

**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: Jennifer DeStefano Oppong, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: Law Office of James M. Abramson, PLLC
375 Fifth Ave., Fourth Floor
New York, New York 10016

██████████

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 (obstruction of reports of reportable incidents).

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: September 2, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 W. 125th Street
New York, New York 10027
On: ██████████

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: Jennifer DeStefano Oppong, Esq

████████████████████

████████████████

████████████████████████████

By: Law Office of James M. Abramson, PLLC
375 Fifth Ave., Fourth Floor
New York, New York 10016

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 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], at the [REDACTED] [REDACTED] located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you did not report to the Vulnerable Persons Central Registry, the subject allegations of abuse and/or neglect which resulted in three service recipients entering another service recipient's bedroom undetected and physically assaulting her.

These allegations have 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], [REDACTED] is a residential treatment center, operated by the [REDACTED]

██████████ and is licensed by the NYS Office of Children and Family Services (OCFS), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by ██████████ as a Program Director, and had been employed for approximately one year. He had been previously employed as a consultant to ██████████. The Subject was a custodian as that term is defined in Social Services Law (SSL) section 488(2) and, therefore, a mandated reporter. (SSL § 488(5)) In addition, he was a senior faculty member of the ██████████, and had been serving in that capacity for approximately eight years. (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was a fifteen year old female; it is unclear how long she had resided at ██████████. The Service Recipient has a diagnosis of mood disorder, with a history of psychiatric hospitalizations. (Hearing testimony of Subject, Justice Center Exhibit 6 and Subject Exhibit C)

7. The incident underlying the allegation occurred at or about 6:00 p.m. on ██████████, and involved four young female service recipients in the program, residents of the ██████████ and another nearby cottage. The Service Recipient was physically assaulted by the other three service recipients, who managed to gain access to her bedroom where the assault was committed. The Service Recipient reported to the Administrator on Duty (AOD) that she was hiding contraband inside her pants and that her peers had pulled her hair, knocked her to the floor and pulled down her pants, grabbing her aggressively about her private area – all in an attempt to take the contraband from her. The Service Recipient was seen by the nurse for a small cut on her finger, taken to the local police station to give a statement, and the next day was referred to the county medical center and admitted for psychiatric evaluation. (Justice Center Exhibits 4, 9

██████████
and Subject Exhibit C)

8. At the time of the incident, the Subject was serving as the Administrator on Call (AOC). He was otherwise off duty and not on the premises at the time. The Administrator on Duty (AOD) phoned the Subject within approximately 30 minutes of the incident and relayed what she then knew about the incident. The Subject immediately directed the AOD to contact law enforcement and ensure that the Service Recipient was safe and received any required medical attention. The hearing record is not entirely clear as to the issue of whether the Subject was made aware by the AOD that direct care staff on duty in the cottage were not in the same area of the cottage as the Service Recipient and her peers. Supervision of the service recipients in this program did not require staff to keep the service recipients constantly within eyesight, but staff must always know where they are. (Hearing testimony of Subject and Justice Center Exhibit 4)

9. The following day, ██████████, meetings were convened at 9:00 a.m and again in early afternoon with administrative staff to review the incident, after which the Subject ensured that the incident was properly reported to OCFS on an "OCFS Critical Incident Report" form, as required. During the meetings, the question of the whereabouts of the direct care staff was discussed; it was noted that the staff were not in the same part of the cottage as the service recipients, and that the perpetrators of the assault had managed to access the Service Recipient's room unseen. They concluded that no apparent abuse or neglect had been involved, and therefore they were not required to notify the Justice Center of the incident. The Subject was further advised by his supervisor that no call was needed. (Hearing testimony of Subject, Hearing testimony of Associate Director of Clinical Services ██████████ Hearing testimony of ██████████ Continuing Process Improvement (CPI) Director ██████████ Hearing testimony of OCFS Investigator ██████████ and Justice Center Exhibits 2, 4, 5, 6, 7, 10, 11 and 15)

10. The Subject signed the Justice Center Code of Conduct on July 10, 2013; he testified that he understood and agreed with the requirements set forth therein. (Hearing testimony of Subject and Justice Center Exhibit 8)

11. The Subject did not call the Justice Center Vulnerable Persons Central Register (VPCR) to report this incident. (Hearing testimony of 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 (obstruction of reports of reportable incidents).
- 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 abuse (obstruction of reports of a reportable incident) of a person in a facility or provider agency is defined by SSL § 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.

