

**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]

The attached Recommended Decision After Hearing (Recommended Decision) is incorporated in its entirety including but not limited to the Findings of Fact, Conclusions of Law and Decision section.

ORDERED: The attached and incorporated Recommended Decision is hereby adopted in its entirety.

ORDERED: The Vulnerable Persons' Central Register shall take action in conformity with the attached Recommended Decision, specifically the Decision section.

This decision is ordered by Elizabeth M. Devane, ALJ, of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

Dated: October 10, 2019
Schenectady, New York



Elizabeth M. Devane, Esq.
Administrative Hearings Unit

cc. Vulnerable Persons' Central Register
Amanda Smith, Esq.
[REDACTED], Subject
Peter E. Brill, Esq.

**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:

Sharon Golish Blum
Administrative Law Judge

Held at:

New York State Justice Center for the Protection of
People with Special Needs
125 East. Bethpage Road, Suite 104
Plainview, New York 11803
On: [REDACTED]

Parties:

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

[REDACTED]

By: Peter E. Brill, Esq.
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64 Hilton Avenue
Hempstead, New York 11550-2122

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse 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], [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 or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Neglect against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Neglect pursuant to Social Services Law § 493(4)(c).

The investigation revealed that the subject failed to provide proper supervision and/or threatened the service recipient.

Allegation 2

It was alleged that on or about [REDACTED], while at [REDACTED], located at [REDACTED], you committed Use of aversive conditioning against/to a Service Recipient.

This allegation has been SUBSTANTIATED as Category 3 Use of aversive conditioning pursuant to Social Services Law § 493(4)(c).

The investigation revealed that the Subject withheld the Service Recipient's meal in order to modify or change the Service Recipient's behavior without authorization.

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

4. The facility, located at [REDACTED], is operated by the New York State Office of Mental Health (OMH), which is a provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Investigator [REDACTED])

5. At the time of the alleged neglect and abuse (use of aversive conditioning), the Subject had been employed at the facility as a Mental Health Therapy Aid (MHTA) since [REDACTED] of 2015 and was assigned to work her regular day shift as a Ward Charge in Unit [REDACTED]. Approximately three weeks prior to the incident, the Subject had been reassigned from another unit to Unit [REDACTED] to bring stability to the unit that had been unmanageable and her work with the Unit [REDACTED] service recipients yielded positive results. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject) The Subject was a custodian as the term is so defined in SSL § 488(2).

6. The Service Recipient, an eleven-year-old female, had been admitted to the facility on [REDACTED], five days before the date of the alleged neglect and abuse. The Service Recipient was in the legal custody of [REDACTED] Department of Social Services due to allegations of sexual and physical abuse in her adoptive mother's home. The Service Recipient's history was significant for several psychiatric hospitalizations beginning the past year. The Service Recipient's relevant diagnoses were attention deficit/hyperactivity disorder, opposition and

defiance disorder, depression and post-traumatic stress disorder. The Service Recipient's history of difficulties included suicidality, aggression, oppositional behavior and trauma related symptoms. (Justice Center Exhibit 8) The Service Recipient was the youngest person in Unit [REDACTED]. (Justice Center Exhibit 11: audio interview of the Nurse)

7. The morning program in Unit [REDACTED] was that after the service recipients woke up, they performed their morning routines, which included showering, dressing, brushing their teeth, making their beds and taking their morning medication, and carried out their optional assigned chores before eating their breakfasts. (Justice Center Exhibit 11: audio interviews of MHTA 1, MHTA 2 and the Nurse) Although the performance of morning routines and chores before breakfast was encouraged, it was understood by all facility staff that the service recipients were not to be forced to do anything and that food was never to be withheld by staff from a noncompliant or uncooperative service recipient. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject and audio interviews of MHTA 1, MHTA 2 and the Nurse)

8. At some point after the Subject arrived for her work shift at [REDACTED] on [REDACTED] [REDACTED], the Nurse requested that the Subject modify an entry from the prior day in the log book to reflect a change in a service recipient's supervision level while bathing, a notation that should have been recorded the preceding day. The Subject refused to do so based on her concern that the log book was a legal document that could not be altered retroactively. The conflict over the issue escalated and both the Nurse and the Subject were aggravated with each other as a result. Thereafter, although she did not make the requested notation in the log book, the Subject offered to and assisted the Nurse in distributing the morning medication to the service recipients. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject)

