

**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
AFTER
HEARING**

Adjudication Case #:

[REDACTED]

:

Justice Center for the Protection of People with
Special Needs

By: Thomas Parisi, Esq.
161 Delaware Avenue
Delmar, New York 12054-1310

[REDACTED]
[REDACTED]
[REDACTED]

By: Nicole Murphy, Esq.
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Of Counsel, CSEA
39 Broadway, Suite 1910
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ORDERED:

The subject, [REDACTED], has not been shown by a preponderance of the evidence to have committed abuse and/or neglect as contained in the substantiated report [REDACTED], dated [REDACTED] [REDACTED].

NOW THEREFORE IT IS DETERMINED that the record of this report shall be amended and sealed by the Vulnerable Persons' Central Register, pursuant to SSL § 493(3)(d).

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: Schenectady, New York
September 30, 2014

David Molik, Director
Administrative Hearings Unit

**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**

Adjudication Case #:

[REDACTED]

Before:

Diane Herrmann
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 West 125th Street,
New York, NY 10027
On: [REDACTED]

Parties:

Justice Center for the Protection of People with
Special Needs
By: Thomas Parisi, Esq.
61 Delaware Avenue
Delmar, New York 12054-1310

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By: Nicole Murphy, Esq.
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. The Subject requested that the Justice Center, Administrative Appeals Unit (AAU) amend the report to reflect that the Subject is not a subject of the substantiated report. The AAU 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, [REDACTED], of neglect by [REDACTED] (Subject) against a service recipient. The initial report was investigated by the Justice Center for the Protection of People with Special Needs (Justice Center).
2. The initial report alleges, in pertinent part, that on [REDACTED] while acting as a custodian (DSA) you committed an act of abuse (obstruction of reports of reportable incidents) when you both failed to report acts of physical abuse committed by other custodians against a service recipient and told another service recipient not to report the incident with the intent to suppress the reporting of and impede the investigation of the incident.
3. The Justice Center substantiated the actions as a Category 3 offense pursuant to Social Service Law
4. An Administrative Review was conducted and as a result the substantiated report was retained.

5. At the time of the alleged abuse, the Subject was employed as a Care Aide at [REDACTED], a facility run by OPWDD, which is an Agency or Provider that is subject to the jurisdiction of the Justice Center.

6. On [REDACTED] the subject was working the 3:00 pm-11:30 pm shift and was assigned to Wing [REDACTED] and was the one/one aide for service recipient [REDACTED]. (SR [REDACTED].)

7. Wing [REDACTED] is a multiple diagnostic unit and the residents have a developmental and psychological diagnosis.

8. On [REDACTED] around 5pm there was an incident with one of the service recipients and two staff members who restrained the service recipient.

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 or neglect.
- Pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse or neglect in residential care facilities. SSL § 492(3) (c) and 493(1) and (3). Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse or neglect presently under review was substantiated. A “substantiated report” means a report made “... if an investigation determines that a preponderance of evidence of the alleged neglect and/or abuse exists.”

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: whether the Subject has been shown by a preponderance of the

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evidence to have committed the act or acts giving rise to the substantiated report, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute abuse or neglect; and pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

The abuse and neglect of a person in residential care is defined by SSL § 488:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
 - (a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.
 - (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.
 - (c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that

constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.

- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.
- (e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.
- (f) "Obstruction of reports of reportable incidents," which shall mean conduct by a custodian that impedes the discovery, reporting or investigation of the treatment of a service recipient by falsifying records related to the safety, treatment or supervision of a service recipient, actively persuading a mandated reporter from making a report of a reportable incident to the statewide vulnerable persons' central register with the intent to suppress the reporting of the investigation of such incident, intentionally making a false statement or intentionally withholding material information during an investigation into such a report; intentional failure of a supervisor or manager to act upon such a report in accordance with governing state agency regulations, policies or procedures; or, for a mandated reporter who is a custodian as defined in subdivision two of this section, failing to report a reportable incident upon discovery.
- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a

custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.

- (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.

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 or neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category level of abuse and neglect set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

Substantiated reports of abuse or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:
 - (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
 - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious

disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead

a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

(xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and

(xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.

- (b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.
- (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.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

If the Justice Center proves the alleged abuse, 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 abuse cited in the substantiated report constitutes the category level of abuse set forth in the substantiated report.

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If the Justice Center did not prove the abuse by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of evidence that the Subject committed an act of abuse against SR ██████████.

The Justice Center called one witness, a supervising investigator. The witness did not complete the investigation or interview any of the witnesses but reviewed the investigation documents and evidence. The witness testified that on the evening in question an employee of the facility held down a SR while another employee kicked her. The Justice Center substantiated a finding of abuse against the Subject because she was present during the incident and failed to report the incident and told a service recipient not to report the incident. The JC played the interrogation of the Subject and the interviews of SR ██████████, SR ██████████, and employee ██████████.

