

**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: Thomas Parisi, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Jason Jaros, Esq.
JAROS & JAROS
8207 Main Street, Suite 13
Williamsville, New York 14221

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 physical abuse and abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized, as Category 2 acts.

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:

Mary Jo Lattimore-Young
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People With Special Needs
Administrative Hearings Unit
1200 East and West Road
West Seneca, New York 14224
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
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161 Delaware Avenue
Delmar, New York 12054-1310
By: Thomas Parisi, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Jason Jaros, Esq.
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8207 Main Street, Suite 13
Williamsville, New York 14221

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], [REDACTED] of physical abuse and 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 [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when you dragged a service recipient across a floor, and she sustained bruising and/or abrasions on her back.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493(4)(b).

Allegation 2

It was alleged that on [REDACTED], during an investigation into the events of [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you intentionally made a false statement and/or intentionally withheld material information from the investigator.

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, located at [REDACTED], is an [REDACTED] [REDACTED] for individuals with developmental disabilities that 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. At the time of the alleged incident there were twelve service recipients living at the [REDACTED]. (Testimony of Justice Center Investigator [REDACTED], hereinafter referred to as Investigator [REDACTED], and Justice Center Exhibit 29)

5. At the time of the alleged abuse, the Subject was employed by the [REDACTED] [REDACTED] for over five years.¹ For approximately two years, the Subject was employed by the facility as a Direct Support Assistant (DSA). On [REDACTED], the day of the alleged incident, the Subject worked at the facility from 2:00 p.m. to 10:00 p.m. along with four co-workers. The Subject was a custodian of the Service Recipient as that term is so defined under SSL § 488(2). (Hearing testimonies of Subject and Investigator [REDACTED]; and Justice Center Exhibits 23, 28-29)

6. At the time of the alleged abuse, the Service Recipient was a thirty-one year old female resident of the facility since [REDACTED]. The Service Recipient had diagnoses of moderate intellectual disability, attention deficit hyperactivity disorder, seizure disorder, bipolar disorder, post-traumatic stress disorder, and other medical conditions. (Justice Center Exhibits 25

¹ [REDACTED] staff locally administers and oversees state operations for OPWDD which includes the direct delivery of services and support to people with developmental disabilities.

and 29-30)

7. At one point during the evening of [REDACTED], the Service Recipient was in the living room of the [REDACTED] along with Service Recipient 1 and the Subject. The Service Recipient pulled Service Recipient 1's hair. The Subject then grabbed the Service Recipient's feet/legs and while the Service Recipient was on her back, the Subject dragged her across the living room carpet. (Justice Center Exhibits 6, 27a-c [photographs] and 28-29)

8. At that time, no other staff member was present. No notation regarding the incident was made in the facility's Residential Notes. No call to the VPCR was made to report the incident. (Justice Center Exhibits 7-10, 12, 20, 24, 28-29 and 31-32)

9. On the following morning [REDACTED] at about 6:15 a.m., the Service Recipient told DA 2 that on the previous day, she had pulled Service Recipient 1's hair and that the Subject then dragged her by her feet across the carpeted living room floor causing her back to get "hurt and bruised." (Justice Center Exhibits 6 and 29)

10. At 8:00 a.m. that same morning, the [REDACTED] registered nurse (RN) 2, examined the injuries on the Service Recipient's back. RN 2 observed a horseshoe-shaped abrasion on the Service Recipient's upper back area that measured 5" x 1.5 x 2" in size, along with a bruised area in the right upper back above the abrasion. At that time, the Service Recipient reported to RN 2 that, on the preceding day, she had pulled Service Recipient 1's hair and that the Subject then had pulled her across the living room carpet. RN 2 concluded that the injuries were caused "most definitely from being dragged." (Justice Center Exhibits 6, 13-14, 28-29)

11. Later that morning [REDACTED], the Service Recipient was transported to her Day Habilitation Program (Day Hab). Upon her arrival at Day Hab and without being prompted, the Service Recipient reported to the Day Hab Program Coordinator (DHPC) that, on

the preceding day, the Subject had dragged her across the floor. The D.H.P.C. took photographs of the Service Recipient's back injuries. At about 1:00 p.m. that same afternoon, the Service Recipient told D.H.P.C. she had fallen out of a chair and hurt her back either the day prior or the day before that. [Justice Center Exhibits 11, 20, 27a-c (photographs of injuries) and 28-29]

