

**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**

Adjudication Case #:

[REDACTED]

Held at:

Administrative Hearings Unit
Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977

On:

[REDACTED]

Vulnerable Persons' Central Register
Justice Center for the Protection of People with
Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
Appearance Waived.

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: Theresa Wells, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject), for abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient. The Subject invoked an internal administrative review which was denied. An administrative hearing was then held, on [REDACTED], in accordance with the requirements of Social Services Law § 494 and Part 700 of 14 NYCRR.

PROCEDURAL HISTORY

The VPCR contains a substantiated report, [REDACTED], of abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident. The Justice Center for the Protection of People with Special Needs (Justice Center), substantiated the report as against the Subject on [REDACTED], concluding that:

Allegation 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to act upon a report of a reportable incident in accordance with governing State regulations, policies or procedures and/or failed to report a reportable incident to the Vulnerable Persons' Central Register.

This allegation has been SUBSTANTIATED as category 3 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(c). Justice Center Exhibit 1.

An Administrative Review was conducted at the request of the Subject to amend the report and the Justice Center Administrative Appeals Unit denied the request. On [REDACTED], a Hearing (the Hearing) was held.

The Administrative Law Judge issued a Recommended Decision after Hearing

¹ Allegation 1 was unsubstantiated.

(Recommended Decision). That Recommended Decision is rejected by the Executive Director pursuant to 14 NYCRR 700.13 and the following constitutes the Final Determination of the Executive Director under 14 NYCRR 700.13.

FINDINGS OF FACT

The Executive Director adopts the "Findings of Fact" in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 set forth in the Recommended Decision and incorporates them herein and makes the following additional Findings of Fact.

Staff members who were present at the time of the incident filled out Critical Incident Reports which state that the Service Recipient stated in sum and substance that the Subject had come into her room multiple times and seen her naked or in states of being undressed and she can't take it anymore. Justice Center Exhibits 9(a), 9(b), 10(a) and 10(b). One staff member reported that the Service Recipient also stated that the Subject would come into her room even when she announced that she was undressed. Justice Center Exhibits 9(a) and 9(b).

The facility/agency rules required that when a male staff member is about to enter the portion of the facility with no doors they are to announce "man on the floor" to give the service recipients the opportunity to let the male staff member know that they are undressed or in a vulnerable state so the male staff member will wait until the service recipients are no longer in a vulnerable state before coming onto the floor. Hearing testimony of OCFS Investigator [REDACTED] and Hearing testimony of the Subject.

Before the subject incident, there was evidence that the Subject had walked in on the Service Recipient in an undressed state, but that it was unintentional and he would walk out. Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of the Subject, Justice Center Exhibits 2, 6, and 14.

Investigator [REDACTED] spoke to another service recipient at or around the time of the incident, and this service recipient told Investigator [REDACTED] that the Service Recipient had told the service recipient that the Subject had walked in on her, prior to the incident, while she was in an undressed state. Hearing testimony of OCFS Investigator [REDACTED].

The Subject was a custodian and as a result necessarily a mandated reporter and failed to report the allegations to the Justice Center.

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 (obstruction of reports of reportable incidents).
- Pursuant to Social Services Law § 493(4), the category level that the abuse (obstruction of reports of reportable incidents) constitutes.

APPLICABLE LAW

The Justice Center is responsible for investigating allegations of abuse or neglect in facilities and provider agencies. Social Services Law § 492(3) (c) and 493(1) and (3). Pursuant to Social Services Law § 493(3), the Justice Center determined that the initial report of abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient 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 ..." (14 NYCRR 700.3(f))

Pursuant to Social Services Law §§ 494(1)(a)(b) and (2) and 14 NYCRR 700.13 this

Final Determination of the Executive Director will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegation constitutes abuse (obstruction of reports of reportable incidents); and pursuant to Social Services Law § 493(4), the category level that the abuse (obstruction of reports of reportable incidents) abuse constitutes.

Obstruction of reports of reportable incidents is defined by Social Services Law § 488

(1)(f) as:

(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.

Neglect is defined by Social Services Law § 488 (1)(h) as:

(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.

A Significant Incident is defined by Social Services Law § 488 (1)(i), in pertinent part, as:

...an incident, other than an incident of abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services and shall include but not be limited to:.....

