

**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: Laurie Cummings, 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 [REDACTED] that the substantiated report dated [REDACTED], as it pertains to Allegation 1, be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect or abuse (use of aversive conditioning).

The request of [REDACTED] that the substantiated report dated [REDACTED], as it pertains to Allegation 2, be amended and sealed is granted in part and denied in part. The Subject has not been shown by a preponderance of the evidence to have committed abuse (use of aversive conditioning), but has been shown by a preponderance of the evidence to have committed neglect.

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

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 1, shall be amended and sealed by the Vulnerable Persons Central Register, pursuant to SSL § 493(3)(d).

NOW, THEREFORE, IT IS DETERMINED that the record of this report, as it pertains to Allegation 2, shall be amended in part and retained in part by the Vulnerable Persons' Central Register. The Subject has not been shown by a preponderance of the evidence to have committed abuse (use of aversive conditioning), but has been shown by a preponderance of the evidence to have committed neglect. The record 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: January 30, 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:

John T. Nasci
Administrative Law Judge

Held at:

New York State Office Building
207 Genesee Street, Room 103D
Utica, New York 13501
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: Laurie Cummings, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse (use of aversive conditioning) and 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], of abuse (use of aversive conditioning) 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], while acting as a custodian, you committed neglect and/or abuse (use of aversive conditioning) when you threatened to spray a service recipient with water from a hose, to induce pain or discomfort for the purpose of keeping him from entering the kitchen, a technique that is not authorized by his behavior support plan.

These allegations have been SUBSTANTIATED as Category 3 neglect and Category 3 abuse (use of aversive conditioning) pursuant to Social Services Law § 493(4)(c).

Allegation 2

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect and/or abuse (use of aversive conditioning) when you instructed another staff member to place a service recipient's television in the agency van to induce pain or

discomfort for the purpose of getting him to agree to go on an outing, a technique that is not authorized by his behavior support plan and which led him to become aggressive and act out.

These allegations have been SUBSTANTIATED as Category 3 neglect and 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, the [REDACTED], located at [REDACTED], provides residential and day nursing services for intellectually disabled, physically disabled and mentally retarded people, and is operated by [REDACTED]. The [REDACTED] is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is an agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of [REDACTED], [REDACTED] Director of Day and Residential Services)

5. At the time of the alleged abuse and neglect, the Subject was employed by [REDACTED] as a Residential Counselor (RC) and had been employed by [REDACTED] for four years. (Hearing testimonies of [REDACTED], [REDACTED] Director of Day and Residential Services and the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse and neglect, the Service Recipient was thirty-two years old, and had been a resident of the [REDACTED] for approximately twelve years. The Service Recipient was an adult male with diagnoses of profound intellectual disability, pervasive developmental disorder with autistic tendencies, psychotic disorder NOS, mood disorder and impulse control disorder (due to mental disability). (Justice Center Exhibit 13 and Hearing testimony of [REDACTED], [REDACTED] Director of Day and Residential Services)

7. At the time of the alleged abuse and neglect, the Service Recipient's challenging

behaviors included physical aggressiveness and putting himself to the floor when he did not want to do something. The Service Recipient was non-verbal and had very limited ability to communicate. Watching television was very important to the Service Recipient and he was afraid of being sprayed with water. (Justice Center Exhibits 6, 13 and 14; and Hearing testimony of [REDACTED], [REDACTED] Director of Day and Residential Services)

8. On [REDACTED], the Subject worked from 6:30 a.m. to 2:30 p.m. at the [REDACTED]. At approximately 9:30 a.m., the Subject and another [REDACTED] staff took three of the [REDACTED] service recipients to church. The Subject, the other staff and the three service recipients returned to the [REDACTED] at approximately 1:30 p.m. (Justice Center Exhibit 12 and Hearing testimony of the Subject)

9. Upon their return to the [REDACTED], the Subject prepared and served lunch for one of the three service recipients whom she had taken to church. While the Subject was doing this, the Service Recipient was running around the house, upset that Staff A was attempting to persuade him to go to the van for a ride. The Subject told Staff A to take the living room television and put it in the van to entice the Service Recipient to get into the van. After Staff A put the living room television in the van, the Service Recipient became more upset and ran outside without any socks or shoes on his feet. Staff A then returned the television to the living room after being told to do so by Staff B. (Justice Center Exhibits 21, 22, 31, 32 and 35; and Hearing testimony of the Subject)

10. A few minutes later, while the Subject was in the [REDACTED] kitchen washing lunch dishes, the Service Recipient attempted to enter the kitchen by rolling over a counter between the kitchen and the room that he was in. To prevent the Service Recipient from entering the kitchen, the Subject grabbed the kitchen sink spray hose. The Service Recipient saw the kitchen sink spray hose and immediately backed down and returned to watching television in the living

room. (Justice Center Exhibit 21 and Hearing testimony of the Subject)

11. In the past, some of the [REDACTED] staff have used the kitchen sink spray hose to prevent the Service Recipient from entering the kitchen. The [REDACTED] staff have also used the television remote control to prevent the Service Recipient from entering the kitchen or to prevent the Service Recipient from engaging in other undesirable behavior. (Justice Center Exhibits 22, 25, 29 and 31)

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 (use of aversive conditioning) 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)(e) and (h):

- (e) "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.

(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.

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:

(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 and 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 neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and 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 neglect cited in the substantiated report constitutes the category of abuse and neglect as set forth in the substantiated report.

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

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed the acts that are described in “Allegation 1” and “Allegation 2” in the substantiated report. The Justice Center has not established that the Subject’s acts constitute abuse (use of aversive conditioning) or neglect in Allegation 1. The Justice Center has not established that the Subject’s acts constitute abuse (use of aversive conditioning) in Allegation 2, but has established that the Subject’s acts constitute neglect in Allegation 2.

In support of its substantiated findings, the Justice Center presented a number of documents and photographs obtained during the investigation. (Justice Center Exhibits 1 through 35) The investigation underlying the substantiated report was conducted by [REDACTED], [REDACTED] Director of Day and Residential Services, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and presented one document. (Subject Exhibit A)

The Justice Center alleges that the Subject prevented the Service Recipient from entering the [REDACTED] kitchen by using a kitchen sink spray hose to threaten him. The Justice Center bases its allegation on the sworn written interview statement of another [REDACTED] staff. Staff C stated that when the Service Recipient attempted to enter the kitchen by rolling over the counter, the Subject “turned on the kitchen sink and grabbed the sprayer,” and then she heard the Subject say: “I don’t do this when supervisors are around.” (Justice Center Exhibit 21) Although the Subject admits that she was using the kitchen sink spray hose to rinse dishes at the same time the Service Recipient was attempting to enter the kitchen by rolling over the counter, she denies that she used the kitchen sink spray hose to prevent the Service Recipient from entering the kitchen.

The Justice Center also alleges that the Subject instructed another [REDACTED] staff to put the Service Recipient's television in the agency van in order to entice the Service Recipient to go to the van for a ride. The Justice Center bases its allegation on the sworn written interview statements of several [REDACTED] staff. Staff C stated that she heard a [REDACTED] staff, who she identified as the Subject, tell Staff A to take the Service Recipient's television and put it in the van in order to entice the Service Recipient to enter the van. (Justice Center Exhibit 21) Staff D stated that a [REDACTED] staff, who she identified as the Subject, told Staff A "to unhook the living room TV and put it in the van." (Justice Center Exhibit 22) Staff A stated that he "was told by an older darker lady to put the TV in the van to see if [the Service Recipient] would come out." (Justice Center Exhibit 35) Staff B stated that she was in her office when she "heard a voice (female) call out 'take the TV outside.'" (Justice Center Exhibit 31) The Subject denies that she told anyone to put the living room television in the van.

The Subject offered no evidence of any motivation of Staffs A, B, C or D to fabricate their sworn statements. The Subject offered no other explanation why the four [REDACTED] staff stated what they stated. Because the statements of the [REDACTED] staff corroborate each other, and contradict the Subject's denial, the [REDACTED] staff's statements are credited evidence and the Subject's statements are deemed not credible.

Allegation 1

The Justice Center first alleges that the Subject committed neglect by threatening the Service Recipient with the [REDACTED] kitchen sink spray hose in order to prevent him from entering the kitchen.

To prove neglect, the Justice Center must establish by a preponderance of the evidence that the Subject breached a custodian's duty that resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service

Recipient. (SSL §488(1)(h))

The Service Recipient's Behavioral Support and Intervention Plan (BSIP) prescribes proactive interventions for the Service Recipient's target behaviors. The BSIP's proactive interventions do not include the use of the kitchen sink spray hose as a method for changing the behavior of the Service Recipient. (Justice Center Exhibit 14) The Subject was familiar with the Service Recipient's BSIP (Hearing testimony of the Subject) and had a duty to follow the prescriptions of the BSIP when attempting to modify the Service Recipient's behavior. Because the Subject's use of the kitchen sink spray hose was not sanctioned by his BSIP, the Subject breached her duty to the Service Recipient when she used it to prevent him from entering the kitchen.

The record reflects that the Service Recipient was afraid of the kitchen sink spray hose. (Justice Center Exhibits 21 and 33, and Hearing testimony of the Subject) The Subject had known that the Service Recipient was afraid of the kitchen sink spray hose (Justice Center Exhibit 33 and Hearing testimony of the Subject) and nonetheless used it to scare the Service Recipient. However, although the Service Recipient was scared by the kitchen sink spray hose, the record contains insufficient evidence that he suffered or was likely to suffer serious or protracted impairment of his physical, mental or emotional condition as a result. Consequently, the Justice Center has not established that the Subject committed neglect by using the kitchen sink spray hose to prevent the Service Recipient from entering the kitchen.

