

**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

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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: Theresa Wells, Esq.

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████████████████
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By: Eric C. Naegely, Esq.
The Avant Building
200 Delaware Avenue
Buffalo, New York 14202

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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 the substantiated report dated ██████████ ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated report should properly be categorized, as a Category 3 act.

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

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: September 20, 2016
Schenectady, New York



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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Gerard D. Serlin
Administrative Law Judge

Held at:

West Seneca DDSO
1200 East and West Road, Building 16
West Seneca, New York 14224-3604
On: ██████████

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
of People with Special Needs
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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse. 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 abuse 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 between [REDACTED] and [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you became aware of allegations that a service recipient was subjected to physical abuse, psychological abuse and neglect, but failed to report the incidents.

These allegations have been SUBSTANTIATED as Category 2 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4) (b).

3. An Administrative Review was conducted and as a result the substantiated report was retained.

4. The facility is an [REDACTED] for adult individuals with developmental disabilities, located at [REDACTED], and is operated by [REDACTED] which is certified by the New York State Office for People With

Developmental Disabilities (OPWDD). [REDACTED] is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed as a Direct Support Professional (DSP) by the provider agency at the [REDACTED]. The Subject was a custodian as that term is so defined in Social Services Law § 488(2), and was a mandated reporter.

6. At the time of the alleged abuse, the Service Recipient was 39 years of age with a primary diagnosis of autism, as well as various mental health conditions. The Service Recipient was non-verbal, very active, often ran into and bumped into objects in the building and had poor motor coordination. (Justice Center Exhibit 6, first page and Hearing testimony of [REDACTED] Quality Assurance-Quality Improvement Administrator for [REDACTED]) The Service Recipient “frequently [suffered] from injuries of unknown origin” and had, for some length of time before the incident, been subjected to twice-daily body checks to document injuries on his person. (Hearing testimony of [REDACTED] Quality Assurance-Quality Improvement Administrator for [REDACTED])

7. On [REDACTED] at approximately 11:00 a.m., the Service Recipient, Staff Person-1 and the Subject traveled to a local store. (Justice Center Exhibit 6, pp. 3-4) During this outing, the Service Recipient consumed a soda purchased by Staff Person-1. Staff Person-1 became angry with the Service Recipient, threatened the Service Recipient and stated something similar to “I gonna get you, I’m gonna beat or whip your ass or fucking ass.” (Justice Center Exhibit 23, statement of the Subject) During the return trip home, Staff Person-1 said to the Service Recipient “that [he] was gonna get it when we got back to the house.” (Justice Center Exhibit 23, statement of the Subject) The Subject did not observe any reaction from the Service Recipient. Historically, when the Service Recipient reacted, he would do so by increasing the

intensity with which he bit his fingers and he would grab at staff members. (Hearing testimony of the Subject)

8. The Subject concluded that the Service Recipient was in no danger and, because she was “tired”, the Subject opted not to immediately report the incident either to the VPCR or to her supervisor. (Hearing testimony of the Subject)

9. After returning to the residence from the outing of [REDACTED] Staff Person-5 observed that the Service Recipient was running throughout the house, dumping juice and water all over. Staff Person-5 also observed that Staff Person-1 appeared to be frustrated with the Service Recipient’s behavior, but Staff Person-1 was not observed engaging in any physically or verbally “inappropriate” conduct toward the Service Recipient. (Justice Center Exhibit 12) Sometime between [REDACTED] and [REDACTED] Staff Person-5 told Staff Person-4 that Staff Person-1 had been frustrated with the Service Recipient on the evening of [REDACTED] when the Service Recipient was running throughout the house and dumping juice and water everywhere. (Justice Center Exhibit 12)

10. On [REDACTED] Staff Person-6 worked the 2:00 p.m. to 10:00 p.m. shift at the residence. Staff Person-6 performed a body check of the Service Recipient at 8:00 p.m. and noted no new bruises or marks. (Justice Center Exhibits 17, 18 and 27)

11. On the morning of [REDACTED] Staff Person-7 completed a minor incident reporting form documenting that the Service Recipient had been very active the previous evening and had engaged in banging, pounding, running around and banging into furniture, and should be monitored for bruising, swelling and scratches. (Justice Center Exhibit 37)