9. That morning, as the service recipients were starting their day, another conflict arose between the Nurse and the Subject regarding the Subject's purchase of snacks for the Unit [REDACTED]

service recipients to celebrate their improved attitudes and behaviors. The Subject had obtained the appropriate supervisory approvals and had taken all allergies into consideration when personally purchasing the service recipients' snacks, but the Nurse disapproved of the Subject's plan, refused to double check allergies against the purchased snacks and involved other staff and supervisors in the dispute, which became heated and involved raised voices on both sides. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject)

10. While the conflict ensued, MHTA 1 was supervising the Unit [REDACTED] service recipients and was having difficulty with the Service Recipient, who was not following directions. MHTA 1 left the Service Recipient in the common area, approached the Subject, who was in the nearby office area, and requested her assistance with the Service Recipient. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject)

11. The Subject entered the common area, approached the Service Recipient and attempted to redirect her, but the Service Recipient responded by indicating that she did not have to listen to her. The Subject attempted to deescalate the Service Recipient's noncompliance by disengaging and walking away. A short while later, MHTA 1 again approached the Subject and reported that the Service Recipient was just sitting on the common area couch and continued to refuse to follow her morning routine. Again, the Subject went over to the Service Recipient to encourage her compliance. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject)

12. While the Service Recipient remained sitting on the couch, the Subject spoke words to her that indicated that if she did not carry out her morning routine and do all the chores, then she could not have her breakfast. (Justice Center Exhibit 11: audio interviews of MHTA 1 and MHTA 3) The Subject then left the common room and returned her attention to the aftermath of

her dispute with the Nurse. (Hearing testimony of the Subject and Justice Center Exhibit 11: audio interrogation of the Subject)

13. Initially, the Service Recipient reacted by saying that she was not hungry anyway. (Justice Center Exhibit 11: audio interview of MHTA 3) Then the Service Recipient approached the Nurse, visibly upset and crying and complained that the Subject told her that she could not have breakfast until she took a shower and did all the chores. The Nurse confirmed with MHTA 1 that the Subject did say this to the Service Recipient and then sent the Service Recipient to the dining area for her breakfast. (Justice Center Exhibit 11: audio interview of the Nurse) MHTA 2 was in the dining area, when the Service Recipient entered and stated that she was hungry. MHTA 2 told the Service Recipient to go and eat and the Service Recipient responded that the "lady" said that she could not eat until she showered and did all the chores, but that she did not want to take a shower. MHTA 2 then handed the Service Recipient a tray of food and she ate her breakfast thereafter. (Justice Center Exhibit 11: audio interview of MHTA 2)

ISSUES

- Whether the Subject has been shown by a preponderance of the evidence to have committed the acts giving rise to the substantiated reports.
- 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 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 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 neglect of a person in a facility or provider agency is defined by SSL § 488(1)(h) as:

"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.

The abuse (use of aversive conditioning) of a person in a facility or provider agency is defined by SSL § 488(1)(e) as:

"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.

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

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

If the Justice Center did not prove the abuse and/or 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 neglect as described in Allegation 1, but not abuse (use of aversive conditioning) as described in Allegation 2 of the substantiated report.

In support of its substantiated findings, the Justice Center presented evidence obtained during the investigation. (Justice Center Exhibits 1-14) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified on behalf of the Justice Center.

The Subject testified at the hearing in her own behalf and provided no other evidence.

The Justice Center relied primarily on the audio interviews of the MHTA 1, MHTA 2, MHTA 3 and the Nurse (Justice Center Exhibit 11), the New York State Incident Reporting Form

dated [REDACTED] (Justice Center Exhibit 7), and the Event Narrative Progress Note dated [REDACTED] (Justice Center Exhibit 13).

