

**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]

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: Robert DeCataldo, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

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The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

ORDERED:

The request of ██████████ that Allegation 3 of the substantiated report dated ██████████, ██████████ be amended and sealed has been withdrawn. The record of Allegation 3 of the substantiated report shall be retained by the Vulnerable Person's Central Register.

The request of ██████████ that Allegation 4 of the substantiated report dated ██████████, ██████████ be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect.

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as to Allegation 3, shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

NOW, THEREFORE, IT IS ALSO DETERMINED that the record of this report as to Allegation 4 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
April 26, 2016



David Molik
Administrative Hearings Unit

**STATE OF NEW YORK
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE
WITH SPECIAL NEEDS**

In the Matter of the Appeal of

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Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjudication Case #:

██████████

Before:

Sharon Golish Blum
Administrative Law Judge

Held at:

Adam Clayton Powell Jr. State Office Building
163 West 125th Street
New York, New York 10027
On: ██████████

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

Administrative Appeals Unit
New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Robert DeCataldo, 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 [REDACTED], [REDACTED] of neglect by the Subject of service recipients.

2. The Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Allegation 4¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you failed to ensure that service recipients were properly supervised, during which time one service recipient was pushed and fell down.

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, [REDACTED], located at [REDACTED]

¹ Allegation 1 and Allegation 2 in the substantiated report were unsubstantiated and the Subject withdrew his request for amendment of Allegation 3 prior to the hearing.

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New York, is certified 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. The facility provides an array of services to people with special needs, including residential treatment, day services, recreational programs and respite care. The facility has an unwritten rule that the staff to service recipient ratio should not exceed one to six. (Hearing testimonies of the Subject and Facility Investigation Supervisor ██████████)

6. At the time of the alleged neglect, the Subject had been employed by the facility as a Day Habilitation Supervisor/Prevocational Manager for fourteen years. One of the Subject's duties was to ensure that a sufficient number of staff members were always present to supervise the service recipients. (Hearing testimony of the Subject and Justice Center Exhibit 24) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

7. On the third floor of the facility, very close to the Subject's office, there is a large classroom (the big room). Classes and activities are routinely conducted in the big room and day program service recipients gather there prior to being bused back to their residences, which occurs at approximately 2:45 p.m. On the date of the alleged neglect, Community Inclusion Mentor (CIM) ██████████, CIM ██████████ and CIM ██████████ were each assigned to a group of six service recipients for activities in the big room. (Hearing testimony of the Subject)

8. At some point after 12:00 p.m, the Subject received an emergency telephone call from another CIM, who was supervising a group of service recipients by himself at a site that was outside of the facility (the site). The CIM requested immediate assistance because one of the service recipients, whom he was supervising, was experiencing diabetic shock and he was unable to tend to the medical crisis and supervise the other service recipients at the same time.

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(Hearing testimony of the Subject)

9. The Subject initially assigned Day Service Supervisor/Prevocational Manager ██████████ to go to the site, but because Day Service Supervisor/Prevocational Manager ██████████ was not authorized to sign out a facility vehicle, the Subject also assigned CIM ██████████, who was authorized to sign out a facility van, to go with him. The Subject instructed Day Service Supervisor/Prevocational Manager ██████████ to find a replacement staff member for CIM ██████████ assigned service recipients (group). (Hearing testimonies of the Subject and Day Service Supervisor/Prevocational Manager ██████████)

10. Day Service Supervisor/Prevocational Manager ██████████ located CIM ██████████ and assigned her to supervise CIM ██████████ group until CIM ██████████ returned. CIM ██████████ went into the big room at approximately 12:55 p.m. to supervise the group. (Hearing testimony of Day Service Supervisor/Prevocational Manager ██████████ and Justice Center Exhibit 31)

11. Because the big room is very close to the Subject's office, the Subject repeatedly confirmed that CIM ██████████ was supervising CIM ██████████ group by looking into the big room that afternoon when he walked past while otherwise carrying out his duties. (Hearing testimony of the Subject)

12. At approximately 1:30 p.m., the Subject agreed to CIM ██████████ request that he supervise her assigned service recipients to allow her to have her lunch break and while the Subject was in the big room covering for CIM ██████████, CIM ██████████ was present in the big room supervising CIM ██████████ group. (Hearing testimony of the Subject and Justice Center Exhibit 31)

13. At approximately 2:00 p.m., there was an incident in the big room, whereby

Service Recipient A touched Service Recipient B with her purse and Service Recipient B reacted by throwing herself to the floor. (Justice Center Exhibit 33)

14. At the time of the incident, there were two staff members, CIM [REDACTED] and CIM [REDACTED], in the big room with approximately eighteen service recipients. Neither CIM [REDACTED] nor CIM [REDACTED] were present in the big room or otherwise supervising the group. (Hearing testimony of the Subject and Justice Center Exhibits 31 and 33)

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 allegation constitutes 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 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 abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1). Under SSL § 488(1)(h), the relevant part of the definition of neglect is:

"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

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a service recipient. Neglect shall include, but is not limited to: (i) failure to provide proper supervision...