Social Services Law §§ 491(1)(a) and (b) require in relevant part that:

(a) Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register...and in accordance with the requirements set forth herein.

(b) Allegations of reportable incidents shall be reported immediately to the vulnerable persons' central register upon discovery. For purposes of this article, "discovery" occurs when the mandated reporter witnesses a suspected reportable incident or when another person, including the vulnerable person, comes before the mandated reporter in the mandated reporter's professional or official capacity and provides the mandated reporter with reasonable cause to suspect that the vulnerable person has been subjected to a reportable incident.

"Reportable incident" is defined by SSL § 488(1) as:

[C]onduct that a mandated reporter is required to report to the vulnerable persons' central registry.

Such conduct is further defined by SSL §§ 488(1)(a) through (1)(i) and includes specific types of abuse and neglect, along with a "significant incident", which is defined by SSL § 488(1)(i) as:

...an incident, other than abuse or neglect, that because of its severity or the sensitivity of the situation may result in, or has the reasonably foreseeable potential to result in, harm to the health, safety or welfare of a person receiving services...

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category three, 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 (obstruction of reports of a reportable incident) 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 (obstruction of reports of reportable incidents), 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 (obstruction of reports of reportable incidents) 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 1-15) The investigation underlying the substantiated report was conducted by OCFS Investigator ██████████, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject offered Subject Exhibits A, B and C, which were admitted into evidence. The Subject testified in his own behalf and called as a witness ██████████ ██████████ Associate Director of Clinical Services. At the time of the incident, ██████████ was a Unit Director. The Subject also called as a witness ██████████, ██████████ Director of Continuing Performance Improvement (CPI).

██████████

In order to prove abuse (obstruction of reports of significant incidents) as charged in Allegation 1 herein, 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 he failed to report a reportable incident upon discovery.¹

The Justice Center Code of Conduct, which the Subject testified that he signed, agreed with and understood, 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. (emphasis added)

Specifically, the evidence establishes that the Subject was a custodian and mandated reporter and, although not on duty or on the campus at the time of the incident, he was made aware of the incident within approximately thirty minutes of its occurrence. He was the Administrator on Call (AOC) and received a telephone report from the Administrator on Duty (AOD), which report he deemed credible. He was advised that an assault against the Service Recipient had taken place, as well as the identities of the three peers who had assaulted her. Further, the Subject was made aware that the Service Recipient had sustained some measure of harm as a result of the assault. The evidence showed that even if the Subject did not know for certain all of the details as a result of the phone call from the AOD, and the record is not entirely clear as to exactly what was known or what he was told about staff movement at the time of the attack, it is concluded that he had enough information to have determined that the Service Recipient had sustained harm and that a supervisory lapse *may have* occurred. (Hearing testimony of OCFS Investigator ██████████
██████████ Hearing testimony of Subject and Justice Center Exhibit 4) Thus, a report to the Justice

¹ The remaining elements of SSL § 488(1)(f) are not applicable to this allegation and have been omitted.

Center was required.

In the alternative, certainly by the end of the following day – after two meetings of administrators and staff who discussed the incident and provided further information - it was made clear that there had been an incident which had harmed the Service Recipient and that there was at least a possibility that direct care staff had been inattentive to the safety and well-being of the Service Recipient. If true, such conduct by staff would be considered neglect, as set forth in SSL § 488(1)(h).

It is concluded that the duty of the Subject to report was clearly evident by then, if not on the previous evening. (Hearing testimony of Subject, Hearing testimony of Associate Director of Clinical Services [REDACTED], Hearing testimony of Continuing Process Improvement Director [REDACTED], Justice Center Exhibits 4, 5, 6, and 7)

The threshold for reporting an incident to the VPCR under SSL § 491 is significantly less than that for substantiating a report of abuse or neglect. The threshold for reporting was triggered when another person came before the Subject in his or 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)) Here, a telephone call from the AOD advising the Subject of the assault of the Service Recipient (and which caused her harm), should have been sufficient to create that reasonable suspicion.