The Justice Center next alleges that the Subject committed abuse (use of aversive conditioning) by threatening the Service Recipient with the [REDACTED] kitchen sink spray hose to prevent him from entering the kitchen.

In order to prove abuse (use of aversive conditioning), the Justice Center must establish by a preponderance of the evidence that the Subject used a physical stimulus, not authorized for use

on the Service Recipient, that was intended to induce pain or discomfort on the Service Recipient in order to modify the Service Recipient's behavior. (SSL §488(1)(e)) The statute gives a non-exclusive list of examples of aversive conditioning which includes the use of noxious odors, noxious tastes, blindfolds, withholding of meals, unpalatable foods, and movement limitations as punishment through the use of mechanical restraint devices. (SSL §488(1)(e))

The credible evidence in the record establishes that the Subject threatened the Service Recipient by turning on the kitchen sink water and grabbing the kitchen sink spray hose. (Justice Center Exhibit 21) There is no evidence in the record that the Subject actually sprayed the Service Recipient with water. Because the statute requires actual physical stimulus, and there is no evidence in the record that the Subject used the kitchen spray hose to physically stimulate the Service Recipient, the Justice Center has not established that the Subject committed abuse (use of aversive conditioning).

Accordingly, 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 neglect and abuse (use of aversive conditioning) alleged in Allegation 1.

Allegation 2

The Justice Center first alleges that the Subject committed neglect by instructing another staff to put the Service Recipient's television in an agency van in order to get him to agree to go on an outing.

The Service Recipient's Behavioral Support and Intervention Plan (BSIP) prescribes proactive interventions for the Service Recipient's target behaviors. The BSIP's proactive interventions do not include the use of the television as a method for enticing the Service Recipient to do something that he is resistant to doing. (Justice Center Exhibit 14) The Subject had a duty to follow the prescriptions of the Service Recipient's BSIP when attempting to modify his

behavior. Because the Subject's method of modifying the Service Recipient's behavior was not sanctioned by his BSIP, the Subject breached her duty to the Service Recipient.

The record reflects that watching television was an activity that the Service Recipient participated in regularly and that it was extremely important to him. (Hearing testimony of [REDACTED], [REDACTED] Director of Day and Residential Services) The Subject knew that the Service Recipient had this emotional connection to the television (Hearing testimony of the Subject) and she used this connection in an attempt to modify the Service Recipient's behavior by instructing Staff A to put the television in the van which she expected would entice the Service Recipient to get in the van. The credible evidence in the record establishes that, after Staff A took the television from the living room and put it in the van, the Service Recipient became greatly upset and ran out of the [REDACTED] with no shoes or socks on his feet. (Justice Center Exhibits 21 and 32, and Hearing testimony of [REDACTED], [REDACTED] Director of Day and Residential Services) Consequently, it is determined that the Subject's actions caused serious impairment of the Service Recipient's emotional condition.

Therefore, the Justice Center has established that the Subject committed neglect by instructing another staff member to put the Service Recipient's television in an agency van in order to get him to agree to go on an outing.

The Justice Center next alleges that the Subject committed abuse (use of aversive conditioning) by instructing another staff member to put the Service Recipient's television in an agency van in order to get him to agree to go on an outing.

Because the statute requires actual physical stimulus, and there is no evidence in the record that the television was used as a physical stimulus on the Service Recipient, the Justice Center has not established that the Subject committed abuse (use of aversive conditioning).

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 neglect alleged in Allegation 2. However, the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the abuse (use of aversive conditioning) alleged in Allegation 2.

Although the report will remain partially substantiated, the next question to be decided is whether the partially substantiated report constitutes the category of abuse or neglect 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 partially substantiated report is properly categorized as a Category 3 act.

Substantiated Category 3 findings of abuse and/or neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a Substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the report remains subject to disclosure pursuant to SSL § 496 (2). The report will be sealed after five years.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED], as it pertains to Allegation 1, be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed neglect or abuse (use of aversive conditioning).


The request of [REDACTED] that the substantiated report dated [REDACTED], as it pertains to Allegation 2, be amended and sealed is granted in part and denied in part. The Subject has not been shown by a preponderance of the evidence to have

committed abuse (use of aversive conditioning), but has been shown by a preponderance of the evidence to have committed neglect.

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

This decision is recommended by John T. Nasci, Administrative Hearings Unit.

DATED: January 27, 2017
Schenectady, New York



John T. Nasci, ALJ