

**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
AND ORDER
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: Juliane O'Brien, Esq.

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By: Constance R. Brown, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224

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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: May 20, 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**

Adjud. Case #:

████████████████

Before: John T. Nasci
Administrative Law Judge

Held at: New York State Office Building
207 Genesee Street, Hearing Room 103D
Utica, New York 13501
On: ████████████████████

Parties: Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
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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] [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] [REDACTED], while acting as a custodian, you committed neglect when you failed to maintain appropriate supervision over a service recipient while he bathed.

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 [REDACTED] for adults with developmental disabilities, and is operated by the New York State Office for People With Developmental Disabilities (OPWDD),

¹ Allegation 1 was unsubstantiated.

██████████ which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OPWDD Investigations Supervisor ██████████)

5. At the time of the alleged neglect, the Subject had been employed by the OPWDD for approximately fourteen years. The Subject worked as a Direct Support Assistant (DSA). (Hearing testimony of the Subject)

6. At the time of the alleged neglect, the Service Recipient was fifty-seven years of age, and a resident of the ██████████. The Service Recipient is an adult with diagnoses of mild mental retardation and psychotic disorder NOS. (Justice Center Exhibits 6, 18 and 19)

7. The ██████████ has the capacity for thirteen service recipients: twelve permanent resident service recipients and one respite service recipient. The permanent resident service recipients have bedrooms in Zone B of the ██████████ while the respite bedroom was located in Zone A of the ██████████. At the time of the alleged neglect, there were only twelve service recipients residing in the ██████████: five male permanent service recipients, six female permanent service recipients and one male respite service recipient. The Service Recipient was a permanent resident of the ██████████. (Justice Center Exhibit 8 and Hearing testimonies of OPWDD Investigations Supervisor ██████████ and the Subject)

8. At the time of the alleged neglect, the overnight shift at the ██████████ started at 10:00 p.m., ended at 8:00 a.m. and was properly staffed with two DSAs. One of the overnight shift DSAs was assigned to Zone A and the other to Zone B. The DSA assigned to Zone B was responsible for monitoring all service recipients who were present in Zone B. The day shift, consisting of four staff, started at 7:00 a.m., thereby overlapping the overnight shift by one hour. (Justice Center Exhibit 7 and Hearing testimonies of OPWDD Investigations Supervisor ██████████ and the Subject)

9. It was common practice in the [REDACTED] for the Service Recipient to start his shower routine each morning one hour before the rest of the service recipients woke, due to the Service Recipient's practice of taking a long time (approximately one hour) to complete his shower routine. Because of this practice, the Service Recipient woke at 5:00 a.m. each day and shortly thereafter walked to the bathroom and started his shower routine. The Service Recipient finished his shower routine at approximately 6:00 a.m. each day. (Hearing testimonies of OPWDD Investigations Supervisor [REDACTED] and the Subject)

10. Facility staff were required to remain with the Service Recipient while he showered or bathed, and to never leave the Service Recipient alone due to his unsteadiness. (Justice Center Exhibit 17)

11. On [REDACTED], the Service Recipient took his morning shower in the bathroom located directly next to the washer/dryer room in Zone B of the [REDACTED]. The bathroom was approximately six feet wide and ten feet deep. The door to the bathroom from the hallway opened into the bathroom, to the left and against the left wall of the bathroom. On the right side of the bathroom, from the door to the rear of the bathroom progressively, were a small closet, a sink and a bathtub/shower. In the rear of the bathroom was a toilet. The bathtub/shower had a shower curtain to contain water spray inside the bathtub area. There were no interior doors or walls in the bathroom. (Justice Center Exhibit 8 and Hearing testimony of the Subject)

12. On [REDACTED], the Subject was assigned to Zone B of the IRA. The Service Recipient woke at 5:00 a.m., went to the bathroom for his shower and was in the bathroom performing his shower routine until approximately 6:10 a.m. While the Service Recipient was in the bathroom, the Subject was in and out of the bathroom, alternating between helping/prompting the Service Recipient inside the bathroom and standing in the hallway outside

the bathroom watching for other service recipients in case they exited their bedrooms. At times when the Subject was in the hallway, the door to the bathroom was closed to give the Service Recipient privacy. While the Service Recipient was in the bathroom, the other ten permanent resident service recipients were in their bedrooms. (Justice Center Exhibit 24: Justice Center Interrogation of the Subject and 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 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), 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(s) 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 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 1-23) The Justice Center also presented audio recordings of the Justice Center Investigator's interview of the Service Recipient and interrogation of the Subject. (Justice Center Exhibit 24) The investigation underlying the substantiated report was conducted by Justice Center Investigator ██████████. OPWDD Investigations Supervisor ██████████ was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and presented one document. (Subject Exhibit A)

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect by failing to provide proper supervision of the Service Recipient while he was bathing himself in the shower.

