

**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]

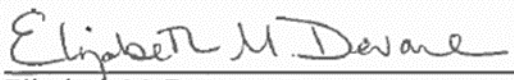
The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

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 Elizabeth M. Devane, ALJ Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: September 10, 2018
Schenectady, New York


Elizabeth M. Devane
Administrative Law Judge

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject

**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:

Keely D. Parr
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
9 Bond Street – 3rd Floor
Brooklyn, New York 11201
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: Nicole Murphy, 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 [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient left the residence unnoticed.

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 [REDACTED], and certified by the 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 [REDACTED] as a Direct Support Professional (DSP). The Subject was working with the Service Recipient as all other staff were on medical appointments. The Service Recipient was on line of sight supervision at all times due to his history of elopement. The Subject was trained on the Service Recipient's line of sight protocol. (Hearing Testimony of Subject; Justice Center Exhibits 6, 21 and 23)

6. At the time of the alleged neglect, the Service Recipient was a 44-year old verbal and ambulatory male, operating within the borderline range of intellectual disability with diagnoses of narcissistic personality disorder, psychosis, bi-polar and behavior disorders. One of the Service Recipient's antecedent behaviors to his elopement was getting upset. (Justice Center Exhibits 6 and 19)

7. At the time of the alleged neglect, the Service Recipient was helping the Subject put away food items in the basement. The Service Recipient became upset because he wanted to go to the store to purchase items with a gift card. The Subject asked him to wait until she finished cooking. The Subject and the Service Recipient went to the first-floor kitchen so that the Subject could cook dinner. The Service Recipient was still upset and threw the boxes of meat on the floor because he did not want to wait for the Subject to finish cooking. (Hearing Testimony of Subject; Justice Center Exhibit 6)

8. The Subject called the program coordinator to inform her of the Service Recipient's behavior. The program coordinator came to the first floor and spoke to the Service Recipient and asked him to apologize, which he did. The Subject continued cooking and the Service Recipient walked out of the kitchen. (Hearing Testimony of Subject; Justice Center Exhibit 6)

9. At approximately 2:15 p.m., when walking from the basement to the second floor, the RN observed that the main door was ajar and the program coordinator discovered that the alarm to the door was inactivated. The program coordinator telephoned the Subject to ask her if she knew where the Service Recipient was. The Subject realized, at that time, that the Service Recipient was not near her and the Subject and the program coordinator searched the residence and the community. When they did not find the Service Recipient, they called 911. (Justice Center Exhibits 6 and 10)

10. The Service Recipient returned to the IRA at 12:52 a.m., unharmed. (Justice Center Exhibits 7 and 15)

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))

The neglect of a person in a facility or provider agency is defined by SSL § 488(1) as:

- (h) "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 as found in SSL § 493(4)(c), 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 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 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 acts 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 neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-23) The investigation underlying the substantiated report was conducted by QA Investigator [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and provided no other evidence.

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. Specifically, the evidence establishes that the Subject committed neglect.

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 she breached that duty, and that her 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))

On the day of the alleged neglect, the Subject was employed as a DSP by [REDACTED] and was acting as a custodian as that term is defined in Social Services Law § 488(2). The Subject was trained on the Service Recipient’s line of sight protocol, which included keeping the Service Recipient in her line of sight at all times. The Subject had a duty to follow this protocol, which she breached by not watching the Service Recipient as he exited the kitchen. As a result of this breach, the Service Recipient eloped from the facility. (Hearing Testimony of Subject; Justice Center Exhibits 6, 16 and 23)

The Subject testified that the Service Recipient was helping her put away food items in the basement and that he became upset because he wanted to go to the store to purchase items with a gift card. The Subject further testified that she asked him to wait until she finished cooking. The Subject and the Service Recipient then went to the first-floor kitchen so that the Subject could cook dinner. The Service Recipient was still upset and threw the boxes of meat on the floor because he did not want to wait for the Subject to finish cooking. (Hearing Testimony of Subject; Justice Center Exhibit 6)

The Subject called the program coordinator to inform her of the Service Recipient's behavior. The program coordinator came to the first floor and spoke to the Service Recipient and asked him to apologize, which he did. The Subject continued cooking and the Service Recipient walked out of the kitchen. The Subject testified that the Service Recipient walked out of the kitchen behind the program coordinator and said he was going upstairs. However, the program coordinator in her statement, indicated that she went to the basement after she spoke to the Service Recipient, so the Service Recipient could not have been following her upstairs. In addition, the RN, who was working in the basement, indicated in her statement that the program coordinator went down to the basement to retrieve print outs, corroborating the program coordinator's whereabouts. It was when the RN and the program coordinator were walking from the basement to the second floor that the RN observed that the main door was ajar and the program coordinator discovered that the alarm to the door was inactivated. (Hearing Testimony of Subject; Justice Center Exhibits 6, 10 and 11).

In accordance with the Service Recipient's monitoring plan, the Subject was required to have the Service Recipient in her line of sight at all times. The Subject breached her duty, allowing the Service Recipient to elope from the facility. (Justice Center Exhibits 6 and 19)

Although no physical injury was observed, as the Service Recipient returned to the facility unharmed, there was a likelihood that the Subject's breach would result in physical injury and/or the serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. Although the Service Recipient was travel trained and able to use the bus and train, he did not independently travel alone. The Service Recipient was on line of sight supervision both in the facility and outside in the community. The Service Recipient had engaged in inappropriate sexual behaviors, property destruction, verbal aggression, lacked impulse control and exhibited poor judgment and insight. Displaying these types of maladaptive behaviors on the streets of ██████████ ██████████ put the Service Recipient in grave risk of physical, emotional and mental harm. (Justice Center Exhibits 6, 18 and 19)

The evidence establishes that the Subject committed neglect when the Subject failed to provide proper supervision, during which time the Service Recipient left the residence unnoticed.

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 of neglect is properly categorized as a Category 3 act. Substantiated Category 3 findings 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 SSL § 496(2). The report will be sealed after five years.

DECISION:

The request of [REDACTED] that the substantiated report dated [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 Keely D. Parr, Administrative Hearings Unit.

DATED: September 5, 2018
Brooklyn, New York


Keely D. Parr, ALJ