

**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: Todd M. Sardella, Esq.

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By: Kevin A. Luibrand, Esq.
950 New Loudon Road
Latham, New York 12110

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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 granted. The Subject has not been shown by a preponderance of the evidence to have committed abuse and/or neglect.

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

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

DATED: November 29, 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

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
401 State Street
Schenectady, New York 12305
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: Todd M. Sardella, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Kevin A. Luibrand, Esq.
950 New Loudon Road
Latham, New York 12110

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. The Subject requested that the 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 and neglect 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] at the [REDACTED], located at [REDACTED] [REDACTED] while acting as a custodian, you committed physical abuse and/or neglect when you tipped over a couch that a service recipient was sitting in causing him to fall onto his knees.

These allegations have been SUBSTANTIATED as Category 3 physical abuse and Category 3 neglect, pursuant to Social Services law § 493(4)(c).

Allegation 2

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED] [REDACTED] while acting as a custodian, you committed abuse (use of aversive conditioning) when you opened the window to expose a service recipient to frigid temperatures in an attempt to get him to modify his behavior.

This allegation has been SUBSTANTIATED as Category 3 abuse (use of aversive conditioning) 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, located at [REDACTED] is an [REDACTED] for adults with intellectual disabilities, and is operated by the [REDACTED]. [REDACTED] is an organization certified by the 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 and/or neglect, the Subject was employed by [REDACTED] and was given her first assignment at the [REDACTED]. The Subject worked as a Resident Counselor (RC). (Hearing Testimony of the Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 45 years of age, and had been a resident of the facility for an unknown period. The Service Recipient is an ambulatory adult with diagnoses of severe intellectual disability, autism, and generalized anxiety disorder. (Justice Center Exhibit 5)

7. On [REDACTED] the Subject worked the day shift, along with two other RCs, at the [REDACTED]. At no point on [REDACTED] did any other staff person report an allegation of abuse and/or neglect regarding the Subject. (Hearing Testimony of Program Administrator [REDACTED], Hearing Testimony of the Subject)

8. On [REDACTED] RC [REDACTED] shift overlapped with RC [REDACTED] and the Subject. None of the staff members who worked that morning reported an incident between the Subject and the Service Recipient. Further, RC [REDACTED] denied any knowledge of the window being opened by staff as a way to induce the Service Recipient to amend his behavior. (Justice Center Exhibit 5)

9. On [REDACTED], RC [REDACTED] did not report any incident occurring, and

specifically noted on the Service Recipient's Health Concerns and Progress Notes Report, "No new health concerns." On [REDACTED], two days after the alleged incident occurred, RC [REDACTED] reported to a Program Administrator that the Subject and another RC had opened the window in the living room, and tipped the Service Recipient off the couch onto the floor in an attempt to get the Service Recipient to take a shower. The Subject was notified of the report, and was relieved of her responsibilities as a Resident Counselor on [REDACTED] (Hearing Testimony of the Subject, Justice Center Exhibit 5-13)

10. The Subject was arrested by the local police department, and tried in a court of law in reference to the accusations of RC [REDACTED]. Given the pending criminal trial, at no point was the Subject interviewed by either the Justice Center or any other civil investigators. (Hearing Testimony of Program Administrator [REDACTED], Hearing Testimony of the Subject)

11. Three Resident Counselors were working on [REDACTED], and of those three, two were accused of abuse and/or neglect by RC [REDACTED]. Ultimately those two Resident Counselors [REDACTED], based primarily upon the accusations of RC [REDACTED]. The allegations made by RC [REDACTED] regarding the events of [REDACTED] were not corroborated by any other evidence or testimony. (Hearing Testimony of Program Administrator [REDACTED]; Hearing Testimony of the Subject)

12. During the course of the Subject's criminal trial, RC [REDACTED] testimony differed materially from the allegations she made at the onset of the investigation. (Hearing Testimony of the Subject)

13. The Subject was found not guilty of the criminal charges. (Hearing Testimony of the Subject)

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 and 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)(a) (“Physical Abuse”), 488(1)(e) (“Use of Adverse Conditioning”), and 488(1)(h) (“Neglect”), to include:

"Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

"Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to

governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.

"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.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 3, which is defined in SSL § 493(4)(c) 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(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.

DISCUSSION

The Justice Center has failed to establish by a preponderance of the evidence that the Subject committed acts, described as “Allegation 1” and “Allegation 2” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1 - 6) The investigation underlying the substantiated report was conducted by [REDACTED], a Program Administrator for the [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.¹

The Subject testified in her own behalf and provided one exhibit. (Subject Exhibit A)

The Justice Center has failed to prove by a preponderance of the evidence that the Subject either committed physical abuse and/or neglect by tipping over a couch being used by the Service Recipient, and correspondingly has failed to prove by a preponderance of the evidence that the Subject committed abuse by opening the windows to the [REDACTED] to expose the Service Recipient to frigid temperatures.

Central to the failure of the Justice Center’s case is the credible testimony of Program Administrator [REDACTED], and the credible testimony of the Subject herself. (Hearing Testimony of Program Administrator [REDACTED] Hearing Testimony of Subject) Specifically, the testimony of Program Administrator [REDACTED] establishes that the entirety of the Justice

¹ Program Administrator [REDACTED] is also referred to in exhibits presented by the Justice Center in her former title as the Director of Quality Improvement.

Center's case is based upon the report received from RC [REDACTED], and is not corroborated by any additional evidence or testimony. (Hearing Testimony of Program Administrator [REDACTED]; Justice Center Exhibit 5)

RC [REDACTED] allegation of misconduct against the Subject was not reported in a timely manner. Program Administrator [REDACTED] specifically testified, and noted in her report, that she was unable to corroborate RC [REDACTED] testimony. (Hearing Testimony of [REDACTED]; Justice Center Exhibits 5 and 5-13) Furthermore, because of the pending criminal charges, Program Administrator [REDACTED] was unable to interview either the Subject or the other RC that was on duty at the [REDACTED] on [REDACTED] (Hearing Testimony of [REDACTED]; Justice Center Exhibit 5) It is troubling that RC [REDACTED] did not note any incident or behaviors in the Service Recipient's Health Concerns Log, or Progress Notes Report for either [REDACTED] or [REDACTED]. Additionally, her failure to disclose any incident to her co-workers who came on shift later that morning, is concerning. (Justice Center Exhibits 5 and 5-13) Only on [REDACTED] did RC [REDACTED] seemingly realize there was an incident two days prior, and report her story to her supervisors. (Hearing Testimony of [REDACTED])

RC [REDACTED] credibility was seriously called into question during the course of the Subject's credible and frank testimony. Critically, the Subject noted that during the course of the criminal trial RC [REDACTED] was unable to recite important details of the incident, and testified that the Subject tipped a chair instead of a couch. (Hearing Testimony of the Subject)

The Justice Center has the responsibility to show, by a preponderance of the evidence, that the allegations contained in the substantiated report occurred. The investigation's sole reliance on RC [REDACTED] statements at the time, without any additional corroboration, does not rise to the evidentiary level required by law. Stated another way, the proof in the record does not establish

that it was more likely than not that the conduct complained of actually occurred.

Accordingly, it is determined that the Justice Center has failed to meet its burden of proving by a preponderance of the evidence that the Subject committed the abuse and/or neglect alleged. The substantiated report will be sealed.

DECISION: The request of [REDACTED] that 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 abuse and/or neglect.

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

DATED: November 14, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge