

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

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Adjud. Case #:

[REDACTED]

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

New York State Justice Center for the Protection
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Theresa Wells, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: V. Jonas Urba, Esq.
Urba Law Firm
520 White Plains Rd., Suite 500
Tarrytown, New York 10591

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 [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).

The substantiated report is properly categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

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: January 13, 2017
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:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
11 Perlman Drive
Spring Valley, New York
On: [REDACTED]

Parties:

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

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By: Theresa Wells, Esq.

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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). 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 (obstruction of reports of reportable incidents) 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 an unknown date [REDACTED], at [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to report that a service recipient had alleged that a staff member had touched her inappropriately.

This allegation has 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, [REDACTED], located at [REDACTED]

██████████ is a residential treatment center operated by the ██████████ ██████████ and licensed by the NYS Office of Children and Family Services (OCFS), 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 by ██████████ for twelve years, and was the Director of the ██████████ Unit. (Hearing testimony of Subject) At all times relevant to this matter, the Subject was a custodian as that term is defined in Social Services Law (SSL) § 488(2) and was therefore a mandated reporter. (SSL § 488(5))

6. At the time of the alleged abuse, the Service Recipient was a female, fifteen years of age, and had been a resident of the facility since ██████████, 2012. She resided in the ██████████ Unit. The Service Recipient presented with oppositional and physically aggressive behaviors. The Service Recipient was diagnosed as having low or borderline intellectual function, and exhibited limited insight and impaired judgment, although the facility psychiatric staff noted on the initial psychiatric assessment report that it had no previous assessment available with which to confirm this impression. The Service Recipient was also believed by staff to have been sexually abused and exploited during childhood, based upon information provided at intake by the Service Recipient's father. (Hearing testimony of Justice Center Investigator ██████████; Justice Center Exhibits 6, 12)

7. On ██████████, the Service Recipient was subjected to several physical restraints involving an identified male staff and other female staff. (Hearing testimony of ██████████ Senior Milieu Counselor ██████████) On ██████████, the Service Recipient verbally reported to the Subject that she had been inappropriately touched by the same male staff during one or more of the restraints. (Hearing testimony of Justice Center Investigator ██████████; Hearing testimony of the Subject; Hearing testimony of ██████████ Milieu Counselor

[REDACTED]; Justice Center Exhibits 1, 2, 6, 7, 8, 24, 35)

8. The Subject signed the Justice Center Code of Conduct [REDACTED]. The Subject had also been trained in the Justice Center reporting requirements, and testified that she understood them. The Subject further testified that when she received the report from the Service Recipient, she understood it was her duty to report the allegation. (Hearing testimony of the Subject; Justice Center Exhibits 7, 8, 35)

9. The Subject did not call the Justice Center VPCR to report this incident. (Hearing testimony of the Subject; 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. (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))

The abuse (obstruction of reports of reportable incidents) 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 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 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, described as “Allegation 1” 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 1-37) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. The Justice Center also called as a witness [REDACTED] Milieu Director [REDACTED].

The Subject testified in her own behalf and offered Subject Exhibits 1-7, which were admitted into evidence. The Subject called five additional witnesses: [REDACTED] Milieu Director [REDACTED], [REDACTED] Milieu Counselor [REDACTED], [REDACTED] Milieu Counselor [REDACTED], [REDACTED] Senior Milieu Counselor [REDACTED], and [REDACTED]-Affiliated Attending Psychologist [REDACTED].

In order to prove abuse (obstruction of reports of significant incidents), the Justice Center must prove by a preponderance of the evidence that, at the time of the incident, the Subject was a custodian and mandated reporter, and that she failed to report a reportable incident upon discovery. The threshold for reporting was triggered when another person came before the Subject in her professional or official capacity, and provided the Subject with reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident. (SSL § 491(1)(b))

Specifically, the Subject acknowledged that she was an employee of the facility, and

¹ Recalled as Subject’s witness.

therefore a custodian as that term is defined by SSL § 488(2) and a mandated reporter at the time of the incident. She also admitted that she had received the allegation by the Service Recipient that the Service Recipient had been inappropriately touched by a male staff. The allegation was reported to the Subject by the Service Recipient during the evening of [REDACTED], at which time the Service Recipient specifically identified the male staff involved. (Hearing testimony of the Subject) The underlying incident alleged by the Service Recipient occurred on or about [REDACTED] during a physical restraint. Lastly, the Subject acknowledged that she had not made a report to the Justice Center after receiving the report. (Hearing testimony of the Subject; Hearing testimony of [REDACTED]; Hearing testimony of [REDACTED] Senior Milieu Counselor [REDACTED]; Justice Center Exhibits 6, 10, 24)

In her defense, the Subject testified that her immediate response was consistent with the policies of [REDACTED], which required her to report the matter to her supervisor and wait for administrative staff to determine whether a report to the VPCR should be made. (Hearing testimony of the Subject; Hearing testimony of Senior Milieu Counselor [REDACTED]; Hearing testimony of Milieu Director [REDACTED]; Subject Exhibits 3, 4, 5)

The Subject's response was inconsistent with the requirements of Social Services Law, the Justice Center's Code of Conduct and guidance documents furnished to and acknowledged by the Subject on June 19, 2013. (Hearing testimony of Subject; Hearing testimony of Milieu Director [REDACTED]; Justice Center Exhibits 7, 8, 35)

Further, the Justice Center Code of Conduct, which the Subject signed on [REDACTED], states in relevant part that:

If I learn of, or witness, any incident of abuse, neglect or harm toward any person with special needs, I will offer immediate assistance and then notify emergency personnel, including 9-1-1 where appropriate, and inform the management of this organization. I pledge also to report the incident to the Justice Center for the

Protection of People with Special Needs. (Justice Center Exhibit 35)

The Subject's evidence regarding the policy of her employer makes her failure understandable, but does not legally excuse it. SSL §§ 488(1), (1)(f), (1)(i) and 491(1)(b) are clear, as is the Justice Center Code of Conduct, and these require notification for any reportable incident. "Reportable incident" is defined by SSL § 488(1) and includes conduct defined therein as abuse, neglect and significant incidents. Since the conduct being alleged by the Service Recipient clearly gave the Subject reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident, the Subject had a duty make a report to the Justice Center upon discovery. In this case, discovery occurred on [REDACTED].

"Reasonable cause" is not a statutorily defined term. However, reasonable cause can fairly be defined as a rational belief, based on the evidence, facts and circumstances known or readily available, 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, training, experiences and common sense. (See NYS Criminal Procedure Law § 70.10(2))

A preponderance of the evidence supports the conclusion that, based on the Social Services Law and the information presented to the Subject by the Service Recipient, coupled with her education, experience, training and understanding of the Justice Center Code of Conduct, the Subject had or should have had reasonable cause to suspect that the Service Recipient had been subjected to a reportable incident. As a result, a report by the Subject to the VPCR was required, but she made no such report. (SSL § 491(1)(a) and (b))

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the abuse (obstruction of reports of reportable incidents) alleged. 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, the witnesses' statements and the substantiated conduct by the Subject in which the health, safety or welfare of the Service Recipient was seriously endangered by the failure to report, it is determined that the substantiated report is properly categorized as a Category 2 act.

Category 2 conduct shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that such custodian engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

DECISION:

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).

The substantiated report is properly categorized as a Category 2 act.

This decision is recommended by Louis P. Renzi, Administrative Hearings
Unit.

DATED: January 11, 2017
Schenectady, New York



Louis P. Renzi, ALJ