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(s) 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 abuse and/or 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 act 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 abuse and/or neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

WITHDRAWAL OF ALLEGATION 3 OF THE SUBSTANTIATED REPORT

The Subject advised the Administrative Law Judge prior to the commencement of the hearing of his intent to withdraw his request for an amendment to Allegation 3 of the substantiated report and it was determined, upon the Subject's consent, that the Subject had withdrawn his request for a hearing to challenge Allegation 3 of the substantiated report. Based on the foregoing, the record of Allegation 3 of the substantiated report shall be retained by the Vulnerable Person's Central Register.

DISCUSSION

With respect to Allegation 4, the Justice Center has not established by a preponderance of the evidence that the Subject committed the neglect described therein.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-5 and 20-38) The investigation underlying the substantiated report was conducted by Facility Investigator [REDACTED] and Facility Investigation Supervisor [REDACTED], the latter of who testified on behalf of the Justice Center.

The Subject and Day Service Supervisor/Prevocational Manager [REDACTED] testified at the hearing on the Subject's behalf and the Subject presented one document as evidence. (Subject Exhibit A)

In his testimony, the Subject acknowledged the existence of an unwritten facility policy requiring a ratio of staff to service recipient not exceeding one to six. The Subject testified that prior to receiving the emergency telephone call from the CIM, requesting staff assistance at the site, there had been a physical altercation between two service recipients, in the big room, that required an investigation, the preparation of incident reports and telephone calls. The Subject testified that at the time that he received the emergency telephone call, there were three staff members in the big room, each supervising a group of six service recipients. The Subject testified that when he assigned Day Service Supervisor/Prevocational Manager [REDACTED] and CIM [REDACTED] to leave the facility to assist at the site, he also directed Day Service Supervisor/Prevocational Manager [REDACTED] to find a replacement to supervise CIM [REDACTED] group in her absence. The Subject testified that his office is close to the big room and that he observed CIM [REDACTED] supervising CIM [REDACTED] group several times

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that afternoon. The Subject testified that it was only when CIM ██████████ came to his office at approximately 2:00 p.m. to report the incident between Service Recipients A and B, that he discovered that CIM ██████████ was no longer in the big room supervising CIM ██████████ group. The Subject testified that CIMs often ask him to assist in supervising service recipients when there are not enough CIMs available and he cited as an example that just that day, CIM ██████████ had asked him to substitute for her while she went on a lunch break. The Subject's testimony on this point was corroborated by CIM ██████████ in her ██████████ interview. (Justice Center Exhibit 31)

Day Service Supervisor/Prevocational Manager ██████████ corroborated the Subject's testimony by testifying that the Subject told him to find a substitute for CIM ██████████ and that he located and assigned CIM ██████████ to supervise CIM ██████████ group. Day Service Supervisor/Prevocational Manager ██████████ also testified that he told CIM ██████████ to stay with CIM ██████████ group until she returned and that he advised the Subject of the arrangement.

The record of the ██████████ interview of CIM ██████████ (Justice Center Exhibit 31) discloses that on ██████████, she was supervising six service recipients and that CIM ██████████ and CIM ██████████ were also supervising groups in the big room that afternoon. CIM ██████████ stated that at approximately 12:55 p.m., CIM ██████████ came to the big room to replace CIM ██████████. CIM ██████████ stated that the Subject supervised her group while she went on her lunch break and at 2:00 p.m., when she returned from her break, CIM ██████████ was still supervising CIM ██████████ group, and one other CIM, who left shortly thereafter, was also supervising service recipients in the big room. CIM ██████████ stated that at the time of the incident between Service

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Recipients A and B, she and CIM ██████████ were the only CIMs in the big room and that when she went to the Subject's office to report the incident, she observed that CIM ██████████ was present with the Subject in his office.

