Recipient made to the Family Care office that the Subject was not present for, the Service Recipient was unable to credibly answer. (Justice Center Exhibit 6 and 16)

In her interview, the Family Care Specialist stated that she had been monitoring the Service Recipient and the Subject from [REDACTED] and was surprised by the allegation. The Family Care Specialist stated that she witnessed a very supportive home setting. She stated that the Service Recipient appeared happy, clean and well taken care of, as well as acknowledging that the Subject ran a strict, regimented schedule which was beneficial to the service recipients. The Family Care Specialist further stated that she met with the Service Recipient monthly, sometimes two to three times a month, at the home and at the day habilitation

program, and he never mentioned any issue or expressed any concerns. The Family Care Specialist stated it was quite the opposite, the Service Recipient was very complimentary and protective of the Subject. The Family Care Specialist did note that the Service Recipient was not happy when the other two service recipients had moved in, as they were very loud and required a lot of assistance due to their low functioning conditions. The Family Care Specialist also stated that at about the time the Service Recipient made the allegation, a potential new service recipient resident was visiting the home as a trial run, and this may have upset the Service Recipient. The Family Care Specialist confirmed that the Service Recipient had a problem with continual alcohol use. (Justice Center Exhibits 6, 8, 9 and 16)

The Investigator interviewed the two other service recipient residents who had no complaints and wanted to remain in the Subject's home. Additionally, in their interviews, neither the Health Coordinator nor the Family Care Coordinator were able to provide any relevant evidence other than to acknowledge that neither one of them reported the allegation to the Justice Center when they were initially made aware of it. (Justice Center Exhibit 16)

At the conclusion of her investigation, the Justice Center Investigator unsubstantiated the initial allegation of psychological abuse. In her report, the Investigator stated: "Based on the interviews conducted, there is insufficient evidence to corroborate that [the Subject] made the statements to [the Service Recipient] that he does not have a home or his family does not want him." (Justice Center Exhibit 6)

The Subject denied that she yelled or spoke inappropriately to the Service Recipient. The Subject testified that she had housed the Service Recipient for just about a year and was very surprised when he was removed from her home. The Subject testified, and the record supported, that she had a very good relationship with the Service Recipient, and it was only recently that his

drinking started to increase and his behavior began to change. The Subject further testified that she was continually counseling and even praying with the Service Recipient to help with the escalation of his drinking. The Subject acknowledged running a strict, organized home and explained that the structured environment was necessary for the service recipients' successful transition into the community. (Hearing testimony of the Subject)

The Subject testified that about a week prior to the Service Recipient making the allegation, he arrived at the home so intoxicated that he fell face first into the house and she had to call for an ambulance. The Subject introduced three videos (Subject Exhibit A – Videos 1, 2 and 3), date stamped [REDACTED], which clearly show the Service Recipient lying face down on the ground as an emergency medical technician administers assistance. Prior to the ambulance arriving, the Subject can be heard requesting that the Service Recipient get off the floor or she would have to call for help. The Service Recipient remained unresponsive and motionless. The Subject testified that she believed that the Service Recipient was embarrassed and upset with her for calling an ambulance. (Justice Center Exhibit 16 and Hearing testimony of the Subject)

The preponderance of the evidence in the record does not support the conclusion that the Subject breached her duty to the Service Recipient. The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on this material issue, finds her testimony to be credible. There is no credible evidence in the record to corroborate the allegation that the Subject committed neglect when between [REDACTED] [REDACTED], she yelled at/or spoke inappropriately 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.

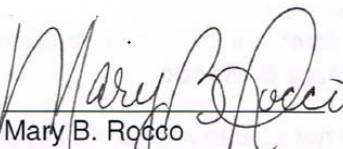
DECISION:

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 Mary B. Rocco, Administrative Hearings Unit.

DATED: December 18, 2017
Plainview, New York


Mary B. Rocco
Administrative Law Judge