

**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]

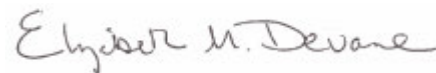
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 23, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Kevin McGuckin, Esq.
[REDACTED], Subject
Shellon Washington, 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:

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: Kevin McGuckin, Esq.

[REDACTED]

By: Shellon Washington, Esq.
2720 Farragut Road, Suite 100
Brooklyn, New York 11210

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 directed a derogatory comment toward a service recipient and/or threatened her.

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] and

¹ Allegation 1 was unsubstantiated.

certified by the Office for People With Developmental Disabilities (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 was employed by a temporary agency and worked at the IRA as a Direct Support Professional. The Subject had been working with the Service Recipient for approximately seven months. (Hearing Testimony of Subject)

6. At the time of the alleged neglect, the Service Recipient was a 23-year old female, functioning in the mild intellectual disability range, diagnosed with bipolar and impulse control disorders with a history of schizophrenia. During waking hours, the Service Recipient was on 2:1 line of sight supervision due to frequent and severe target behaviors including self-injury and aggression. Staff #1² and the Subject were both assigned to the Service Recipient. (Justice Center Exhibits 6 and 24)

7. At approximately 8:30 a.m. on the morning of the alleged neglect, the Subject told the Service Recipient that she should wait to put on her blouse because it was for church and the Service Recipient had not eaten breakfast yet. The Service Recipient became upset and cursed at the Subject. The Subject cursed back at the Service Recipient. The Subject told the Service Recipient that she was not taking her anywhere acting like that. (Hearing Testimony of Subject; Justice Center Exhibits 6 and 7)

8. Staff #1 stated that the Service Recipient did not understand what the Subject told her and hence asked the Subject, “why are you being so mean to me?” Staff #1 tried to explain to the Service Recipient what the Subject meant, however the Subject and Service Recipient began yelling at each other. Staff #1 stated that the Subject yelled at the Service Recipient that she was not going anywhere with her acting like that. Staff #1 telephoned her supervisor to report the

² [REDACTED]

incident and moments later received a telephone call from the Regional Director who instructed Staff #1 to put the Subject on the telephone and to take the Service Recipient to the apartment next door. (Justice Center Exhibits 6, 11 and 18)

9. Staff #2³, in the apartment next door, heard yelling and moments later the Service Recipient and Staff #1 knocked on the door, asking if they could stay in the apartment. Staff #2 stated that the Service Recipient was upset and agitated. The Subject was instructed to leave the premises. (Justice Center Exhibits 6, 12 and 16)

10. On the day after the alleged incident, a post incident counseling assessment was performed. It was noted that the altercation affected the Service Recipient “in some ways” and that discussing the incident “bothered her on some level.” The Service Recipient stated that she would start a fight with the Subject if she saw her again. (Justice Center Exhibits 13 and 23)

11. Approximately two months after the alleged incident, a psychological assessment was performed. The Service Recipient acknowledged the incident with the Subject, stated that she was disappointed and upset but that she calmed down and got better with time. No substantial diminution of the emotional, social or behavioral development or condition of the Service Recipient was found. (Justice Center Exhibits 6 and 21)

12. The Service Recipient’s Behavioral Support Guidelines (BSG) state that staff are to minimize attention when the Service Recipient has a precursor to a behavioral outburst such as making negative statements and/or screaming. Minimizing attention included a monotone voice, acting disinterested, keeping conversation to a minimum and not negotiating with the Service Recipient. (Justice Center Exhibit 25)

³ [REDACTED]

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 neglect of a person in a facility or provider agency is defined by SSL § 488(1) 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 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 abuse and/or 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 abuse and/or 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 acts of abuse and/or neglect cited in the substantiated report constitutes the category of abuse and/or 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.

