

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**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: Jacqueline Seitz, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

██████████

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 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 David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

**DATED:** November 23, 2016  
Schenectady, New York

  
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David Molik  
Administrative Hearings Unit

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjudication Case #:**

[REDACTED]

Before:

Jean T. Carney  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
Adam Clayton Powell, Jr. State Office Building  
163 West 125<sup>th</sup> Street  
New York , NY 10027  
On: [REDACTED]

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: Jacqueline Seitz, Esq.

[REDACTED]  
[REDACTED]  
[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 (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] 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 on [REDACTED], while at the [REDACTED] and away from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to timely report your knowledge of an incident of abuse and/or neglect involving a service recipient.

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], located at [REDACTED], is an [REDACTED] for adults with intellectual disabilities and is operated 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. At the time of the alleged abuse, the Subject had been employed at ██████████ for approximately 3 years as a Direct Support Professional 9 (DSP9). (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2) and a mandated reporter pursuant to Social Services Law § 488(5).

6. At the time of the alleged abuse, the Service Recipient was a 24 year old male with diagnoses of mild to moderate mental retardation, schizophrenia and bipolar disorder. (Justice Center Exhibits 6 and 11)

7. On ██████████ at approximately 4:45 p.m., the Subject, working his regular 3:00 p.m. to 11:30 p.m. shift, heard a loud bang coming from the facility's dining room. Upon inspection, the Subject observed the Service Recipient in an agitated state throwing chairs across the room. The House Manager, who was also in the dining room, spoke to the Service Recipient who eventually calmed down and followed the House Manager out of the dining room. The House Manager escorted the Service Recipient to the Licensed Practical Nurse (LPN) on shift and requested the necessary paperwork be completed for the Service Recipient to be transported to a hospital because he was hearing voices. (Justice Center Exhibits 6, 17, 21 and 26; Hearing testimony of the Subject)

8. Upset with the choice of hospital he was being taken to, and while the LPN was completing the transfer paperwork, the Service Recipient eloped from the facility and boarded a bus to ██████████. The Subject performed a search of the residence and notified the Administrator on Call (AOD). The Service Recipient called the residence house phone to inform facility staff that he was on a bus traveling to ██████████. The Subject was instructed by the House Manager to meet the Service Recipient at ██████████. (Justice Center Exhibits 6, 13, 15 and 17; Hearing testimony of the Subject)

9. At [REDACTED], the Service Recipient recounted the incident to the Subject. The Service Recipient disclosed that the House Manager threatened him stating: “Throw one more chair and I will fucking kill you.” The Subject did not report the allegation to the Justice Center. (Justice Exhibit 17)

10. On [REDACTED], the Service Recipient was discharged from [REDACTED] and he returned to the facility. (Justice Center Exhibit 14, 15) The registered nurse (RN) on shift questioned the Service Recipient regarding the chair throwing incident and subsequent hospitalization. The Service Recipient described the incident to the RN, including the threat made by the House Manager. The RN immediately notified [REDACTED] who, in turn, reported the incident to the Justice Center. (Justice Center Exhibits 6 and 20)

### **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 (obstruction of reports of reportable incidents) 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))

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The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488(1)(f), to include:

"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 (3), which is defined as follows:

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 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 an act of abuse (obstruction of reports of reportable incidents), described as “Allegation 1” in the substantiated report. Specifically, the evidence establishes that the Subject, upon discovery, failed to report a reportable incident to the VPCR.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-25) The Justice Center also presented audio recordings of the OPWDD Internal Investigator’s interrogation of the Subject, and interviews of House Manager [REDACTED] and Developmental Assistant [REDACTED]. (Justice Center Exhibit 26) The investigation underlying the substantiated report was conducted by OPWDD Internal Investigator [REDACTED] who is no longer employed with OPWDD. OPWDD Internal Investigator [REDACTED] testified regarding the investigative report and 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 facts in this matter are not in dispute. The Subject was a custodian, and as a result, necessarily a mandated reporter. Following the [REDACTED] hospitalization of the Service Recipient, the Subject was made aware of a reportable incident; namely, that the Service Recipient was verbally threatened by the House Manager. The Subject did not report the incident to the Justice Center. (Justice Center Exhibits 6 and 26; Hearing testimony of the Subject)

A mandated reporter is required to report allegations of reportable incidents to the Justice Center immediately upon discovery. Where, as here, the mandated reporter does not actually witness a suspected reportable incident, discovery occurs when another person, including a service recipient, gives reasonable cause for the mandated reporter to suspect that the service recipient was subjected to a reportable incident. [Social Services Law §491(1)(b)]. The Service Recipient’s



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allegation of abuse and neglect was sufficient to establish that the incident was a reportable incident. Upon discovery, the Subject had a legal obligation to immediately report the incident, which he did not do.

In his defense, the Subject testified that he believed that because ██████████ had already called the Justice Center to report the incident, the Subject was no longer under an obligation to do so. (Hearing testimony of the Subject) However logical that may have seemed to the Subject at the time, the fact remains once SSL § 488 was enacted, and an avenue through which reporting acts of suspected reportable incidents was created, the Subject had a duty to report such suspected incidents, whether previously reported or not.

The Subject further asserted in his defense that although he had received annual training regarding mandatory reporting and signed an acknowledgement of receiving such training, he was never informed that he had to report an incident that had been previously reported. The Subject further admitted that he not read the training material provided to him. (Hearing testimony of the Subject) It was the Subject's responsibility to review the training material and therefore should have known his responsibilities as a mandated reporter.

Accordingly, it is determined that the Justice Center has sufficiently established that the Subject committed abuse (obstruction of reports of reportable incidents) when he failed to timely report knowledge of an allegation of abuse and/or neglect by the House Manager of the Service Recipient. 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. Based upon the totality of the circumstances, the evidence presented and the witnesses' statements, it is determined that the substantiated report is properly categorized as a Category 3 act.

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.

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

This decision is recommended by Jean T. Carney, Administrative Hearings Unit.

  
Jean T. Carney  
Administrative Law Judge