In the interrogation of the Subject she told the investigator that she was the one/one aide assigned to SR. ██████████. The Subject said that she spent most of the day outside the unit with SR ██████████. At approximately 4:45 pm she and SR ██████████ returned to the unit for dinner. SR ██████████ did not like the food and refused to eat. The Subject said that she completed a log book entry and she and SR ██████████ then left the unit to go outside to the vending machine area. While at the vending machines she heard staff members talking about an incident in Unit ██████████. She said she wanted to return to the unit to help and she left the area with SR ██████████.

SR ██████████ told the investigator that a SR was arguing with employee ██████████ and was yelling at her. She said that the SR threw a chair at the employee then she was restrained on the ground and one employee held her and another employee stomped on her stomach. She said that the Subject told her that she didn't see anything and to leave the area.

SR [REDACTED] told the investigator that the only three employees were present during the incident and the Subject was not there. The details she provided differed from SR [REDACTED]. She said that SR [REDACTED] was there, then said she wasn't there, then said she was.

Employee [REDACTED] was interviewed on [REDACTED]. She told the investigator that SR [REDACTED] was present but not the Subject.

The Subject testified in her own defense. The Subject testified that staff was reluctant to be the one/one aide for SR [REDACTED]. The Subject testified that SR [REDACTED] was a difficult person and she regularly tried to get staff in trouble. The Subject testified that she spent most of the day outside the unit because SR [REDACTED] wanted to visit with her boyfriend who resided in unit [REDACTED]. The Subject testified that at 4:45pm they headed back to the unit so they could eat dinner. She testified that SR [REDACTED] did not like the food so they immediately went to Area A so she could fill out the log book. After this they headed to the vending machines so SR [REDACTED] could buy some food. At the vending machines they heard employees talking about an incident in Unit [REDACTED]. The Subject told SR [REDACTED] they needed to return to the unit so she could help. The Subject also said they ran into a supervisor who was responding to the unit and he gave a brief description of what went on.

The investigator interviewed SR [REDACTED] on [REDACTED]. In the beginning of the interview SR [REDACTED] says that she didn't see anything, in fact she says this twice. After prodding by the investigator she talked about the incident. Later in the interview she again states that she didn't see anything. She made only one comment about the Subject, and that is her one/one told her to leave the area and told her she didn't see anything.

The investigator testified that SR [REDACTED] knew details about the incident so she had to have witnessed it. The investigator interviewed SR [REDACTED] three days after the incident. It is

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reasonable to believe that the women on the unit had discussed the incident and provided details about the incident. The only person who places the Subject at the scene is SR ██████████. None of the other witnesses said the Subject was present. The JC completed 17 interviews and only one person said the Subject was there. The only person who says that the Subject told them not to report the incident was the same person, SR ██████████.

Hearsay is admissible in administrative proceedings and an administrative determination may be based solely upon hearsay evidence under appropriate circumstances Gray v. Adduci, 73 N.Y.2d 741 (1988), 300 Gramatan Avenue Associates v. State Division of Human Rights, 45 N.Y.2d 176 (1978), Eagle v. Patterson, 57 N.Y.2d 831 (1982), People ex rel Vega v. Smith, 66 N.Y.2d 130 (1985). A crucial concern with respect to hearsay evidence is the inability to- cross examine the person who originally made the statement in order to evaluate his or her credibility. Such evidence, then, must be carefully scrutinized and weight attributed to it depending upon its degree of apparent reliability. Factors to be considered in evaluating the reliability of hearsay include the circumstances under which the statements were initially made, information bearing upon the credibility of the person who made the statement and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements.

The investigator testified that it was not important to research whether a witness had a history of making false allegations or a history of lying. The investigator said that this would not be an important issue to help determine the credibility of a witness.

Though the testimony of a witness who has made false allegations in the past will not be totally discounted it must be taken into consideration when judging the credibility of the statements made. In this case, SR ██████████ statement alone is not enough to substantiate the allegations. It has not been established that SR ██████████ was present during the incident, or that

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the Subject told her she didn't see anything. The information provided by SR ██████████ was similar to all of the other accounts of the incident. On the night of the incident SR ██████████ heard staff members discussing the incident. SR ██████████ was residing in the unit where the incident occurred and the investigator talked to her three days after, more than enough time for residents to share stories and talk about the evening in question.

Accordingly, it is determined that the Agency 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 ██████████ that the substantiated report ██████████
██████████ are amended and sealed is granted.

This decision is recommended by Diane Herrmann, Administrative
Hearings Bureau.

DATED: Schenectady, New York

Diane Herrmann, ALJ