12. On [REDACTED] at approximately 8:00 a.m., Staff Person-5 performed a body check of the Service Recipient and noted two new abrasions on his left side. (Justice Center Exhibit 6, p. 6 and Justice Center Exhibit 38)

13. On [REDACTED] at 8:00 a.m., a body check was performed of the Service Recipient and new bruising on the left hand was noted. (Justice Center Exhibit 30) At approximately 8:15 a.m., the Service Recipient was subjected to a single person physical escort. (Justice Center Exhibit 39) A body check of the Service Recipient at 8:00 p.m. revealed a large red bruise on the Service Recipient's left side. (Justice Center Exhibit 6, p. 6 and Justice Center Exhibit 31)

14. On [REDACTED], the Service Recipient ran throughout the residence and bumped into many walls and wall corners. Staff documented this activity and requested that the Service Recipient be monitored for injuries resulting from this behavior. (Justice Center Exhibit 40)

15. Sometime on [REDACTED] Staff Person-4 conducted a body check of the Service Recipient. During this check, Staff Person-4 found a large red mark on the Service Recipient's left side. (Justice Center Exhibit 15) At that time, Staff Person-6, who was bathing the Service Recipient, said that either Staff Person-1 "may have kicked or punched the [Service Recipient] on the ride with the [Subject]," (Justice Center Exhibit 15) or that [Staff Person-1] "had possibly done something to [the Service Recipient]" and this conclusion was based on a report made by Staff Person-5 that the Service Recipient was acting a little "weird...[and] was active and aggressive" presumably on [REDACTED] after returning from the outing. (Justice Center Exhibit 17)

16. At some point on or after [REDACTED], Staff Person-4 disclosed to the Subject that Staff Person-6 and perhaps another staff person told her that Staff Person-1 kicked the Service Recipient on [REDACTED] (Justice Center Exhibits 15 and 23, third page)

17. Sometime on the morning of [REDACTED], Staff Person-2 conducted a body check of the Service Recipient and noted bruising on the left bicep, right upper thigh and right shin. (Justice Center Exhibits 10 and 36). This bruising was not documented during routine body checks performed on [REDACTED]. (Justice Center Exhibits 10 and 35) The Subject became aware of the new bruising noted by Staff Person-2. The Subject then notified her supervisor of the threat made by Staff Person-1 toward the Service Recipient on [REDACTED] (Justice Center Exhibit 6, p. 3) and that another staff person had advised her that Staff Person-1 had kicked the Service Recipient. (Justice Center Exhibits 8 and 9)

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 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)(f), to include:

(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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 2, which is defined as follows:

(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.

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, 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 of abuse as set forth in the substantiated report.

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

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed the prohibited act described in “Allegation 1” of the substantiated report.

The Justice Center proved by a preponderance of the evidence that the Subject witnessed a suspected reportable incident of neglect and psychological abuse on [REDACTED] specifically that Staff Person-1 used derogatory language toward and made threats to harm the Service Recipient, and the Subject failed to immediately report the same to the VPCR.

The Justice Center also proved by a preponderance of the evidence that the Subject had reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident (physical abuse) on [REDACTED] and the Subject failed to immediately report same to the VPCR.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-45) The investigation underlying the substantiated report was conducted by [REDACTED] who was formerly employed as an investigator by [REDACTED] However, that investigator was unavailable to testify at the hearing and instead [REDACTED] supervisor, [REDACTED], Quality

Assurance-Quality Improvement Administrator for [REDACTED] testified for the Justice Center and was the only witness who testified at the hearing on behalf of the Justice Center.

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

At the hearing, the Subject conceded that she failed to report the threats and derogatory language directed towards the Service Recipient on [REDACTED], which do clearly rise to the level of the suspected reportable incidents of neglect and psychological abuse.

Pursuant to SSL § 491(l) (b), "discovery occurs when the mandated reporter witnesses a suspected reportable incident ... or has reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident." The Justice Center interprets the relevant statute to mean, and argues that for a report to be timely, the report should be made to the VPCR within 24 hours of the incident. In this case, the Subject never reported the threats and derogatory language of [REDACTED] to the VPCR.

The Subject's counsel argued that, because there was no convincing evidence in the record that Staff Person-1 committed physical abuse toward the Service Recipient, there could be no finding of obstruction for failing to report physical abuse, which did not occur.

The argument concerning physical abuse as it pertains to the issue of obstruction is largely academic, but it does need to be addressed. While there was no compelling evidence in the record that Staff Person-1 committed physical abuse against the Service Recipient, the standard for reporting a suspected reportable incident is not whether the incident occurred, but whether the mandated reporter has reasonable cause to believe that a suspected reportable incident occurred.

Reasonable cause is not a statutorily defined term. However, reasonable cause is present when, based on the evidence, facts and circumstances known or readily available, it is rational to think that a service recipient was subjected to a reportable incident. In assessing the reliability of

an allegation, the mandated reporter has to use his or her personal observations, trainings, experiences and common sense. Although not dispositive, the definition of “reasonable cause” contained in Criminal Procedure Law § 70.10(2) may be instructive. Under that provision, “Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay.” (NY CLS CPL § 70.10(2))

While the evidence in the record pertaining to physical abuse is ambiguous and not compelling, the preponderance of the evidence in the record establishes that the Subject came to believe during a conversation with Staff Person-4 on [REDACTED], that it was reasonably likely that Staff Person-1 had committed physical abuse against the Service Recipient. This is evidenced by the fact that on [REDACTED] the Subject felt compelled to tell her supervisor about her concern that the Service Recipient had been physically abused (kicked) by Staff Person-1. (Justice Center Exhibits 8 and 9) However, the Subject did not immediately, nor at any time, report this suspected reportable incident to the VPCR. Accordingly, the Justice Center has established by a preponderance of the evidence that the Subject had reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident (physical abuse).

After considering all of the evidence, it is determined that the Justice Center proved by a preponderance of the evidence that the Subject committed the act of abuse (obstruction of reports of reportable incidents). 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 abuse set forth in the substantiated report.

Counsel for the Subject argued that the Subject's conduct should be properly categorized as a Category 3 offense, as the evidence in the record does not support the conclusion that the failure to report the incidents seriously endangered the health, safety or welfare of the Service Recipient, as is required to support a Category 2 finding.

The Subject's counsel argued that there is no convincing evidence in the record that the Service Recipient was physically assaulted by Staff Person-1, and/or that Staff Person-1 was actually inclined to follow through and harm the Service Recipient. Therefore, a preponderance of the evidence does not support the conclusion the failure to report either the threats, derogatory language or suspected physical abuse, seriously endangered the health, safety or welfare of the Service Recipient.

No direct evidence was obtained to support the conclusion that Staff Person-1 physically harmed the Service Recipient. This Service Recipient routinely sustained bruising and minor injuries because of his own high activity level. As is noted, well before [REDACTED], the Service Recipient was subject to twice-daily body checks for injuries and there was no medical evidence presented linking any marks to Staff Person-1. Certainly, it is not necessary to conclude that the Service Recipient was physically assaulted in order to sustain a Category 2 finding against the Subject for failing to report the reportable incident. However, there is also no evidence in the record that Staff Person-1 was likely to follow through on the threats of harm or that he was particularly motivated do so or more apt to do so because of some extenuating circumstance.

There was also no evidence that the derogatory language or threats rose to a level necessary to conclude that they seriously endangered the health, safety or welfare of the Service Recipient, even in a non-physical manner, such as some type of emotional or psychological harm.

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Certainly, this could have been the case but there was no evidence in the record to sustain this conclusion. Without such evidence, it is not possible to conclude that the Subject's failure to report this suspected reportable incident seriously endangered the health, safety or welfare of the Service Recipient. Irrespective of the fact that upon the record it is not possible to sustain a Category 2 finding, every mandated reporter must immediately report threats and derogatory language made toward a service recipient to the VPCR.

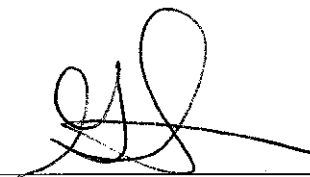
Based upon the totality of the circumstances, the evidence presented and the witnesses statements, it is determined that the substantiated report should properly be categorized as a Category 3 act. A substantiated Category 3 finding of abuse and/or neglect will not result in the Subject's name being 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 NY SSL § 496(2). This report will be sealed after five years.

DECISION: The request of ██████████ that the substantiated report dated ██████████ ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated report should properly be categorized, as a Category 3 act.

This decision is recommended by Gerard D. Serlin, Administrative
Hearings Unit.

DATED: August 31, 2016
Schenectady, New York


Gerard D. Serlin ALJ