12. On [REDACTED], after hearing the Service Recipient's disclosure, RN 2 examined Service Recipient 1's scalp and found "no areas of redness, swelling or irritation." (Justice Center Exhibits 6, 13-14, 28-29)

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 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 physical abuse and abuse (obstruction of reports of reportable incidents) of a person in a facility or provider agency are defined by SSL § 488(1)(a) and SSL § 488(1)(f) that states as follows:

"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.

"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 shall be categorized into categories pursuant to SSL § 493(4)(b), including Category 2, which is defined as follows:

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(s) 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 those acts described in “Allegation 1” and “Allegation 2” of the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-28, an Audio CD of the Subject’s interrogation and witness interviews; and Justice Center Exhibits 29-32) The investigation underlying the substantiated report was initially conducted by former Justice Center Investigator [REDACTED], but was then transferred to the [REDACTED] Police Department. The police department did not criminally prosecute the matter. (Justice Center Exhibits 15-19) Thereafter, the case was returned to the Justice Center and re-assigned as a non-criminal case to Justice Center Investigator [REDACTED], who completed the investigation. Investigator [REDACTED] was the only witness to testify at the hearing on behalf of the Justice Center. (Hearing testimony of Investigator [REDACTED] and Justice Center Exhibit 29)

The Subject testified on her own behalf and provided no other evidence.

With respect to Allegation 1 of the substantiated report, the Service Recipient reported to facility and Day Hab staff that on [REDACTED], after she pulled Service Recipient 1’s hair, the Subject pulled her on her back across the living room carpet, which caused her back injuries. According to their audio interviews, telephone interviews and/or written statements, none of the facility staff present that evening witnessed the alleged incident. (Justice Center Exhibits 7-10,

12, 16-20, 24, 27a-c and 28-29)

On [REDACTED], the Subject was initially interrogated by Detective [REDACTED] of the [REDACTED] Police Department. At that time, the Subject denied touching the Service Recipient and stated that she started work about 2:00 p.m. and had heard about a hair pulling incident between the two Service Recipients. The Subject also told Detective [REDACTED] that, although she heard a disturbance, the matter was handled by other staff without her assistance. Additionally, the Subject told Detective [REDACTED] that her only contact with the Service Recipient was later on that day, when the Subject left the facility to buy juice pops at the store and she told the Service Recipient that she could not go to the store. The Subject told Detective [REDACTED] that when she returned from the store she had “no confrontation” with the Service Recipient. (Justice Center Exhibit 17)

During her [REDACTED] interrogation conducted by Investigator [REDACTED], the Subject stated that early that evening there was an incident between the Service Recipient and Service Recipient 1; however, she was not present and thought she heard yelling for only a few seconds. The Subject told Investigator [REDACTED] that she called out to see if the Service Recipients needed help, but they said they handled it. The Subject also told Investigator [REDACTED] that she did not recall interacting much with the Service Recipient that day. However, she saw the Service Recipient jumping around, yelling and recalled that other staff may have been in the room with her at that time. (Justice Center Exhibits 28 and 29)

During her hearing testimony, the Subject denied that the alleged incident occurred during her work shift and suggested that the Service Recipient may have been injured after her work shift ended at 10:00 p.m. that evening. The Subject also testified that at the time of the alleged incident, there were other staff present and that she was never left alone with the Service Recipient.

