

**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]

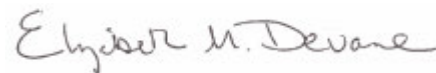
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: April 19, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kevin McGuckin, Esq.
[REDACTED], Subject
J. Kevin Meneilly, 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, Suite 104
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: Kevin McGuckin, Esq.

[REDACTED]

By: J. Kevin Meneilly, Esq.
Attorney at Law
225 Old Country Road
Melville, New York 11747

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 [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you pulled and/or dragged a service recipient.

The 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 [REDACTED] (hereinafter "Day Hab"), located at [REDACTED], is a daily program designed to offer

¹ It should be noted that Allegation 1, alleging physical abuse for the same conduct alleged in Allegation 2, was unsubstantiated.

meaningful activities for individuals with varying developmental disabilities and is operated by [REDACTED] and certified by the Office for People With Development Disabilities (hereinafter "OPWDD"), 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 had been employed at the Day Hab for approximately two years as a Habilitation Specialist (hereinafter "HS") with a regular shift of [REDACTED], Monday through Friday. As an HS, the Subject's duties consisted of supervising his assigned classroom of fifteen to twenty service recipients, as well as the supervision of two Direct Support Professionals (DSPs) assigned to the same classroom, with the safety and well-being of the service recipients being paramount. The Subject was responsible for classroom instruction, in addition to assisting service recipients with their routine daily activities. (Hearing testimony of 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 sixty-one-year-old non-verbal male who functioned within the severe range of intellectual disability and was blind in his right eye. The Service Recipient did not like to be touched, became upset in crowded areas and was predictably aggressive when returning from doctor's appointments. The Service Recipient's aggression generally manifested in the pushing of objects, staff and other service recipients. The Service Recipient also suffered from severe arthritic psoriasis which manifested in skin flare ups ranging from small red marks to large red marks and were often mistaken by staff for injuries. (Justice Center Exhibits 8, 9 and 14; Hearing testimonies of Justice Center Investigator [REDACTED] (hereinafter "Investigator") and the Subject)

7. At approximately 11:45 a.m., the Service Recipient returned from a medical

appointment and joined his class who were in the Day Hab multipurpose room just finishing their scheduled lunch. The multipurpose room was a gymnasium that was set up with tables for lunch time, with at least two classes present in the multipurpose room during the alleged incident. The Subject, DSP 1 and DSP 2 were assisting approximately sixteen service recipients with eating lunch, cleaning up thereafter and toileting before being escorted back to the classroom. There were approximately five service recipients confined to wheelchairs with all of the service recipients functioning at varying developmental stages and requiring differing levels of supervision. (Justice Center Exhibits 6 and 14: audios of interviews of DSP 1 and DSP 2 and interrogation of the Subject; Hearing testimony of the Subject)

8. While waiting to be escorted back to the classroom, the Service Recipient became agitated and pushed the table he was seated at with other service recipients. The Subject verbally attended to the Service Recipient assuring him that everything was fine and that he would be returning to the classroom momentarily. The Subject turned to continue feeding another service recipient and the Service Recipient pushed the table again. The Subject again spoke to the Service Recipient reassuring his safety and requesting that he calm down. (Justice Center Exhibit 14: audio of interrogation of the Subject; Hearing testimony of the Subject)

9. As some of the service recipients were ushered towards the door with DSP 2 to return to the classroom, the Service Recipient became agitated and pushed a passing service recipient. The Subject approached and again verbally attended to the Service Recipient assuring him and requesting that he calm down. Moments later, the Service Recipient pushed another service recipient towards a wall that was equipped with coat hooks and a fire extinguisher. The elderly service recipient was unsteady and visibly upset. DSP 1 immediately left the service recipient she was feeding and attended to the service recipient that had just been pushed. With

concerns of safety due to the Service Recipient's continued physical aggression, the Subject spoke to the Service Recipient, and using touch control, he placed a hand on the Service Recipient's shoulder and a hand under the Service Recipient's forearm/wrist and began to guide him toward the door with the objective of removing him from the other service recipients. (Justice Center Exhibits 2 and 14: audio of interrogation of the Subject; Hearing testimony of the Subject)

10. As the Subject guided the Service Recipient, the Service Recipient began to struggle, at which point DSP 1 approached to offer assistance. DSP 1 initially attempted to verbally calm the Service Recipient, but the Service Recipient continued to push both the Subject and DSP 1. The Subject and DSP 1 then initiated a two-person escort with the Subject wrapping an arm around the Service Recipient's back and placing a hand under his forearm/wrist while DSP 1 did the same on the Service Recipient's other side. While thus escorting the Service Recipient, and while the Subject attempted to push the door open with his hip/buttock and maintain hold of the Service Recipient, the Service Recipient suddenly fell to the ground. The Subject, still holding the Service Recipient's wrist, bent down, hooked the Service Recipient under the arm and together with DSP 1, who was on standing on the Service Recipient's other side, assisted the still struggling Service Recipient up from the floor. The Subject called out to DSP 3, who was attending to another class in the same room, to watch the rest of his class for a moment. The Subject and DSP 1 continued with the two-person escort and arrived seconds later at the relaxation room, where the Service Recipient immediately calmed. (Justice Center Exhibit 14: audios of interview with DSP 1 and the interrogation of the Subject; Hearing testimony of the Subject)

11. Moments later the Service Recipient returned to the classroom where he completed the day uneventfully. A body check was done immediately following the incident that indicated red marks on the back of both wrists and another check at 3:05 p.m. that indicated a nickel size

bruise located at the outer area of the Service Recipient's left wrist. (Justice Center Exhibits 11 and 14: audios of interview of DSP 1 and interrogation of the Subject; Hearing testimony of the Subject)

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:

"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 neglect, described as “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by [REDACTED], Justice Center Investigator, who testified at

the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided one document that was received into 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 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))

On the day of the alleged neglect, the Subject was employed as an HS and was therefore acting as a custodian as that term is defined in Social Services Law § 488(2). The Subject acknowledged that he owed a duty to the service recipients to ensure their safety, security and well-being, but denied breaching that duty.