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject committed the act of abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient alleged in the substantiated report and that such act or acts constitute the category level set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

As is relevant to this proceeding, substantiated reports of abuse or neglect shall be categorized pursuant to Social Services Law § 493(4) (a-c). The Subject has been substantiated for a Category 3 level offense, which is abuse and/or neglect committed by a custodian, not otherwise described in categories one and two. Social Services Law § 493 states in pertinent part:

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;

- (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.

If the Justice Center proves the alleged abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient the report will not be amended and sealed. Pursuant to Social Services Law § 493(4) and Title 14 NYCRR 700.10(d), it must then be determined whether the act of abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient cited in the substantiated report constitutes a Category 3 act, as set forth in the substantiated report.

If the Justice Center did not prove the abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient by a preponderance of evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject committed abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient.

Social Services Law § 491 provides in pertinent part:

Duty to report incidents. 1. (a) Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register as established by section four hundred ninety-two of this article and in accordance with the requirements set forth therein. (b) Allegations of reportable incidents shall be reported immediately to the vulnerable persons' central register upon discovery. For purposes of this article, "discovery" occurs when the mandated reporter witnesses a suspected reportable incident or when another person, including the vulnerable person, comes before the mandated reporter in the mandated reporter's professional or official capacity and provides the mandated reporter with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

Where a custodian is alleged to have committed obstruction of reports of reportable incidents, based on a failure to report a reportable incident upon discovery, under Social Services Law § 488 (1)(f), the evidence must establish by a preponderance of evidence that:

1. The Subject is a custodian, and that;
2. The Subject failed to report a reportable incident upon discovery.

The uncontroverted evidence in the record establishes that the Subject was at the time of the incident, a custodian, and as a result, necessarily a mandated reporter. A mandated reporter is required to report allegations of reportable incidents to the VPCR immediately upon discovery. Discovery occurs when the mandated reporter witnesses a suspected reportable incident. Where, the mandated reporter does not actually witness a suspected reportable incident, discovery

occurs when another person, including the vulnerable person, comes before the mandated reporter, in his or her professional or official capacity, and provides the mandated reporter with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident. Social Services Law § 491(1)(b).

Social Services Law § 488(1)(a-i) defines “reportable incidents” ranging from various types of abuse and neglect to “significant incidents” which are incidents other than incidents of abuse or neglect. Among the types of reportable incidents contained in Social Services Law § 488(1) are neglect (Social Services Law § 488(1)(h) and significant incidents § 488(1)(i)).

The threshold for reporting under Social Services Law § 491 is significantly less than substantiating a report of abuse or neglect. The threshold for reporting, in the instant matter, was triggered when another person, including the vulnerable person, came before the Subject, in his professional or official capacity, and provided the Subject with reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident. Social Services Law § 491(1)(b). Although, given the proof admitted during the Hearing, the reporting threshold could well have been triggered when the Subject witnessed a suspected reportable incident. In any event the legal result is unchanged as the Subject never reported the conduct, at any time, provided to him by the Service Recipient on [REDACTED], so that this analysis will focus on the former reporting trigger under Social Services Law § 491(1)(b).

As set forth in the Recommended Decision, on [REDACTED] after the Service Recipient returned to Cottage [REDACTED], apparently upset, and reported to staff, and in the presence of the Subject, that she “couldn’t take it anymore” and was tired of the Subject walking in on her when she was undressed. Hearing testimony of OCFS Investigator [REDACTED]; Hearing testimony of Subject and Justice Center Exhibits 6, 9(a), 9(b), 10(a), 10(b), 11, 12, 15, 16, 18, 23 and 24.

At this point in time the Subject's obligation to report the incident was triggered. In other words, given the evidence admitted at the Hearing, namely that there was evidence that prior to [REDACTED], the Subject had committed the precise conduct attributed to him in the report made by the Service Recipient. It was the above information which clearly gave the Subject reasonable cause to suspect that the Service Recipient had been subjected to a **reportable incident**. (emphasis added) Social Services Law § 491(1)(b). The reportable incident the Subject had reasonable cause to suspect the Service Recipient had been subjected to could have been neglect or a significant incident, among others. Social Services Law §§ 488(1)(h), and 488(1)(i).

The Subject did not make a report to the Justice Center, but did immediately contact the Administrator on Duty (AOD) and reported to the AOD that the Service Recipient appeared intoxicated and reported the Service Recipient's allegation against him. The Subject then directed the two staff members who were present when the allegation was made to write reports about the incident. They did so and placed the reports in the Subject's office. Thereafter the Director of Special Programs at the facility became aware of the incident on [REDACTED], when it was reported to him by a Social Worker. The incident was reported to the Justice Center on [REDACTED]. Hearing testimony of OCFS Investigator [REDACTED] and Justice Center Exhibits 6(b), 7 and 18.

Moreover, as set forth above, Staff members who were present at the time of the incident filled out Critical Incident Reports which state that the Service Recipient stated in sum and substance that the Subject had come into her room multiple times and seen her naked or in states of being undressed and she can't take it anymore. Justice Center Exhibits 9(a), 9(b), 10(a) and 10(b). One staff member reported that the Service Recipient also stated that the Subject

would come into her room even when she announced that she was undressed. Justice Center Exhibits 9(a) and 9(b).

The facility/agency rules required that when a male staff member is about to enter the portion of the facility with no doors they are to announce "man on the floor" to give the service recipients the opportunity to let the male staff member know that they are undressed or in a vulnerable state so the male staff member will wait until the service recipients are no longer in a vulnerable state before coming onto the floor. Hearing testimony of OCFS Investigator [REDACTED] and Hearing testimony of the Subject.

Before the subject incident, there was evidence that the Subject had walked in on the Service Recipient in an undressed state, but that it was unintentional and he would walk out. Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of the Subject, Justice Center Exhibits 2,6,and 14.

Finally, Investigator [REDACTED] spoke to another service recipient at or around the time of the incident, and this service recipient told Investigator [REDACTED] that the Service Recipient had told the service recipient that the Subject had walked in on her, prior to the incident, while she was in an undressed state. Hearing testimony of OCFS Investigator [REDACTED].

The Subject argued that he did not report the incident to the Justice Center essentially because he knew the allegations were untrue.

This argument is misplaced.

There was in fact evidence that the Subject had walked in on the Service Recipient in an undressed state, but that it was unintentional and he would walk out. Hearing testimony of OCFS Investigator [REDACTED], Hearing testimony of the Subject, Justice Center Exhibits 2,6,and 14.

Even if done unintentionally, the conduct was indeed a reportable incident. The element

of intent is not an element of neglect under Social Services Law § 488(1)(h), nor is intent a necessary element of a Significant Incident under Social Services Law § 488(1)(i). Inserting elements into the statutory definitions of abuse, neglect or significant incidents, which do not exist is plainly not a justification or defense for failure to report a reportable incident under Social Services Law § 488 (1)(f).

In other words, the Subject had reasonable cause to **suspect** that the Service Recipient had been subjected to a **reportable incident**. (emphasis added) Social Services Law § 491(1)(b). This is so because there was evidence admitted during the Hearing establishing that, the subject had engaged in the precise conduct reported by the Service Recipient. The Service Recipient did not report that it was intentional. The reportable incident the Subject had reasonable cause to suspect the Service Recipient had been subjected to could have been neglect, a significant incident, among others. Social Services Law §§ 488(1)(h) and 488(1)(i).

Accordingly, based on the above the Justice Center has established by a preponderance of evidence that the Subject committed abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a Service Recipient.

Not only has the Justice Center established by a preponderance of evidence that the Subject committed abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident, as defined in Social Services Law § 488(1)(f), but it has also established that the abuse is properly categorized as a Category 3 offense under Social Services law § 493(4)(c).

The Administrative Law Judge in the Recommended Decision, recommended that this case be unsubstantiated as to the allegation of abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident involving a

Service Recipient, because, the Administrative Law Judge found that the Justice Center failed to established by a preponderance of evidence that the Subject had reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident, essentially based on the arguments advanced by the Subject at the Hearing as set forth above.

For the same reasons the Subject's arguments, as to his basis for not reporting the subject incident, are rejected as set for above, so too is the rational for recommending this matter be unsubstantiated in the Recommended Decision rejected as well.

Accordingly, based on the foregoing it is hereby:

ORDERED:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident.

The substantiated report for abuse (obstruction of reports of reportable incidents), based on the Subject's alleged failure to report a reportable incident is properly 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 Davin Robinson, Chief of Staff, who has been designated by the Executive Director to make such decisions.

DATED: October 6, 2016
Delmar, New York


Davin Robinson
Chief of Staff

**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**

Adjud. Case #:

[REDACTED]

Before:

Elizabeth M. Devane
Administrative Law Judge

Held at:

Administrative Hearings Unit
Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register
New York State Justice Center for the Protection
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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.

[REDACTED]

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 § 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 2¹

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to act upon a report of a reportable incident in accordance with governing State regulations, policies or procedures and/or failed to report a reportable incident to the Vulnerable Persons' Central Register.

This allegation has been SUBSTANTIATED as category 3 abuse (obstruction of reports of reportable incidents) 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], [REDACTED] located at [REDACTED]

¹ Allegation 1 was unsubstantiated.

██████████, is a residential school and campus facility for at-risk youth ages seven to sixteen with behavioral and/or mental health issues. ██████████ is operated by the ██████████ which is licensed by the New York State Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of OCFS Child Abuse Specialist 1 ██████████ and Justice Center Exhibit 6)

5. At the time of the alleged abuse, the Subject was employed by ██████████ as a Resident Supervisor. The Subject's duties included supervision, maintaining appropriate staff coverage and ensuring that service recipients' needs were being met by the counselors. The Subject was a custodian as that term is defined in Social Services Law § 488 (2). The Subject was also a mandated reporter as that term is defined in Social Services Law § 488 (5). (Hearing testimony of OCFS Child Abuse Specialist 1 ██████████ and Hearing testimony of Subject)

6. At the time of the alleged abuse, the female Service Recipient was a teenager, her exact age was not specified, and she had been a resident of ██████████ for approximately one year. (Hearing testimony of OCFS Child Abuse Specialist 1 ██████████ and Justice Center Exhibit 26)

7. On ██████████, the Subject was the Resident Supervisor in charge of ██████████ Cottage ██████████, a cottage for females where the Service Recipient resided. (Hearing testimony of OCFS Child Abuse Specialist 1 ██████████ and Hearing testimony of Subject)

8. That evening, around 6:30 p.m., the Service Recipient went to a different cottage for a ██████████ party. While at the party, a Milieu Counselor realized that the Service Recipient appeared intoxicated and escorted the Service Recipient back to her residential Cottage ██████████. The residential area of Cottage ██████████ was an open area, there were no doors, and the rooms were set up in

a cubicle fashion. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED] and Justice Center Exhibits 6, 12, 15 and 23)

9. Sometime after returning to Cottage [REDACTED], the Service Recipient asked the Subject to unlock her closet. The Subject refused to unlock the closet and went to his office. The Service Recipient became agitated and began cursing and repeatedly kicking the closet door. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 9(a), 10(a), 11, 15, 16, 18 and 24)

10. The Service Recipient went to the Subject's office and continued to yell and curse at the Subject. Eventually, the Service Recipient began kicking the door to the Subject's office. The Subject opened his office door and the Service Recipient swung at the Subject. Another Milieu Counselor came over to assist. The Service Recipient turned to that Milieu Counselor and said she "couldn't take it anymore" and was tired of the Subject walking in on her when she was undressed. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 6, 9(a), 9(b), 10(a), 10(b), 11, 12, 15, 16, 18, 23 and 24)

11. The Subject immediately contacted the Administrator on Duty (AOD) and reported to the AOD that the Service Recipient appeared intoxicated and reported the Service Recipient's allegation against him. Facility practice dictated that when any incidents occurred, including an allegation of this nature, the AOD was to be notified. The AOD met with the Service Recipient. Respite was also called to assist. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject and Justice Center Exhibits 2, 9(a), 10(b), 11, 15 and 16)

12. The Subject instructed the two Milieu Counselors who were present when the allegation was made to write reports about the incident. They did so and placed the reports in the Subject's office. It is unclear what happened next with those reports. However, they were included

in the investigative file that was introduced into evidence. (Hearing testimony of OCFS, Hearing testimony of Subject, Justice Center Exhibits 6, 9a, 9b, 10a 10b, 11, 15, 23 and 24)

13. The [REDACTED] Director of Special Programs became aware of the incident on [REDACTED], when it was reported to him by a Social Worker. The incident was reported to the Justice Center on [REDACTED]. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED] and Justice Center Exhibits 6(b), 7 and 18)

14. An investigation by OCFS Child Abuse Specialist 1 [REDACTED] determined that the Service Recipient's allegations were unfounded and recommended that the allegations of neglect by the Subject be unsubstantiated. The recommendation was adopted by the Justice Center and the neglect allegation against the Subject was unsubstantiated. Nevertheless, an allegation of abuse (obstruction of reports of reportable incidents) was substantiated against the Subject for failure to report the allegations. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject and Justice Center Exhibit 6)

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.
- Pursuant to Social Services Law § 493(4), the category of abuse 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. (Social Services Law § 492(3)(c) and 493(1) and (3)) Pursuant to Social Services Law § 493(3), the Justice Center determined that the report of neglect was

unsubstantiated while a report of abuse (obstruction of reports of reportable incidents) 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 of a person in a facility or provider agency is defined by Social Services Law § 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 Social Services Law § 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 committed the act or acts of abuse alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of abuse 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 Social Services Law § 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

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1 – 30) The investigation underlying the substantiated report was conducted by OCFS Child Abuse Specialist 1 [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

The Allegation includes two theories of obstruction of reports.

Abuse (Failure to report a reportable incident)

Where a custodian is alleged to have committed obstruction of reports of reportable incidents, based on a failure to report a reportable incident upon discovery, under Social Services Law § 488 (1)(f), the evidence must establish by a preponderance of evidence that:

1. The Subject is a custodian and mandated reporter, and that;
2. The Subject failed to report a reportable incident upon discovery.

Reportable incidents pursuant to Social Services Law 488 (1) (a –i) range from various types of abuse and neglect, to “significant incidents” which include acts not rising to the level of abuse or neglect.

The uncontroverted evidence in the record establishes that the Subject is a custodian and, as a result, he is necessarily a mandated reporter. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 6, 15 and 16)

Pursuant to Social Services Law § 491, a mandated reporter is required to report allegations of reportable incidents to the VPCR immediately upon discovery. Discovery occurs when the suspected reportable incident is witnessed by the mandated reporter, or when the mandated reporter is provided with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

At issue is whether the Subject had reasonable cause to suspect that a reportable incident of abuse or neglect occurred. The Subject testified that he had no reasonable cause to suspect that abuse or neglect had occurred as he knew the Service Recipient's claim was false because he was the target of the allegation.

This decision does not address potential constitutional issues pertaining to whether a Subject has an obligation to report allegations of abuse or neglect to the VPCR when they themselves are the target. Ultimately, the Justice Center is a law enforcement agency, nonetheless the Subject did not raise that constitutional defense at the hearing. This decision also does not address the obligation of other staff persons involved in this case to report the suspected abuse or neglect to the VPCR after learning of a suspected reportable incident or significant incident. There is no evidence that any other mandated reporter present, including two Milieu Counselors, the AOD and respite staff, who became aware of the disclosure on [REDACTED], reported the allegations to the VPCR within 24 hours.

This portion of the decision addresses the narrow issue of whether this Subject had reasonable cause to suspect that abuse or neglect had occurred.

During the course of the investigation, OCFS Child Abuse Specialist 1 [REDACTED] interviewed the Subject, as well as a number of employees and service recipients at [REDACTED]. After investigation, it was determined that there was not a preponderance of evidence to establish

the Service Recipients' allegation. Ultimately, the allegation that the Service Recipient made against the Subject was recommended to be unsubstantiated by OCFS Child Abuse Specialist 1 [REDACTED]. Further, those allegations remained unsubstantiated after review by the Justice Center.

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 the 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. Criminal Procedure Law § 70.10(2) provides that, "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."

At the hearing, the Subject testified and argued that he had no reasonable cause to suspect that the Service Recipient was abused or neglected in the manner alleged. He testified that, in fact, he had no suspicion that the Service Recipient was subjected to abuse, neglect or a significant incident, as he had direct personal knowledge that the Service Recipients allegations were untrue. Therefore, as he did not have reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident, he had no duty to report.

The fact that there was not a preponderance of the evidence to establish that the underlying

conduct occurred certainly does not preclude a finding that there was reasonable cause to suspect a reportable incident. However, this factor, coupled with the fact that the Subject was identified as the perpetrator and, therefore, arguably knew that he did not commit the acts alleged by the Service Recipient, weigh strongly against a finding that the Subject had reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident. In this matter, that issue needs to go no further, as the evidence presented supports the conclusion that the Subject did not have reasonable cause to suspect abuse or neglect.

During the hearing, there was significant proof focused on the chain of custody, for lack of a better term, of two statements created by staff who witnessed the disclosure. The Milieu Counselors indicated they left statements in the Subject's office. The Subject was questioned extensively as to what happened to those statements after they were placed in his office. The Subject testified that the next time he went to work, three days later, the statements were not in his office. The Subject testified that others did have access to the office, however he did not know what happened to the statements. Eventually the statements were obtained and made part of the investigative file. How the statements became part of the investigation is unclear. While this proof could arguably support an obstruction finding under the theory that the Subject intentionally withheld information, this was not the theory of the substantiation set forth in the substantiated allegation. (Hearing testimony of OCFS Child Abuse Specialist 1 [REDACTED], Hearing testimony of Subject, Justice Center Exhibits 9(a), 9(b), 10(a), 10b, 15, 23 and 24)

Accordingly, the Justice Center has not established by a preponderance of the evidence that the Subject failed to report a reportable incident upon discovery, as set forth in the allegation.

Abuse (Intentional failure to act upon a report of a reportable incident)

To prove abuse under this theory of the allegation, the Justice Center must establish that

the Subject, while acting as a supervisor, intentionally failed to act upon a report of a reportable incident in accordance with the governing state agency regulations, policies or procedures upon discovery.

Social Services Law § 488(16) states that the word “intentionally” has the same meaning as provided in New York Penal Law § 15.05. Under New York Penal Law § 15.05(1), a person acts “intentionally” with respect to a result or conduct when a person has a “... conscious objective ...” to cause a result or engage in such conduct.

There is no dispute that, as the Resident Supervisor of Cottage [REDACTED], the Subject was a supervisor as well as a custodian.

At the time of the incident, [REDACTED] protocol was to report all incidents to the AOD. It was the duty of the AOD to document and report all incidents. There was no evidence to the contrary. The Subject testified that he believed he fulfilled his responsibilities when he reported the incident to the AOD, as was his facility’s protocol, and that he had no intention of failing to act upon a report of a reportable incident.

The Notice to Mandated Reporters dated [REDACTED] and Code of Conduct for Custodians of People with Special Needs dated [REDACTED] were in evidence. However, there was nothing signed or acknowledged by the Subject and no evidence that the Subject received training or was aware of the reporting requirements to the Justice Center in [REDACTED]. While this void is not terribly compelling or dispositive, considering the time period, the absence of evidence of such training or acknowledgment makes a finding of intent problematic.

OCFS Child Abuse Specialist 1 [REDACTED] testified that under OCFS regulations, mandated reporters and supervisors must make a report to OCFS if there is reasonable cause to suspect that abuse or neglect has occurred. [REDACTED] did not provide the regulatory citation or

written policy or protocol of OCFS to which she was referring. Social Services Law § 413, and the associated regulations, require mandated reporters to make a report to the statewide central register of child abuse or maltreatment as set forth in Social Services Law § 415. However, the statewide central register is different and apart from the VPCR. After the creation of the New York State Justice Center on June 30, 2013, Social Services Law § 413 and § 415 did not establish the standard, or dictate the process, for reporting suspected abuse or neglect of a child in a facility, such as the one at issue in this case.


After considering all of the evidence, 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 alleged abuse (obstruction of reports of reportable incidents). The substantiated report will be amended and sealed.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED], [REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse.

This decision is recommended by Elizabeth M. Devane, Administrative Hearings Unit.

DATED: August 8, 2016
Schenectady, New York



Elizabeth M. Devane
Administrative Law Judge