

**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
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: Theresa Wells, Esq.

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By: Eliot Bloom, Esq.
1551 Kellum Place, 2nd Floor
Mineola, New York 11501

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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 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.

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: April 6, 2016
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**

Adjudication Case #:

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Justice Center for the Protection of People with
Special Needs
125 East Bethpage Road, Suite 104, Plainview,
New York 11803

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
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By: Eliot Bloom, Esq.
1551 Kellum Place, 2nd Floor
Mineola, New York 11501

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating ██████████ (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 ██████████, ██████████ ██████████ 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 ██████████, while away from the ██████████ ██████████, located at ██████████, while acting as a custodian, you committed neglect when you failed to supervise a service recipient while he waited for his bus, during which time he attempted to board the incorrect bus and was later found wandering alone in the community.

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 Subject is a Family Care Provider (FCP), and her residence, located at ██████████ ██████████, is a ██████████, operated by the ██████████ ██████████, located at ██████████

██████████
the Subject)

9. When the Subject finished the garbage cleanup and reentered the house, ██████████ ██████████ told the Subject that when she came downstairs, another Service Recipient advised her that the Service Recipient went on “the white bus.” At that point, ██████████ received a telephone call from the bus company advising that the Service Recipient’s day program bus was running forty-five minutes late. After the Subject searched the house for the Service Recipient, she drove around the neighborhood, looking for the Service Recipient and “the white bus.”
(Hearing testimony of the Subject)

10. The Subject located the Service Recipient walking outside by himself, approximately one hour after he had left the house and she took him to the Emergency Department of ██████████ Hospital Center for evaluation, where he was found to be unharmed.
(Hearing testimony of OPWDD Investigator ██████████ and Justice Center Exhibit 8)

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 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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Under SSL § 488(1)(h) neglect is defined 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(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).

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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.

If the Justice Center did not prove the abuse and/or 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 the act described as Allegation 1 in the substantiated report. Specifically, the evidence establishes that the Subject breached her duty to the Service Recipient, by failing to provide adequate supervision to him, thereby allowing him to be in the community unsupervised, which was likely to result in the Service Recipient's physical injury or serious or protracted impairment of his physical, mental or emotional condition.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-15) The investigation underlying the substantiated report was conducted by the OPWDD Investigator ██████████, who was on personal leave at the time of the hearing, and the OPWDD Investigator ██████████ testified on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf and provided two documents that were admitted into evidence. (Subject Exhibits A and B)

In the Level of Supervision paragraph of the Service Recipient's Family Care Residential Plan Health and Safety Needs (RPHSN) dated ██████████, it states that the Service Recipient does not stay at home alone as there is always someone home with him, that he

■■■■■
accompanies the Subject on outings, and that he is unable to go into the community on his own.
(Justice Center Exhibit 10)

In the Service Recipient's Individualized Service Plan (ISP), dated ■■■■■, it states that the Subject supervises the Service Recipient when he takes walks in the community, that the Service Recipient is not travel trained, and that the Service Recipient takes a program bus to and from the home. (Justice Center Exhibit 12)

The Service Recipient's RPHSN and ISP establish that the Subject had a duty to ensure that the Service Recipient was supervised during the times that he was in her care and to ensure that he not go into the community unsupervised.

As a FCP, the Subject received general trainings regarding her responsibilities, as well as specific training regarding each of the Service Recipient's needs and issues. The Subject was aware of the Service Recipient's RPHSN and ISP and had attended meetings regarding the Service Recipient and for continuing trainings. (Hearing testimony of the Subject)

The Subject's defense to the allegation of neglect was that the Service Recipient had not been designated for 1:1 supervision and further, that she was not even required to maintain direct line of sight supervision of him.

While the Subject's assertions are valid, the fact remains that the Service Recipient wound up alone in the community for one hour as a direct result of having been left unsupervised by the Subject. The Subject's failure to supervise the Service Recipient as was specified in the Service Recipient's RPHSN and ISP was a breach of the Subject's duty to the Service Recipient under SSL § 488(1)(h).

While there was no evidence that the Subject's failure to supervise the Service Recipient actually resulted in physical injury, or serious or protracted impairment of the physical, mental or

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emotional condition of the Service Recipient, such evidence is not necessary for a finding of neglect. In this case, it was extremely fortunate that no harm came to the Service Recipient. The Service Recipient's RPHSN, ISP, and his Psychological Report dated ██████████, together indicate that, for various reasons, the Service Recipient required supervision in the community and that being alone in the community without proper supervision posed a risk of harm to the Service Recipient. Consequently, the Subject's breach of duty to the Service Recipient was likely to result in the Service Recipient's physical injury or serious or protracted impairment of the physical, mental or emotional condition.

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 under SSL § 488(1)(h), as specified in Allegation 1 of the substantiated report.

The report will remain substantiated. The next issue to be determined 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 is properly categorized 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 subject to disclosure pursuant to NY SSL § 496 (2). This report will be sealed after five years.

DECISION:

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.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: March 28, 2016
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge