

STATE OF NORTH CAROLINA
COUNTY OF WARREN

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 14283

Cynthia Tuck Champion,
Petitioner,

vs.

Department of Health and Human Services,
Division of Health Service Regulation,
Respondent.

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DECISION

THIS MATTER came on for hearing before Beecher R. Gray, Administrative Law Judge, on May 29, 2012, in Raleigh, North Carolina. Respondent filed a Proposed Decision on June 8, 2012.

APPEARANCES

For Petitioner: Robert T. May, Jr., Esq.
Banzet, Thompson, & Styers, P.L.L.C.
101 N. Front Street, P.O. Box 535
Warrenton, North Carolina 27589

For Respondent: Thomas E. Kelly, Esq.
Associate Attorney General
North Carolina Department of Justice
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Raleigh, NC 27699-9001

ISSUE

Whether Respondent otherwise substantially prejudiced Petitioner's rights and failed to act as required by law or rule when Respondent substantiated the allegation that Petitioner neglected a resident of Murdoch Developmental Center in Butner, NC and entered findings of neglect by Petitioner's name in the Health Care Personnel Registry and Nurse Aide Registry.

APPLICABLE STATUTES AND RULES

N.C. Gen. Stat. § 131E-256
N.C. Gen. Stat. §150B-23
42 CFR § 488.301
10A N.C.A.C. 13O.0101

EXHIBITS

Respondent's exhibits 1 – 19 were admitted into the record.

Petitioner's exhibit 1 was admitted into the record.

WITNESSES

Cynthia Champion (Petitioner)
Michael Enis
Alesia Ragland
Stacy Szumigala
Tracy Hanson née Viger (Advocate)
Cindy Legge (Supervisor)
Solomon Weiner (HCPR Investigator)
Daphne Allen

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility including, but not limited to, the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses and documentary evidence admitted, the undersigned makes the following:

FINDINGS OF FACT

1. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.
2. At all times relevant to this matter, Petitioner, Cynthia Champion, was an Educational Development Assistant ("EDA") at Murdoch Developmental Center ("Murdoch") in Butner, North Carolina. Murdoch is a state-operated health care facility and therefore subject to N.C. Gen. Stat. § 131E-256.
3. Respondent is a North Carolina State Agency charged with investigating allegations of abuse or neglect by health care personnel, and--if allegations are verified by Respondent-- a written account of the findings are entered into the North Carolina North Carolina Health Care Personnel Registry.

4. On November 23, 2011, Respondent informed Petitioner that an investigation of events that occurred on July 27, 2011 had led Respondent to conclude that Petitioner had neglected K.B., a resident at Murdoch.
5. Respondent found that Petitioner did not ensure the whereabouts of resident K.B. and unintentionally locked her alone in a classroom, resulting in the resident screaming and hurting herself. The above finding, if proven, could constitute neglect; Respondent subsequently entered Petitioner's name into the State Health Care Personal Registry.
6. Petitioner gave timely Notice of Appeal from the finding of neglect and entry in the State Health Care Personnel Registry.
7. Petitioner's regular duties as an Educational Development Assistant include the supervision of a class of six residents in the Woodside building. She has taught the Woodside class for approximately the last five years.
8. On the morning of July 27, 2011, Petitioner's duties were modified. She was assigned to teach a class in the Arbor Cottage in substitution for the regular staff. Alesia Ragland and Michelle Owusu, other staff members from Woodside, also were assigned as substitutes. Michael Enis, another Woodside staff member, was present and assigned to the one-on-one supervision of an individual resident. All Murdoch staff who regularly taught the morning Arbor Cottage class were absent from work that day.
9. The regular protocol to transport Woodside residents to Arbor classes utilized two passenger vans to take residents from Woodside to Arbor.
10. On July 27, 2011, only one passenger van was available. Some of the residents were transported to the Arbor Cottage class by van with Alesia Ragland and Michelle Owusu. Other residents walked to Arbor cottage escorted by Petitioner and Michael Enis.
11. At approximately 10:20 a.m., three additional residents arrived late to the Arbor Cottage classroom. Those residents had been receiving haircuts at the beauty shop and were transported by other Murdoch staff. K.B., the resident allegedly neglected by Petitioner, was among those residents brought from the beauty shop.
12. K.B. is a severely mentally handicapped individual with a history of routinely engaging in self-injurious behavior ("SIB"), including hand biting and striking her forehead with her hands.
13. Near the end of class time, Petitioner began cleaning and organizing the various workstations within the classroom, which is one of her prescribed job duties as an EDA. At the same time, staff members Alesia Ragland and Michelle Owusu began transporting residents back to their assigned living unit. As Alesia Ragland and Michelle Owusu escorted the residents from the classroom, they failed to inform Petitioner that they were leaving and exactly which residents were leaving with them. Petitioner was cleaning a workstation from which her view of the classroom door was obscured by bookshelves.