The Subject credibly testified that, while providing supervision oversight in the multipurpose room, following numerous attempts at verbal de-escalation, he initiated a touch control escort and then an assisted two-person escort following the Service Recipient exhibiting maladaptive behaviors that were becoming increasingly dangerous to other service recipients. During the two-person escort, the Service Recipient unexpectedly fell to the floor. Together the Subject and DSP 1 lifted the Service Recipient off the floor, regaining the two-person escort, and guided the Service Recipient out the door and into the relaxation room where the Service Recipient immediately calmed. The Subject and DSP 1 steadfastly denied dragging or pulling the Service Recipient and the Subject maintained that any injury noted was either incidental to the fall or a result of the Service Recipient's documented and often misdiagnosed psoriasis. (Justice Center Exhibits 14: audios of interview of DSP 1 and the interrogation of the Subject)

The Justice Center relied on two witness statements from staff present in the multipurpose room attending to other classes and two facility body check forms in support of the allegation. (Justice Center Exhibits 11, 13 and 14: audios of interviews of HS 1 and DSP 3)

HS 1 reported that she witnessed the Subject yell at the Service Recipient and was pulling him by both of his wrists from where he had fallen on the floor. HS 1 stated that she then witnessed DSP 1 approach and that the Subject handed the Service Recipient's right wrist to DSP 1 wherein they both began to pull the Service Recipient up off the floor by his wrists. HS 1 stated that the Service Recipient, now standing, again fell to the floor and that the Subject and DSP 1 then dragged the Service Recipient out the door and down the hallway. During her interview, HS 1 acknowledged that she was located more towards the middle of the multipurpose room, that she was focused on feeding a 1:1 supervision required service recipient and admitted that she did not see the entire encounter. (Justice Center Exhibits 6 and 14: audio of interview of HS 1)

The Subject testified that HS 1 had reason to fabricate the allegation in retaliation for a negative evaluation he had given of her. Statements of DSP 1, DSP 2, DSP 4 and HS 1 herself, all of which acknowledged a history of tension between HS 1 and the Subject, lend credence to the Subject's assertion that HS 1 had a strong motivation to fabricate. (Justice Center Exhibit 14) Moreover, HS 1's version of events admittedly did not include the entirety of the encounter, nor was it consistent with that of DSP 3 or DSP 1, who, against her own interests, detailed the interaction fundamentally consistent with the version given by the Subject. Thus, HS 1's evidence is found to be of little evidentiary weight.

The Justice Center additionally proffered and emphasized the written statement and interview of DSP 3 who stated that he was present in the multipurpose room attending to another class about twenty feet or so from where the Subject and the Service recipient were located. DSP

3 stated that he heard HS 1 yell at the Subject, not the Subject yell at the Service Recipient as alleged by HS 1, and that he then saw the Subject alone pulling the Service Recipient strongly by the arm out of the multipurpose room like “an animal on a leash.” (Justice Center Exhibits 13 and 14: audio of interview with DSP 3)

Similar to HS 1, DSP 3 acknowledged that he did not see the entire encounter as he was focused on feeding the service recipients he was assigned. Notably, DSP 3 stated that himself, the Subject and HS 1 were the only staff present in the multipurpose room during the incident, with no mention of DSP 1’s presence. (Justice Center Exhibits 6, 13, and 14: audio of interview of DSP 3) Although DSP 3’s description of “an animal on a leash” conjures a disturbing image, it does little to rectify the elementary discrepancies in his account. At best, DSP 3’s description was a simple misperception or an exaggeration of a snippet of the Subject’s actions. It was also noteworthy that both HS 1 and DSP 3 admittedly did not intervene but rather left the multipurpose room and the service recipients they were charged with supervising to report to a supervisor. (Justice Center Exhibits 6, 13, and 14: audio of interviews of HS 1 and DSP 3) Whereas the statements of HS 1 and DSP 3 may be ostensibly corroborative, neither were convincing or congruent and therefore not credited evidence.

Conversely, the Subject’s testimony detailing the encounter and denying the allegation was presented in a clear, persuasive and forthright manner. The Subject’s testimony provided a credible and compelling narrative of the entire incident. Additionally, DSP 1’s altruistic statement was consistent and corroborative in all pertinent respects to that of the Subject’s version of events.

Accordingly, it is concluded that, in weighing the totality of the evidence in the record, 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 2 of the substantiated

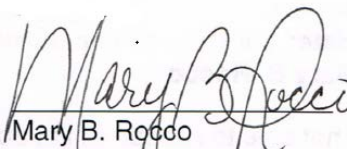
report.

DECISION:

The request of [REDACTED] that the substantiated report dated [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: April 12, 2019
Plainview, New York


Mary B. Rocco
Administrative Law Judge