

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER
HEARING**

Adjud. Case #:

██████████

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

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

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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 ██████████ that report "substantiated" on ██████████, ██████████ dated and received on ██████████ 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 Person's 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: September 22, 2015
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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977
On: ██████████

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 of
People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Todd Sardella, Esq.

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating ██████████ (the Subject) for abuse and/or 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 report "substantiated" on ██████████, ██████████ ██████████, dated and received on ██████████ of abuse and/or neglect by the Subject against a Service Recipient.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Offense 1

It was alleged that on ██████████, at the ██████████, located at ██████████, while acting as a custodian, you committed neglect when you failed to secure a service recipient's wheelchair, causing the wheelchair to roll and tip over, resulting in injury to her elbow and ankle.

This allegation of neglect has been SUBSTANTIATED as a Category 3 offense pursuant to Social Services Law § 493.

3. An Administrative Review was conducted and, as a result, the substantiated report was retained.

4. The facility, the ██████████ ██████████, located at ██████████ ██████████ ██████████ ██████████ ██████████ ██████████, is a ██████████ ██████████ group home providing care to adults with

██████████ developmental disabilities and psychiatric diagnoses, and is operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or 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 by ██████████ ██████████ and at the facility as a Direct Support Aide (DSA) for a period of ██████████. She was working at her regular shift from 4:00 p.m. to 12:00 a.m. The Subject and three other DSAs were assigned to provide general supervision to the nine facility residents, including the Service Recipient. (Hearing testimony of ██████████, Subject)

6. At the time of the alleged neglect, the Service Recipient was a fifty-nine year old individual who had been a resident of the facility for ██████████. In ██████████, the Service Recipient lost her independent mobility and became wheelchair bound. The Service Recipient is a person with a diagnosis of severe intellectual disabilities and psychotic disorder not otherwise specified. (Justice Center Exhibit 5)

7. The facility is a ranch style house with the front door exiting onto a front porch, which has a wheelchair ramp leading straight down to the sidewalk. On ██████████, at approximately 6:00 p.m., a fire drill was carried out at the facility. Some of the residents, including the Service Recipient, had to be pushed out of the facility by means of a wheelchair. (Justice Center Exhibit 5)

8. The Subject was responsible for evacuating the Service Recipient and another wheelchair bound resident from the facility. The Subject exited the facility pushing the Service Recipient in front of her, with the other resident behind her. After the Subject rolled the wheelchair bound Service Recipient onto the front porch, the Subject turned away from the Service Recipient to evacuate the other resident behind her. The Subject did not secure the Service Recipient's wheelchair brake at that time. (Justice Center Exhibit 5)

9. As she turned her attention away from the Service Recipient, the Service Recipient's wheelchair began to roll forward and tilted off of the side of the porch. Because the Service Recipient was strapped into the wheelchair, she did not fall out, but the wheelchair began dangling from the porch. The Subject and another DSA rushed to prevent the wheelchair from falling to the ground. Because they could not pull the wheelchair back up on to the porch from its precarious position, they lowered it to the ground with the Service Recipient still in the wheelchair. (Justice Center Exhibit 5)

10. Immediately subsequent to the incident, the facility staff members believed that the only injury to the Service Recipient was a mildly scraped elbow. However, two days later, on [REDACTED], the Service Recipient was diagnosed with a fractured ankle as a result of the incident. (Justice Center Exhibit 12)

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/or 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))

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The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h), to include:

"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 abuse or neglect, which means:

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(s) 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 abuse and/or 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 act 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.

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If the Justice Center did not prove the abuse and/or neglect by a preponderance of 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 a prohibited act described as Offense 1 in the substantiated report. Specifically, the evidence establishes that the Subject committed an act of neglect by failing to engage the brakes on the Service Recipient's wheelchair before letting go of it during a fire drill.

Neglect, under SSL § 488(1)(h), was established in that the Subject's "inaction or lack of attention" was a breach of her duty to the Service Recipient that resulted "in physical injury" to the Service Recipient.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-19) The investigation underlying the substantiated report was conducted by Justice Center Investigator ██████████, who, together with ██████████, testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf and provided no other evidence.

