

**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**

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]

By: Constance R. Brown, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224

[REDACTED]

By: Constance R. Brown, Esq.
CSEA, Inc.
143 Washington Avenue
Capitol Station Box 7125
Albany, New York 12224

[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] [REDACTED] [REDACTED] be amended and sealed is denied. The Subjects have been shown by a preponderance of the evidence to have committed neglect.

It is agreed that the substantiated report is properly categorized as a Category 3 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated and 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: October 3, 2016
Schenectady, New York

A handwritten signature in dark ink, appearing to read "David Molik", is written over a horizontal line.

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
UPON STIPULATED
FACTS**

Adjud. Case #:

[REDACTED]

Before:

John T. Nasci
Administrative Law Judge

Held at:

Upon written stipulation,
Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street
Syracuse, New York 13202

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: Theresa Wells, Esq.

[REDACTED]

2.

[REDACTED]

By: Constance R. Brown, Esq.
CSEA, Inc.
143 Washington Avenue
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Albany, New York 12224

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JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subjects) for neglect. The Subjects requested that the VPCR amend the report to reflect that the Subjects are 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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED], an allegation was reported to the VPCR that [REDACTED] [REDACTED], the Subjects, employees of the [REDACTED] [REDACTED], located at [REDACTED] had neglected a Service Recipient who was a resident of the [REDACTED]. The Justice Center classified this report as a neglect case and assigned [REDACTED] to the report.

2. This report was investigated by the Justice Center.

3. On [REDACTED], the Justice Center substantiated the report against the Subjects for neglect. The Justice Center concluded, for both Subjects, that:

Allegation 1

It was alleged that on [REDACTED], at the [REDACTED] located at [REDACTED] [REDACTED] while acting as a custodian, you committed neglect when you failed to document that a service recipient was engaging in self-injurious behavior, and failed to document or notify incoming staff that he was wearing his protective gear, which requires staff supervision.

These allegations have been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493(4)(c).

4. An Administrative Review was conducted and as a result the substantiated report

was retained.

5. Notwithstanding that the Subjects were entitled to a full evidentiary hearing, the Subjects elected to waive their rights to an evidentiary hearing on the relevant issues and instead the Subjects elected to proceed to a hearing decision based upon stipulated facts. The Parties have entered into a Stipulation of Facts, which is attached hereto and incorporated into this decision. As part of the Stipulation, it was agreed and it is understood that, subject to the approval of the Executive Director of the Justice Center, the report will be maintained within the VPCR as a Category 3 finding of neglect.

ISSUE

Whether the resolution of this substantiated report proposed in the Stipulation of Facts is both legally correct and consistent with the public policy expressed in the Protection of People with Special Needs Act (PPSNA) (Ch. 501, L. 2012) that the primary focus of the Justice Center will be on “the protection of vulnerable persons” and that workers found responsible for abuse or neglect are held accountable.

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 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 in relevant parts by SSL § 488(1)(h).

Substantiated reports of abuse and neglect are categorized into categories pursuant to SSL § 493(4), including Category 3 neglect, which is defined, as relevant here, 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.

DISCUSSION

The stipulated facts agreed to by the parties establish by a preponderance of the evidence that the Subjects committed the neglect that was alleged in the substantiated report as contained in Allegation 1. I am recommending that the Executive Director accept the stipulated outcome which upholds the finding of neglect.

The parties also have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect remain a Category 3 finding. Based upon the facts contained in the parties' stipulation, it is determined that the substantiated report is properly categorized as a Category 3 act.

DECISION:

The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied. The Subjects have been shown by a preponderance of the evidence to have committed neglect.

It is agreed that the substantiated report is properly categorized as a Category 3 act.

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

DATED: September 23, 2016
Schenectady, New York

A handwritten signature in black ink, appearing to be 'J. Nasci', written over a horizontal line.

John T. Nasci, ALJ

STATE OF NEW YORK – NYS JUSTICE CENTER
ADMINISTRATIVE HEARINGS BUREAU

STIPULATION OF FACTS

In the Matter of:

[REDACTED]

Adjudication Case Nos. [REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subjects), for a Category 3 offense under [REDACTED]. Each Subject requested that the Justice Center amend the report to reflect that the category findings are not supported by a preponderance of the evidence. The Justice Center, after review, declined to do so, and a hearing was scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

A hearing in this matter is currently scheduled for [REDACTED] at 10:30 a.m. The purpose of a full evidentiary hearing in this matter is to determine:

1. Whether the Subjects have been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report?
2. Whether the substantiated allegations constitute abuse or neglect?
3. Pursuant to Social Services Law § 493(4), the category level of abuse or neglect that such act or acts constitute.

Notwithstanding that the Subjects are entitled to a full evidentiary hearing, each Subject has elected to waive her right to an evidentiary hearing on the aforesaid issues and instead each Subject has elected to proceed to a hearing decision based upon the following **STIPULATION OF FACTS** and it is further understood by the parties that the report will continue to be maintained within the VPCR as a Category 3 finding of neglect.

The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the **STIPULATION OF FACTS**. However, the ultimate authority to approve the hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be issued based upon this stipulation is subject to the approval of the Executive Director of the Justice Center. Each Subject also agrees, after having had an opportunity to consult with counsel, and upon the receipt of the approval of the recommended decision by the Executive Director that the report will continue to be maintained within the VPCR as a Category 3 finding of neglect, that each Subject is waiving any rights that she may have for an appeal of this proceeding.

