

**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 #:
521026856**

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, New York 12601
On: October 12, 2016

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 M. Sardella, Esq.


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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 December 4, 2014, (VPCR Master Case # 551018074) 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 June 20, 2014, at the Gomer Street IRA, located at 3492 Gomer Street, Yorktown Heights, New York, while acting as a custodian, you committed neglect when you failed to provide proper supervision to a service recipient by leaving her home unattended.

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 3492 Gomer Street, Yorktown Heights, New York, is an Individualized Residential Alternative (Gomer IRA), and is operated 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 OPWDD as a Direct Support Assistant (DSA) since 2008, and had been working at the Gomer IRA for three years. (Justice Center Exhibit 18)

6. At the time of the alleged neglect, the Service Recipient was a [REDACTED] female, with diagnoses of [REDACTED]. (Justice Center Exhibit 14)

7. Three staff were working at Gomer IRA on the morning of June 20, 2014. DSA [REDACTED] started her shift at 6:00 a.m. and was assigned to transport some of the service recipients to their day program offsite. DSA [REDACTED] had worked the overnight shift, stayed on to work a double shift during the day, and was assigned one-to-one to a service recipient. The Subject had also worked the overnight shift, and was scheduled to end his shift at 8:00 a.m. (Justice Center Exhibits 13 and 18)

8. At approximately 8:20 a.m., DSA [REDACTED] left the residence with several service recipients to transport them to their day program. DSA [REDACTED] heard DSA [REDACTED] say that she was leaving, but she did not say which service recipients she had with her. Both DSA [REDACTED] and DSA [REDACTED] were on the first floor of the residence at that time, while the Subject was upstairs. (Hearing testimony of DSA [REDACTED])

9. When the Subject came downstairs, he discovered that DSA [REDACTED] had left with an unknown number of service recipients. Contrary to normal practice, DSA [REDACTED] did not note in the log which service recipients she had taken with her.¹ (Hearing testimonies of Subject and DSA [REDACTED]; Justice Center Exhibit 18)

10. The Subject then looked through the house, except for the women's bathroom, and

¹ Thirteen service recipients resided in the Gomer IRA at this time. Not all the service recipients attended the day program, and those who did attend, varied in their attendance.

██████████ saw only one service recipient, who was waiting for a ride. The Subject waited for that service recipient's ride to arrive, helped him into the van, and then told DSA ██████████ he was clocking out. The Subject left the residence at about 9:15 a.m. (Hearing testimonies of Subject and DSA ██████████; Justice Center Exhibit 18)

11. At approximately 10:20 a.m., DSA ██████████ called and spoke to DSA ██████████, informing him that she was caught in traffic and would arrive back at Gomer IRA in about 10 minutes. DSA ██████████ asked DSA ██████████ if the Subject was still in the residence, to which DSA ██████████ replied that the Subject had left after escorting a service recipient onto the van. DSA ██████████ then asked DSA ██████████ if he knew that the Service Recipient was still in the house, and he replied no, because he was attending to his one-to-one service recipient. Shortly thereafter, the staff psychologist arrived at the Gomer IRA and discovered the Service Recipient upstairs by herself. It was later determined that the Service Recipient was in the women's bathroom when the Subject searched the residence. (Hearing testimony of DSA ██████████; Justice Center Exhibits 6 and 18)

12. It is normal practice not to leave female service recipients in the residence if only male staff are on duty. Normal procedure dictates that female service recipients accompany the female staff when transporting other service recipients if there is no other female staff on duty. (Hearing testimonies of the Subject and DSA ██████████; Justice Center Exhibit 18)

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)(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 committed the act of neglect alleged in the substantiated report that is the subject of the proceeding and that such act 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, as well as an audio recording of interrogations of the Subject and DSA [REDACTED], obtained during the investigation. (Justice Center Exhibits 1-18) The investigation underlying the substantiated report was conducted by OPWDD Investigator Andrew Morgese, who was the only witness who testified at the hearing on behalf of the Justice Center. DSA [REDACTED] testified on behalf of the Subject, and the Subject testified in his own behalf.

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 dispute between the parties that the Subject was a custodian as defined in SSL §488(2). He was working at the time of the incident and owed a duty to the service recipients residing in the Gomer IRA. In fact, the record shows that the Subject was a very conscientious employee, who stayed after his shift was over in order to ensure that a service recipient was safely loaded onto a van. The record reflects that if the Subject had been aware that the Service Recipient was in the residence, he would have stayed with her until DSA [REDACTED] returned. (Hearing testimony of Subject; Justice Center Exhibit 18)

The Justice Center contends that the Subject knew that the Service Recipient was still in the residence, and he breached his duty to her by leaving before DSA [REDACTED] returned. The only evidence supporting that contention is Investigator Morgese's report where DSA [REDACTED] told him that she had a "face to face" conversation with the Subject, advising him that the Service Recipient was still in the residence. (Justice Center Exhibit 6) However, in Ms. [REDACTED]'s written statement, made on the day of the incident, DSA [REDACTED] never mentioned this conversation. (Justice Center Exhibit 11) In addition, both DSA [REDACTED] and the Subject testified at the hearing, and stated during their interrogations, that DSA [REDACTED] did not have any such conversation with the Subject. (Hearing testimonies of the Subject and DSA [REDACTED]; Justice Center Exhibit 18) The interrogations and hearing testimonies of both DSA [REDACTED] and the Subject were substantially consistent with each other and therefore are credited evidence.

The record further reflects that it is normal practice that female residents are not to be left in a residence if the only staff on duty are male. Both DSA [REDACTED] and the Subject testified that normally the Service Recipient would have gone with DSA [REDACTED], even if she was not attending program that day, because there was no other female staff in the residence. (Hearing testimonies

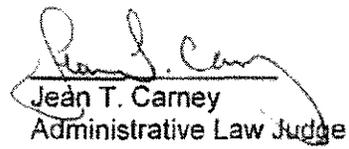
of DSA [REDACTED] and the Subject; Justice Center Exhibit 18) Therefore, the Subject had no reason to believe that the Service Recipient was still in the residence after DSA [REDACTED] left that morning to transport the service recipients to their day program. The Subject searched the residence, except for the women's bathroom, because DSA [REDACTED] did not give any indication of which service recipients she had taken with her. Consequently, the evidence does not support the Justice Center's contention that the Subject breached his duty to the Service Recipient through either action, or inaction, or a lack of attention.

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 December 4, 2014, (VPCR Master Case # 551018074) 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: December 22, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge