

**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]

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Laurie Cummings, Esq.

[REDACTED]

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED:

The request of [REDACTED] that the substantiated report dated [REDACTED]
[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.

NOW, THEREFORE, IT IS DETERMINED that the record of this report shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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: May 30, 2017
Schenectady, New York



David Molik
Administrative Hearings Unit

**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
163 West 125th Street
New York, New York 10027
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived

New York State Justice Center for the Protection
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Laurie Cummings, 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 multiple dates between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide adequate medical care to a service recipient by administering double doses of a medication to 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 the [REDACTED], an organization certified by the New York State 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 [REDACTED] Associate Director [REDACTED])

5. At the time of the alleged neglect, the Subject was employed by [REDACTED] as a Direct Support Staff (DSS). In addition, the Subject was an Approved Medication Administering Personnel (AMAP) since 2011. The Subject was a custodian as that term is so defined in Social Services Law § 488(2). (Justice Center Exhibits 11 and 21)

6. At the time of the alleged neglect, the Service Recipient was a 79-year-old resident of the facility. Her relevant diagnoses included schizophrenia and seizure disorder. (Justice Center Exhibits 6 and 8)

7. The Service Recipient was prescribed Lamotrigine, 200 mg in the morning, and 250 mg in the evening. Lamotrigine comes in 100 mg tablets, so the Service Recipient should have received two tablets in the morning, and two and one-half tablets in the evening. The pharmacy packaged the medication into blister packs so that each blister contained one dose, and the pack contained a 15 day supply of the medication. (Hearing testimony of [REDACTED] Associate Director [REDACTED]; Justice Center Exhibits 6, 8, 18 and 18-A)

8. On [REDACTED], Staff [REDACTED], who normally worked at another IRA, was covering a shift at the facility and reported that it appeared that the Service Recipient had received double doses of Lamotrigine on more than one occasion. (Hearing testimony of [REDACTED] Associate Director [REDACTED]; Justice Center Exhibit 12)

9. During the relevant time, staff noticed that the Service Recipient began exhibiting unusual behaviors including irritability, visual hallucinations, increased sleeping problems, ambulation issues, and vomiting. These behaviors could be attributed to Lamotrigine use, and they subsided once the medication overdose was detected and corrected. (Justice Center Exhibits 7, 10

and 13; Hearing testimony of [REDACTED] Associate Director [REDACTED])

10. When administering medications, staff are trained to triple check to ensure that the proper medication and dosage are given to the service recipients. Triple checking consists of checking the blister pack against the prescription and the physician's order form before dispensing the medication. (Hearing testimony of [REDACTED] Associate Director [REDACTED]; Justice Center Exhibits 14, 20 and 21)

11. The Subject did not triple check the Service Recipient's Lamotrigine before administering the medication to her. On seven dates between [REDACTED] and [REDACTED], the Subject opened two doses of Lamotrigine in the blister pack and failed to account for the extra dose. (ALJ Exhibit 18-A; Hearing testimony of Subject; Justice Center Exhibits 2, 18 and 19)

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 allegation constitutes 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 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 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.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-22) The investigation underlying the substantiated report was conducted by [REDACTED] Associate Director [REDACTED], who was the only witness who testified on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence. The Administrative Law Judge presiding over this hearing admitted on her own motion the empty blister pack of medication given to the Service Recipient during the relevant time (ALJ Exhibit 18-A); On consent of the parties, correspondence between [REDACTED] and the Subject’s former representative was also admitted. (ALJ Exhibit 1)

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 this 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))

There is no dispute in this matter that the Subject was a custodian as that term is defined in § 488(2). The Subject owed a duty of care to the Service Recipient to ensure that she received the

proper amount of medication as prescribed by her doctor. The Subject breached this duty by failing to follow protocol. The Subject admitted that he did not triple check the Service Recipient's blister pack of medication against the prescription and the physician's orders. In his defense, the Subject argued that he did not have time to triple check every medication prior to dispensing them to the service recipients. (Hearing testimony of Subject; Justice Center Exhibit 2) However, that protocol was put into effect in order to prevent medication errors such as this from occurring.

In addition to triple checking, AMAP staff are trained to date and initial next to each blister of medication they dispense. (Hearing testimony of Subject) On seven dates between [REDACTED] and [REDACTED], the Subject's initials appear next to a line drawn between two blisters. The date is at the top of one blister, and the initials are at the bottom of the second blister. (ALJ Exhibit 18-A) Therefore, it is more likely than not that the Subject dispensed two blisters of medication to the Service Recipient on those dates. At the hearing, the Subject asserted that he had popped those extra blisters in error; but he had not dispensed the medication to the Service Recipient. Rather, the Subject testified that he had put the medication back and taped over the blister, with the intention of informing his supervisor of the error, but he forgot to do so. (Hearing testimony of Subject) The Administrative Law Judge presiding over the hearing, having observed and evaluated the hearing testimony of the Subject on this material issue, does not find his testimony on this issue to be credible. [REDACTED] Associate Director [REDACTED] testified that if a blister is popped in error, then the medication should be placed back into the blister, sealed with tape, and a note made on the back of the blister pack. There was no such note on the back of the blister in this case. (ALJ Exhibit 18-A) Further, nothing in the record corroborates the Subject's testimony in this regard. Therefore, the preponderance of the credible evidence supports the contention that the Subject administered double doses of Lamotrigine to the Service Recipient on seven occasions

██████████ during the relevant period of time, including twice on ██████████. (Justice Center Exhibits 18 and 19; ALJ Exhibit 18-A)

As a result of the Subject's breach, the Service Recipient suffered physical injury as well as a serious or protracted impairment of her mental and emotional condition. The record clearly sets forth the Service Recipient's deteriorating mental health, including hallucinations where she could not see her legs and believed that they were gone. (Hearing testimony of ██████████ Associate Director ██████████) Staff reported that the Service Recipient would walk into walls and doors; she was unable to sleep at night; she would slap her legs and argue with someone only she could see. (Justice Center Exhibit 13) The fact that these behaviors stopped once the medication overdose was discovered and corrected indicates that it was more likely than not that they occurred as a result of the Subject's breach.

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 abuse or 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 is properly categorized as a Category 3 act.

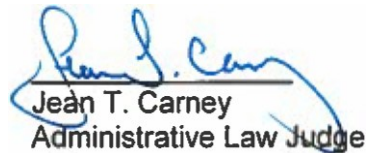
DECISION: The request of ██████████ that the substantiated report dated ██████████
██████████, ██████████ be amended and sealed is denied.

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 Jean T. Carney, Administrative Hearings Unit.

DATED: May 23, 2017
Schenectady, New York



Jean T. Carney
Administrative Law Judge