The record of the ██████████ interview of CIM ██████████ (Justice Center Exhibit 33) discloses that at approximately 2:40 p.m. on the date of the incident, she observed Service Recipient A touch Service Recipient B lightly with her purse and that Service Recipient B threw herself on the floor. CIM ██████████ stated that at that time, there were between fifteen and twenty service recipients in the big room and that she and CIM ██████████ were the only staff members present. She also stated that she believed that CIM ██████████ had left the room for a moment. She did not mention CIM ██████████ and she was not asked if CIM ██████████ was present in the big room that afternoon.

The record of the ██████████ interview of CIM ██████████ (Justice Center Exhibit 34) discloses that, although she did not remember specific times, she did recall supervising CIM ██████████ group on ██████████ until CIM ██████████ returned sometime before 2:00 p.m.

The record of the ██████████ interview of CIM ██████████ (Justice Center Exhibit 35) discloses that CIM ██████████ had come to the big room to supervise CIM ██████████ group and that CIM ██████████ overheard Day Service Supervisor/Prevocational Manager ██████████ explain "the situation" to CIM ██████████. CIM ██████████ stated that she returned to the facility at approximately 2:20 p.m. and that she was not present in the big room at the time that the incident occurred between Service Recipients A and B.

There are gaps and unresolvable contradictions in the evidence. It is unclear from the

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evidence in the record the specific times at which the various CIMs were in the big room on the day in question. According to CIM ■■■■■ statement, she did not leave the big room until CIM ■■■■■ returned to the facility and she was not present when the incident occurred. According to CIM ■■■■■ statement, there had been a staffing deficiency in the big room virtually all afternoon and CIM ■■■■■ had returned to the facility at some time prior to the incident. According to CIM ■■■■■ statement, she returned to the facility at approximately 2:20 p.m. and she was not present when the incident occurred. Meanwhile, CIM ■■■■■ statement did not even mention the presence of CIM ■■■■■ and she stated that she thought that, at the time of the incident, CIM ■■■■■ had left the room for a moment. (Justice Center Exhibits 31, 33, 34 and 35)

Based on this assortment of statements, the only unassailable relevant fact that emerges is that at the specific time that the incident between Service Recipients A and B occurred, there were two CIMs and between fifteen and twenty service recipients in the big room. This fact alone, however, does not prove by a preponderance of the evidence that the Subject failed to ensure adequate supervision of service recipients. Although it is true that the big room had only two CIMs present at the relevant time, there was no clear timeline established in the record with respect to what happened after CIM ■■■■■ began supervising CIM ■■■■■ group and the time at which she left the big room. The length of time that there were only two CIMs supervising the three groups is an important piece of information that is missing from the record. There are a variety of potential explanations that would exonerate the Subject under these circumstances, including the possibility that a CIM required a bathroom break or needed to step out of the big room briefly to deal with an urgent matter.

The evidence in the record establishes that the Subject took all reasonable steps to ensure

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that there was adequate staffing to provide proper supervision in the big room at the relevant time. When the Subject reassigned CIM ██████████ to leave the facility, he directed Day Service Supervisor/Prevocational Manager ██████████ to find another CIM to supervise CIM ██████████ group in her absence. The Subject was aware that CIM ██████████ was to supervise the group and he checked in the big room several times that afternoon, when he was passing by, to ensure that CIM ██████████ was supervising the group. Furthermore, the Subject made himself available to assist the CIMs with supervision, which he did to ensure adequate supervision of the group, when CIM ██████████ asked him to cover for her when she took a break for her lunch.

The Justice Center did not establish by a preponderance of the evidence that the Subject breached his duty to provide proper supervision to the service recipients under SSL § 488(1)(h). The Subject took all reasonable steps available to him to assure the correct staff to service recipient ratio in the big room and there was no evidence in the record to the contrary.

The fact that an alleged incident occurred between Service Recipients A and B while there were two CIMs supervising fifteen to twenty service recipients in the big room has no bearing as to whether the Subject breached his duty to service recipients. In this case, because there was no breach of duty, it is unnecessary to analyze what transpired between the two Service Recipients, although the evidence indicates that the basis for that aspect of the allegation is similarly unsupportable.

In the final analysis, based on all of the evidence, it is concluded that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged in Allegation 4 of the substantiated report.

DECISION:

The request of [REDACTED] that Allegation 3 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed has been withdrawn. The record of Allegation 3 of the substantiated report shall be retained by the Vulnerable Person's Central Register.

The request of [REDACTED] that Allegation 4 of 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 Sharon Golish Blum, Administrative Hearings Unit.

DATED: April 6, 2016
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge