

**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 David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: February 9, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
William T. Burke, 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:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
4 Burnett Blvd.
Poughkeepsie, NY 12601
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: Thomas C. Parisi, Esq.

[REDACTED]

By: William T. Burke, Esq.
O'Neil & Burke, LLP
135 North Water Street
Poughkeepsie, NY 12601

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 preceding [REDACTED], as reportedly observed on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to provide adequately for a service recipient's environmental needs and activities of daily living.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

3. An Administrative Review was conducted and the substantiated report was retained.

4. The facility, located at [REDACTED], is an Individualized Residential Alternative (IRA) for adults with developmental disabilities and is operated 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.

5. At the time of the alleged neglect, the Subject was employed by OPWDD as a Developmental Assistant 3 (DA 3). Among the Subject's duties were overseeing nine IRAs and one day program; and occasionally performing Developmental Assistant 2 (DA2) functions for houses that were short-staffed. (Hearing testimony of Subject; Justice Center Exhibit 36: Treatment Team Leader (TTL) interview)

6. At the time of the alleged neglect, the Service Recipient was a male, 64 years of age, and had been a resident of the facility for just over one year. The Service Recipient had a relevant diagnosis of moderate intellectual disability, and had been placed on a fluid restricted diet. According to the Service Recipient's Plan of Protected Oversight, he can perform most activities of daily living (ADL) with minimum supervision. However, he tends to rush through his personal hygiene routine and requires verbal prompting to ensure that he brushes his teeth, shaves, and dresses appropriately for the weather. (Justice Center Exhibits 30 and 33)

7. During visits on [REDACTED], the Service Recipient's mother and sister observed that the Service Recipient's bedroom was dirty, the headboard on his bed was broken, the sheets on his bed were damp and stained, there were ants in the bathroom, his toothbrush was worn down, and his razor was broken. In addition, the Service Recipient was wearing a lightweight canvas coat, inappropriate for the weather, that was ripped under one arm. The Service Recipient reported to his family that he was cold at night, and only had pajama bottoms in his dresser drawer. The Service Recipient further reported that he had told the House Manager, Developmental Assistant 2 [REDACTED] (the DA2), that he was cold, and she told him to put an extra blanket on the bed. (Justice Center Exhibits 6, 7, and 8)

8. The DA2 was responsible for overseeing the day-to-day operations of the IRA. The

Subject visited the IRA once or twice a week during the relevant period of time, but never observed the specific conditions complained of by the Service Recipient and his family. Neither the DA2 nor the IRA staff reported any issues to the Subject regarding the Service Recipient's care. (Hearing testimony of Subject; Justice Center Exhibits 6 and 36)

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])

Neglect 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 not 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 and audio interviews obtained during the investigation. (Justice Center Exhibits 1-36) The

investigation underlying the substantiated report was initially conducted by OPWDD Lead Investigator [REDACTED], and was concluded by OPWDD Internal Investigator [REDACTED] (Investigator [REDACTED]), who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence. DA2 [REDACTED]

[REDACTED] also testified at the hearing.

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 his 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 issue here that the Subject is a custodian as defined in SSL § 488(2). The issue is whether the Subject had a duty to provide for the Service Recipient's environmental needs and activities of daily living. The record reflects that the staff working in the IRA were responsible for attending to the Service Recipient's daily needs, and the DA2 was responsible for ensuring that staff performed their assigned tasks, and complied with all applicable rules, regulations, and policies. (Hearing testimonies of Investigator [REDACTED], DA2 [REDACTED], and Subject; Justice Center Exhibits 6, 18, and 36)

The Subject was unaware of any issues regarding the heat in the Service Recipient's room, or any deficiencies in the Service Recipient's activities of daily living. The Subject relied on the DA2 to inform him of any issues or problems that she was unable to resolve. The record reflects that if there was a problem with the heating, or pests, it was the DA2's responsibility to complete the relevant work orders. Neither the Service Recipient, nor his family, reported any issues to the

Subject. Neither staff, nor the DA2, reported any issues to the Subject. (Hearing testimony of Subject; Justice Center Exhibits 6 and 36)

In conclusion, the record does not support the allegation that the Subject had a duty to provide for the Service Recipient's environmental needs and activities of daily living. If the Subject was at fault, it was for relying too heavily on the DA2's judgment and ability to manage the IRA. However, that is not the allegation at issue.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will be amended and sealed.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED], be amended and sealed is granted.
The Subject has not been shown by a preponderance of the evidence to have committed neglect.

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

DATED: January 18, 2018
Schenectady, New York


Jean T. Carney
Administrative Law Judge