The Subject's answer to the allegation was that she did engage the brakes on the Service Recipient's wheelchair and that the Service Recipient was able to and did, in fact, release the brakes on her own, causing her wheelchair to roll away. (Hearing testimony of ██████████, Subject)

On ██████████, Justice Center Investigator ██████████ attended the facility and interviewed all four of the DSAs who were present on the date of the incident, each of whom provided her with a signed statement. (Justice Center Exhibits 6, 7, 8 and 9)

DSA ██████████ provided a signed statement which indicates that when the Subject

■■■■■ exited the facility, pushing the Service Recipient's wheelchair, DSA ■■■■■ was standing at the safe area, located on the sidewalk in front of the facility at the end of the facility wheelchair ramp. From that location, DSA ■■■■■ observed that:

■■■■■ came out of the residence with [the Service Recipient]. [The Service Recipient] was in a manual wheelchair. ■■■■■ was pushing the wheelchair from behind. ■■■■■ took a few steps and then let go of the wheelchair. The Service Recipient] leaned forward and the wheelchair rolled down the ramp and tipped over on it's (sic) side. (Justice Center Exhibit 7)

DSA ■■■■■ provided a signed statement that he was also standing at the safe area during the relevant time and from that location, DSA ■■■■■ observed:

I saw ■■■■■ coming out of the house pushing [the Service Recipient] in the wheelchair. [Another resident] was in the grass area in his wheelchair near the door... I saw [the Service Recipient] coming down the ramp tilting to the left side. ■■■■■ was holding onto the wheelchair... I looked back toward the house ■■■■■ struggling to hold [the Service Recipient] in her wheelchair in the upright position. (sic) (Justice Center Exhibit 8)

DSA ■■■■■ provided a signed statement that she was also standing at the safe area during the relevant time and from that location, DSA ■■■■■ observed:

[The Service Recipient] and [the other resident] were brought out in wheelchair (sic). [The Service Recipient] is in front of ■■■■■ facing forward at the ramp. ■■■■■ was holding onto [the Service Recipient]'s chair. ■■■■■ turned to pull [the other resident]'s chair out of the doorway. [The other resident] was facing forward. I was not able to see how ■■■■■ pulled [the other resident]'s chair. I then witnessed [the Service Recipient] lift her feet up and her chair started to go down the ramp. (Justice Center Exhibit 9)

The Subject signed a statement dated ■■■■■ that:

As we exited the residence I exited [the Service Recipient] first out the front door on the front landing and I locked her wheelchair brakes. I then turned to unlock [the other resident]'s wheelchair brakes we I saw (sic) [the Service Recipient] moving down the ramp. (Justice Center Exhibit 6)

The Subject's hearing testimony was consistent with her signed statement. She testified that she had "secured" the Service Recipient's wheelchair brakes and that "it is not possible that [she] forgot" to lock the brakes before she turned her attention to the other resident who was

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Furthermore, while the statements obtained by Investigator ██████████ provided partially differing descriptions of the incident, there were no material conflicts in the evidence. By all accounts, when the Subject pushed the Service Recipient's wheelchair onto the front porch, it rolled away and tipped over. It is undisputed that the Subject was assisting another wheelchair bound resident, behind her, to evacuate the facility while she was managing the Service Recipient's wheelchair. The fact that DSA ██████████ statement indicated that she observed that the Subject had "let go of the wheelchair" supports the finding herein that, while attempting to manage the two wheelchairs, the Subject had let go of the Service Recipient's wheelchair without engaging its brakes, which is why the wheelchair rolled away and tipped over.

Having determined that the Subject committed the act as alleged, the next question is whether his conduct constitutes neglect as defined in SSL § 488(1)(h). As a result of the incident, the Service Recipient was later diagnosed with a fractured ankle. The only explanation for this injury is that the Service Recipient sustained the injury during the incident underlying this substantiated report.

Accordingly, in the final analysis, based on all of the evidence, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the neglect as alleged in Offense 1 of the substantiated report.

Moreover, based upon the totality of the circumstances, the evidence and testimony presented, it is determined that the category of the affirmed substantiated neglect that such act constitutes was properly substantiated as a Category 3 act. A substantiated Category 3 finding 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

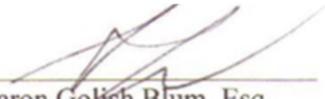
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subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

DECISION: The request of ██████████ that report "substantiated" on ██████████, ██████████ dated and received on ██████████ 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 Sharon Golish Blum, Administrative Hearings Unit.

DATED: August 10, 2015
Plainview, New York


Sharon Golish Blum, Esq.
Administrative Law Judge