The Subject's alleged violation is described generally as the failure to report a reportable incident to the VPCR. The Subject acknowledged that he recognized the incident was a serious incident, but stated that he did not recognize it as having been caused by any abuse or neglect on the part of staff, and therefore was not reportable. The Subject testified that, as a result, he did not believe he needed to notify the VPCR, and indeed, he was advised that no report was necessary.

██████████

That belief was misplaced. SSL § 488(1) defines a “reportable incident” as ranging from abuse and neglect (488(1)(a-h)) to a “significant incident” (488(1)(i)), which is an incident *other than* an incident of abuse or neglect, but which is serious or sensitive in nature and thus has the reasonably foreseeable potential of harm to the Service Recipient.

The Subject testified credibly that he had spent his career caring for the safety and well-being of challenged youth. He described his employment history and training, and specifically the steps that he took upon learning of this incident to secure the Service Recipient’s safety, obtain medical attention and notify law enforcement, since he believed there may be a criminal component to the incident. Further, he ensured that the state oversight agency, OCFS, was properly notified of the incident as required by OCFS. All of this is commendable and clearly demonstrates his deep commitment to the service recipients in his care.

Unfortunately, despite all of his efforts on behalf of the Service Recipient in response to the incident, the Subject failed to timely notify the Justice Center. He acknowledged that failure during his testimony and in his original request for amendment and provided substantial evidence in his own defense to explain why he did not notify the Justice Center. Primarily, the Subject claimed that, based upon ██████████ policy and the NYS Office of Children and Family Services (OCFS) guidance, protocol and advice from his superior(s), he and the administrative staff made a determination that the incident did not involve either abuse or neglect, and therefore it was not necessary to call the Justice Center. The Subject was also advised by his supervisor that no call to the Justice Center was required. In fact, ██████████ Associate Director of Clinical Services ██████████ testified that he did not consider the incident even a significant incident. The Subject’s second witness, ██████████ Director of CPI ██████████, also testified that she did not believe the incident required any report to the Justice Center as a result of the follow-up meetings held by

██████████

the administrators, where that determination was made, although all agreed that a report to OCFS (the oversight agency) was required. That report was then timely submitted. (Hearing testimony of Subject, Hearing testimony of ██████████, and Hearing testimony of ██████████, Justice Center Exhibits 2, 4, 7, 12 and 13)

The Subject's evidence makes his 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, which is defined as any incident that gives reasonable cause to believe that abuse, neglect or a significant incident may have occurred, or that harm to the Service Recipient was caused. "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, trainings, experiences and common sense. Although not dispositive, the definition of "reasonable cause" contained in Criminal Procedure Law § 70.10(2), may be instructive:

Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in this chapter, such apparently reliable evidence may include or consist of hearsay. ([NY CLS](#) [CPL § 70.10\(2\)](#))

At the hearing, the Subject argued that he had been advised by his staff of some details of the incident, but that he had no reasonable cause to suspect that the Service Recipient was the victim of abuse or neglect. This position is inconsistent with the facts presented at the hearing.

██████████

Moreover, the Subject had signed the Code of Conduct; he testified that he knew and understood what it meant, and what it required. He had been trained in recognition of reportable incidents. There is no evidence in this record to support a conclusion that, in a controlled environment such as ██████████ physical assaults of one service recipient by another (or several, as was the case here) are common or are likely to happen in the absence of neglectful inattention by staff. Subject's statement, taken as true, that there are numerous peer altercations or incidents in the program during the course of any given week does not alter that determination. It is *reasonable suspicion*, not proof, of abuse, neglect or a significant incident that triggers the duty to report to the VPCR. As the Program Director, the Subject had a duty to recognize the incident as reportable and to report it to the VPCR.

A preponderance of the credible evidence supports the conclusion that, based on the facts presented to him, coupled with the Social Services Law and his understanding of the Justice Center Code of Conduct, the Subject had, or should have had, reasonable cause to suspect that a vulnerable person had been subjected to a reportable incident; i.e., in that an incident of abuse or neglect may have been the underlying cause of the incident, and/or that an incident had occurred which caused harm to the Service Recipient. As a result, a report to the VPCR was necessary. That he and his co-administrators inexplicably determined otherwise did not relieve him of the duty to report, under these facts. (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 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 substantiated report is properly categorized as a Category 3 act.

DECISION:

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 (obstruction of reports of reportable incidents).

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

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

DATED: August 30, 2016
Schenectady, New York



Louis P. Renzi, ALJ