In the event that the Executive Director shall not approve a recommended decision based upon the **STIPULATION OF FACTS**, a full evidentiary hearing will be scheduled and the existence of this stipulation and any facts admitted herein will not be admitted into the hearing record and this document shall not be used for any purpose whatsoever, at the evidentiary hearing.

Each Subject understands and agrees that the report will continue to be maintained by the VPCR as a Category 3 finding of neglect as more particularly set forth below.

STIPULATION OF FACTS

Constance R. Brown, Esq. is an Associate Counsel for Civil Service Employees Association, Inc., and has the authority to enter into this Stipulation of Facts on behalf of the Subjects. [REDACTED]

[REDACTED]

Theresa Wells, Esq., is an Assistant Counsel of the Administrative Appeals Unit, New York State Justice Center and has the authority to enter into this Stipulation of Facts on behalf of the Justice Center.

The parties hereby agree to the following facts:

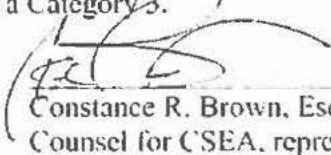
1. The facility, [REDACTED], located at [REDACTED] [REDACTED], is operated by the New York State Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.
2. On [REDACTED], the Subjects, [REDACTED], were both employed as Direct Support Assistants (DSA) at [REDACTED] and at all times relevant hereto each was a custodian pursuant to Social Services Law § 488(2).
3. Each subject began her shift on [REDACTED] at 2:00 p.m. and worked until 10:00 p.m. that evening.
4. At the time of the incident, the Service Recipient was a thirty-one year old man on the autism spectrum who resided at the [REDACTED]. According to his Behavior Support Plan (BSP), he is unable to communicate and cannot perform most basic life-sustaining tasks on his own. He engages in self-injurious behavior and suffers from epilepsy and osteoporosis. In addition to engaging in floor sprawling and aggression, he displays unusual flexibility and strength particularly when escalated.
5. According to his BSP, after attempting other less restrictive options, to protect the Service Recipient, staff members may place the Service Recipient in a helmet and protective Double Secure Posey mitts, as well as use multiple bean bag chairs and pillows placed on the floor, to help calm him and prevent him from injuring himself.
6. The use of the mechanical restraint devices (Posey Mitts and Helmet) must be documented on the Service Recipient's Mechanical Restraint Forms. The staff members using the devices must complete all behavior data sheets on a daily basis. The staff

members must also document the frequency and duration of target behaviors and replacement behaviors as well as the Service Recipient's response to the interventions.

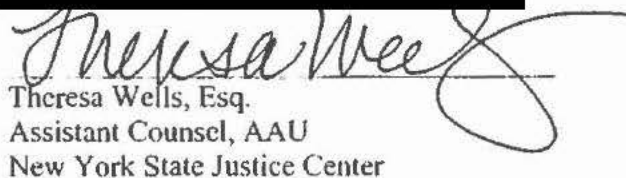
7. The staff utilizing the mechanical restraint devices must also document the time on and time off for the use of each mechanical device. The Health Care Progress Notes should also be completed at the time the restraints are used to document the Service Recipient's self-injurious behaviors, and physical needs, comfort and safety.
8. At approximately 9:45 p.m. on [REDACTED], the Service Recipient engaged in self-injurious behavior in his bedroom. The Subjects placed the Service Recipient in his helmet and mitts and surrounded him with bean bag chairs according to his behavior plan. Subject [REDACTED] sat in the doorway of the bedroom until the overnight staff members arrived. Subject [REDACTED] went to the kitchen to wait for the overnight staff to arrive. At approximately 10:02 p.m., Subject [REDACTED] walked to the kitchen to be relieved by the overnight staff members.
9. After a brief conversation, the overnight staff started their shifts (10:00 p.m. to 6:00 a.m.) and each Subject ended her shift and left the residence.
10. Twenty minutes later, when doing their rounds, the overnight staff walked by the Service Recipient's room and saw he was still in his protective gear. The overnight staff members removed him from the gear and put him in his bed. The Service Recipient did not sustain any visible injuries.
11. The overnight staff members stated they were not informed or did not hear from the Subjects that the Service Recipient was in his gear prior to the Subjects leaving at 10:00 p.m. There were no entries in the Mechanical Restraint Forms stating who placed the Service Recipient in the gear that evening. There were no Health Care Progress Notes completed for [REDACTED].

12. During interrogation, each Subject stated the overnight staff members were verbally notified the Service Recipient was in his gear at the 10:00 p.m. shift change.
13. Each Subject admitted that neither the Mechanical Restraint Forms nor the Health Care Progress Notes were completed for the evening.
14. They acknowledge they had a duty to complete the forms referenced above and breached that duty by not completing the forms that evening.
15. The Subjects do not contest that their conduct outlined above constitutes a breach of their duty of care to the Service Recipient.
16. The Subjects do not contest that the foregoing conduct was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient.
17. Based on the above, the parties have agreed that the substantiated finding that the Subjects committed neglect will be based on the fact that the Subjects failed to document that the Service Recipient was engaging in self-injurious behavior and failed to document that he was wearing his protective gear.
18. The Category level will remain a Category 3.


Dated: 9/15/2016


Constance R. Brown, Esq., Associate Counsel
Counsel for CSEA, representing
[REDACTED]

Dated: 9/16/16


Theresa Wells, Esq.
Assistant Counsel, AAU
New York State Justice Center

Approved for recommendation:


John T. Nasci
Administrative Law Judge
New York State Justice Center for the Protection of People With Special Needs
Dated: September 19, 2016