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. (Justice Center Exhibits 1-28) The investigation underlying the substantiated report was conducted by [REDACTED] Investigator [REDACTED], who was not available to testify at the hearing. [REDACTED] Quality Assurance Manager, [REDACTED] (QA Manager), 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 Direct Support Professional and was acting as a custodian as that term is defined in Social Services Law § 488(2). The Subject had a duty to follow the Service Recipient's Behavioral Support Guidelines (BSG), which duty she breached by not minimizing attention when the Service Recipient had a precursor to a behavioral outburst including making negative statements and screaming. Minimizing attention included a monotone voice, acting disinterested, keeping conversation to a minimum and not negotiating with the Service Recipient. Instead of following these guidelines, the Subject did the exact opposite and agitated the Service Recipient. (Hearing Testimony of QA Manager; Justice Center Exhibit 25)

The Subject testified that she told the Service Recipient not to put on her white shirt because she was going to breakfast, and she would get dirty, that the Service Recipient became upset and began yelling at the Subject. The Subject denied yelling back at the Service Recipient, testifying that she did not call the Service Recipient a "bitch" but simply asked the Service Recipient, "Did you just call me a bitch"? Even crediting the Subject's testimony, which is contradicted by evidence in the record, results in the Subject breaching her duty to the Service Recipient. The Subject testified that the Service Recipient was upset. As per the Service Recipient's BSG, the

Subject was to minimize attention by acting disinterested and keeping conversation to a minimum in response to the Service Recipient making negative statements and screaming; asking the Service Recipient whether she just called her a bitch is not in accord with these guidelines and only further escalated the Service Recipient. (Hearing Testimony of Subject; Justice Center Exhibits 6 and 25)

Additionally, Staff #1 stated that the Subject was yelling at the Service Recipient telling her that she was not going anywhere with her acting like that. The Subject denied yelling, testifying that she asked the Subject how are we supposed to go on the train with you acting like that? One again, the Subject breached her duty to minimize attention and escalated the Service Recipient who thought that she would not be going to church. During her post incident counseling session, the day after the alleged incident, the Service Recipient stated that she would start a fight with the Subject if she saw her again. (Hearing Testimony of Subject; Justice Center Exhibits 13 and 18)

Although no physical injury was observed, there was a likelihood that the Subject's breach would result in the serious or protracted impairment of the mental or emotional condition of the Service Recipient. During the alleged incident between the Subject and the Service Recipient, the Service Recipient became upset and agitated and was cursing and yelling. Staff #1 stated that the Service Recipient asked the Subject, "why are you being so mean to me?" Staff #2 stated that the Service Recipient was upset and agitated. On the day after the incident, during her assessment, it was noted that the altercation affected the Service Recipient "in some ways" and that discussing the incident "bothered her on some level." The Service Recipient also stated that she would start a fight with the Subject if she saw her again. During her psychological assessment, performed approximately two months after the alleged incident, the Service Recipient stated that she felt disappointed and that she was crying and upset but then got better. The Subject argued that since

there was no finding of a substantial diminution of the emotional, social or behavioral development or condition of the Service Recipient, that the Justice Center did not prove their case. However, a finding of neglect can be established by a likelihood that the Subject's breach of her duty would result in the serious or protracted impairment of the mental or emotional condition of the Service Recipient, which has been established. The BSG are in place to reduce the Service Recipient's challenging behaviors including emotional outbursts which are precipitated by the Service Recipient not getting what she wants. These behaviors severely limit the Service Recipient's independence and "could benefit from additional support". One of the behaviors sought to be reduced was aggression. Instead of facilitating a reduction in these behaviors, the Subject agitated her. Accordingly, the Subject's breach resulted in the likelihood of the serious or protracted impairment of the mental or emotional condition of the Service Recipient. (Justice Center Exhibits 11, 13, 16, 21, 25 and 26)

The evidence establishes that the Subject committed neglect when the Subject directed a derogatory comment toward the Service Recipient and/or threatened her.

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: April 17, 2019
Brooklyn, New York


Keely D. Parr, ALJ