14. Upon completion of her cleaning duties, Petitioner stepped out of the workstation, noticed that Alesia Ragland and Michelle Owusu had left with residents, and asked staff member Michael Enis how many residents were remaining in the classroom. He responded that five residents were present in the classroom. Petitioner counted and confirmed that five residents were present in the classroom.
15. While waiting for staff to return with the transport van, Petitioner gathered up the Behavior Intervention Plan (“BIP”) books that accompanied each resident. There were five BIP books in the classroom, which mirrored the number of residents observed to be present by Petitioner. Petitioner was unaware of the fact that one of the residents in the class that day did not have a BIP book. Petitioner found a book bag belonging to K.B. Petitioner did not see K.B. in the classroom and assumed that K.B. had left with the first group of residents.
16. When Alesia Ragland returned with the transport van, Petitioner and Michael Enis escorted the remaining residents to the van. Alesia Ragland waited with the van and did not enter the classroom.
17. Upon their return to Woodside, maintenance was being performed on floors so all residents were being kept in the programming room, which is a small room used for various activities. The residents accompanied by Petitioner were delivered to the programming room, which was staffed by other Murdoch personnel. Petitioner gave K.B.’s book bag to a staff member in the programming room. Petitioner then resumed her normal daily duties.
18. At approximately 11:33 a.m., Unit Manager Stacy Szumigala and Program Director Chrissy Dykeman heard moaning and other vocalizations coming from the Arbor Cottage classroom. At first they assumed them to be normal behavior and that a class was in session. Approximately one minute later, after hearing continuous sounds of loud moaning, Manager Szumigala and Program Director Dykeman went to the Arbor Cottage classroom and found resident K.B. sitting near the bathroom engaging in SIB involving biting her hands and hitting her forehead.
19. Other staff members and nurses were called to help calm K.B. and to examine her for any physical harm because of her SIB. Upon examining K.B., the nurse noted that K.B. has a permanent hematoma, or protrusion, on her forehead because of habitually engaging in SIB and that it was red and seemed bigger than normal. An ice pack was applied to K.B.’s forehead.
20. Shortly thereafter, Petitioner was contacted while on lunch duty and informed that resident K.B. had been left in the Arbor Cottage classroom. Petitioner and staff member Alesia Ragland immediately returned to Arbor Cottage.
21. Upon entering the classroom, Petitioner found that K.B. was not acting out or engaging in SIB. Petitioner did not see any visible signs of injury or physical harm. Petitioner and

Alesia Ragland accompanied K.B. to the programming room at Woodside. Petitioner again resumed her normal daily duties.

22. At approximately 11:50 a.m., Daphne Allen, LPN, performed a body check on K.B. because of her seclusion in the Arbor Cottage classroom. Nurse Allen noted that K.B.'s forehead was red and that an Arbor nurse applied an icepack for 10 minutes. Nurse Allen also noted that there was no broken skin, no other visible injuries, and that K.B. did not require any treatment.
23. Prior to the events of July 27, 2011, management never had promulgated an attendance policy or class roster to ensure the whereabouts of residents during classes or periods of travel to and from classes.
24. Subsequent to these events, an attendance policy was approved and initiated. Under the new policy, responsible staff members are given class rosters that require them to take attendance at the beginning of class and at the end of class. These staff members must also initial beside the name of each resident on the class roster when attendance is taken.

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under chapters 131E and 150B of the North Carolina General Statutes.
2. All parties correctly have been designated and there is no question as to misjoinder or nonjoinder.
3. As an Educational Development Assistant working in a health care facility in North Carolina, Petitioner is a health care personnel and is subject to the provisions of N.C. Gen. Stat. § 131E-256.
4. Neglect is defined as the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.
5. Considering all of the evidence presented, the events of July 27, 2011 placed Petitioner and patient K.B. outside of the usual and customary practices of their routine. Those interruptions included the substitution of Petitioner into an unfamiliar class; the availability of only one transport van; the arrival of residents after class had begun because of haircuts; and the lack of communication between staff in the classroom. These interruptions, as well as the lack of an attendance policy, led to the unfortunate consequence of K.B. being left in the classroom for approximately 15 minutes.

6. There is insufficient evidence to find that Petitioner failed to provide the care necessary to avoid physical harm.
7. While Petitioner may have taken a different course of action by searching all rooms and workstations, the evidence supports neither the proposition that Petitioner was the individual responsible for performing those actions, nor whether it was neglect on her part not to do so.
8. The greater weight of the evidence produced in this contested case hearing does not support the decision made by Respondent to substantiate neglect of Murdoch Developmental Center resident K.B. by Petitioner on July 27, 2011.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby determines that Respondent's findings of substantiation against Petitioner for neglect of Murdoch Developmental Center resident K.B. are not supported by sufficient evidence and are REVERSED.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Health Service Regulation.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36, the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

This the 15th day of June, 2012.

Beecher R. Gray
Administrative Law Judge