The facts in this matter are not in dispute. The Subject admitted in his interrogation and in his hearing testimony that, during the Service Recipient's shower, he was in and out of the bathroom and that at several points during the hour he remained outside the bathroom in the hallway with the bathroom door closed. (Justice Center Exhibit 24: Justice Center Interrogation of the Subject and Hearing testimony of the Subject)

To prove neglect, the Justice Center must establish conduct by the Subject that breaches the Subject's duty to the Service Recipient and results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

The record establishes that the Subject remained in the hallway outside the bathroom with the bathroom door closed for at least part of the time that the Service Recipient was bathing himself in the shower. The record also establishes that the Service Recipient's Individual Plan of

Protective Oversight required that facility staff remain with the Service Recipient and not leave the Service Recipient unattended while the Service Recipient is in the shower or the whirlpool tub, due to the Service Recipient's unsteadiness. (Justice Center Exhibit 17) By standing in the hallway with the bathroom door closed, the Subject was not with the Service Recipient and could not have attended to the Service Recipient had the Service Recipient experienced unsteadiness. In the event that the Service Recipient experienced unsteadiness while in the bathtub/shower, it was likely that the Service Recipient would have suffered physical injury from falling.

The Subject explained that he stood in the hallway because, having been assigned to Zone B, he was responsible for the supervision of not only the Service Recipient but also the ten other service recipients in Zone B, and part of his duty was to watch for the other service recipients who may have been exiting their bedrooms. (Justice Center Exhibit 24: Justice Center Interrogation of the Subject and Hearing testimony of the Subject)

When asked during his hearing testimony why the other DSA who was on duty could not have helped him by watching the Service Recipient or the hallway, the Subject explained that the other DSA was assigned to one-to-one supervision of the respite service recipient and therefore could not have left Zone A. (Hearing testimony of the Subject) However, there is no indication in the record that the other DSA had such an assignment, that one-to-one supervision of the respite service recipient was necessary or that the DSA was unable or prohibited from assisting the Subject. (Justice Center Exhibits 9 and 10)

The record also reflects that there were door alarms on each of the service recipients' respective bedroom doors that were available for use by the facility staff, and that the door alarms were used to alert [REDACTED] staff when service recipients were exiting their bedrooms. However, on [REDACTED], the Subject elected to use the door alarm for only one service

recipient. (Justice Center Exhibit 24: Interrogation of the Subject)

Additionally, when the Subject was asked during his hearing testimony why he chose to stand outside the bathroom to monitor the other service recipients' bedrooms instead of standing in the bathroom and looking out the door once in a while, his only explanation was that he wanted to give the Service Recipient privacy. (Hearing testimony of the Subject)

The Subject argued that it was not necessary for him to be in close proximity to the Service Recipient because in his experience the Service Recipient was not unsteady and did not have a problem with his gait. (Hearing testimony of the Subject) However, the contents of the Service Recipient's Individual Plan of Protective Oversight, Individualized Service Plan and Individualized Protective Oversight Plan more than rebut the Subject's argument and clearly establish a serious concern about not only the Service Recipient's unsteadiness but also his behavior while he is in the bathroom. (Justice Center Exhibits 17, 18 and 19)

Finally, the Subject admitted that he had not read the Service Recipient's Individual Plan of Protective Oversight. (Hearing testimony of the Subject) Had the Subject read the document as he was required, he would have been aware of the precise level of supervision required for the Service Recipient.

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 is properly categorized as a Category 3 act.

DECISION: The request of [REDACTED] that the substantiated report dated [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 John T. Nasci, Administrative Hearings Unit.

DATED: May 18, 2016
Schenectady, New York



John T. Nasci, ALJ