The Subject raised many assertions at the hearing that were either unsupported by sufficient

proof or lacked merit. The Subject argued that the Service Recipient may have sustained these back injuries after falling out of a chair or as the result of engaging in self-injurious behavior. Although, the Service Recipient had indicated to D.H.P.C. on [REDACTED], that she had fallen out of a chair either the preceding day or the day before that, there was no corroborative proof that any such fall from a chair caused her existing back injuries. Furthermore, the Subject's assertion that these injuries were caused by self-injurious behavior on the Service Recipient's part is speculative at best and unsupported by sufficient proof. (Justice Center Exhibits 11 and 25)

The Subject also argued that the Service Recipient had a history of making false allegations and had done so previously against her. Nevertheless, the record contained no corroborating evidence of any prior false allegation made by the Service Recipient against the Subject or that the Service Recipient was angry at the Subject for not allowing her to go to the store that day giving the Service Recipient a motive to be untruthful. The Subject told Detective [REDACTED] that when she returned from the store the Service Recipient did not confront her about not being permitted by the Service Recipient to go to the store. (Hearing testimony of Subject; Justice Center Exhibits 17 and 29)

The Subject also argued during the hearing that the instant allegations are false and unreliable because RN 2 did not find any redness or injury to Service Recipient 1's scalp or hair when she conducted her [REDACTED] examination. While this evidence may be one probative factor in the determination of the totality of the circumstances in this case, it alone is not dispositive as to the credibility of the Service Recipient's version of events. (Justice Center Exhibits 14 and 28-29)

The Subject's account of the events substantially differs from the Service Recipient's. Therefore, the crucial issue then becomes whose version of events is credible. In this case, the

Service Recipient reported her version of the incident to facility staff members DA 2, DSA 3, RN 2 and Day Hab staff (D.H.P.C.) close in time to the event. In her reporting of the incident, the Service Recipient consistently told staff that after she pulled Service Recipient 1's hair, the Subject grabbed her feet/legs and dragged her across the floor which caused her back injuries. The Service Recipient reported the same version of events to Investigator [REDACTED] during her interview on [REDACTED], more than six months after the alleged incident occurred. (Hearing testimony of Investigator [REDACTED]; Justice Center Exhibits 7-14, 20, 27 a-c [photographs of back injuries] and 28-29)

After reviewing all of the evidence, including the Service Recipient's history of making false allegations, it is found that the record establishes detailed, consistent, tangible and reliable evidence that corroborates and supports the credibility of the Service Recipient's version of events. Additionally, the Service Recipient's account of events was persuasively corroborated by RN 2's physical findings on examination regarding the Service Recipient's back injuries. RN 2 concluded that the injuries were "most definitely" consistent with the Service Recipient being dragged. (Justice Center Exhibits 13, 20 and 28-29)

Furthermore, the Subject had a strong motive to be untruthful in order to protect her employment and reputation. Therefore, it is determined that the Service Recipient's version of events is credited evidence and that the Subject's denial is not. It is further determined that the Subject's conduct constituted physical abuse under SSL § 488(1)(a), as it intentionally or recklessly caused, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.

With respect to Allegation 2 of the substantiated report, the question is whether the Subject intentionally made a false statement and/or intentionally withheld material information from the

investigator.

The determination has been made herein that the Service Recipient's back injuries were caused by the Subject having committed an act of physical abuse against her. The record establishes that the Subject was the Service Recipient's custodian and mandated reporter and that the Subject did not report the incident to the VPCR. Following the incident, the Subject's actions of intentionally making false statements and withholding material information during the investigation, impeded the investigation into the report concerning the treatment of the Service Recipient. Under these circumstances, it is further determined that pursuant to SSL § 488(1)(f), the Subject committed abuse (obstruction of reports of reportable incidents) when she intentionally made false statements and intentionally withheld material information during the investigation into the instant report of physical abuse.

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 physical abuse and 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 and the witnesses' statements, it is determined that the substantiated report is properly categorized as Category 2 acts.

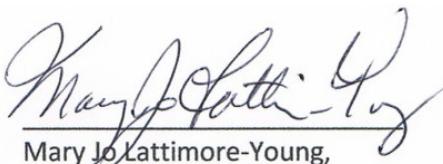
DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence

to have committed physical abuse and abuse (obstruction of reports of reportable incidents).

The substantiated report is properly categorized, as Category 2 acts.

This decision is recommended by Mary Jo Lattimore-Young,
Administrative Hearings Unit.

DATED: January 6, 2017
West Seneca, New York



Mary Jo Lattimore-Young,
Administrative Law Judge