The undisputed facts are that on [REDACTED] the Subject had been involved in two verbal conflicts with the Nurse before she was asked by MHTA 1 to intervene to encourage the Service Recipient to follow the morning program; that the Subject repeatedly and unsuccessfully attempted to speak with and redirect the Service Recipient; and that, although facility service recipients were expected and encouraged to perform their morning routines and carry out their chores before eating breakfast, facility policy provided that they were not to be forced to do anything and that food was never to be withheld by staff from a service recipient.

The only issue with respect to the substance of the allegation is whether the Subject communicated to the Service Recipient that if the Service Recipient did not perform her morning routine and carry out the chores, then she could not have her breakfast.

MHTA 1 stated during her interview (Justice Center Exhibit 11: audio interview of MHTA 1) that she heard the Subject tell the Service Recipient that, “if you don’t do your morning routine and all chores, then you can’t get your breakfast;” that the Service Recipient got upset and went to tell the Nurse and that MHTA 1 then spoke to the Nurse and confirmed that she had heard the Subject’s relevant communication to the Service Recipient.

MHTA 3 stated during his interview (Justice Center Exhibit 11: audio interview of MHTA 3) that he heard the Subject tell the Service Recipient that, “if you don’t take a shower and do your morning routine, then we’re going to hold your breakfast;” that the Subject was already highly emotional from her conflict with the Nurse at the time that she attempted to redirect the Service Recipient and that he felt uncomfortable with the situation because he knew that service recipients were not supposed to be denied food in any type of situation.

MHTA 2 stated during his interview (Justice Center Exhibit 11: audio interview of MHTA

2) that when he was in the dining area, the Service Recipient entered and stated that she was hungry; that he told the Service Recipient to go and eat and she responded that the “lady” said that she could not eat until she showered and did all the chores, but that she did not want to take a shower, and that he handed her a tray of food.

The Nurse stated during her interview (Justice Center Exhibit 11: audio interview of the Nurse) that when the Service Recipient approached her to complain that the Subject withheld her breakfast from her, she was visibly shaken and crying; that the Service Recipient reported that the Subject “won’t let me eat;” that the Service Recipient stated that the Subject gave her an ultimatum that if she did all the chores and all her morning care, then she could eat.

The Event Narrative Progress Note (event narrative) (Justice Center Exhibit 13) was written by the Nurse as an attachment to the New York State Incident Reporting Form dated [REDACTED] (Justice Center Exhibit 7), based on the Service Recipient’s verbal report to the Nurse. The details contained in the event narrative, regarding the Subject’s threat to withhold the Service Recipient’s breakfast until she showered, and all chores were done, were consistent with the statements of MHTAs 1, 2 and 3 and, therefore strongly support the substance of the allegation.

The Physician Assessment/Examination on the second page of the event narrative (Justice Center Exhibit 13), signed by an unidentified doctor indicates that the Service Recipient disclosed to the doctor that the Subject told her that she could not eat unless she took a shower. It is noteworthy that this section of the document, which strongly supports the substance of the allegation, was prepared by someone other than the Nurse.

The Subject denied the substance of the allegation in both her testimony and during her interrogation. The Subject testified and stated in her interrogation that the facility policy provided that service recipients were supposed to perform their morning routine and do their chores before

breakfast and that she was simply attempting to redirect the Service Recipient when she told her that when she was calm and ready for breakfast, she could come to the dining area; that she knew that staff were not to deny breakfast to anyone; that she had been brought in to Unit [REDACTED] as a strong individual to handle and bring stability to a unit that was out of control approximately three weeks prior to the incident; that the Service Recipient displayed difficult behaviors; and that, due to the high level of conflict between herself and the Nurse, the Nurse had the motive to fabricate the substance of the allegation against her out of spite, although she could provide no explanation as to why MHTAs 1, 2 and 3 would provide untrue versions of the incident.

Regarding the Service Recipient, the Subject testified that she had her moments of defiance when she did not want to do anything; that she was quite adamant; that she would get disrespectful and that other staff liked to hug her, even though it was not allowed, and to treat her like she was a baby and that the Service Recipient preferred that staff. The Subject stated in her interrogation (Justice Center Exhibit 11: audio interrogation of the Subject) that the Service Recipient's behavior was highly aggressive and very oppositional; that she did not like to follow directions; that she was impulsive; that she could be a danger at times to others; that she was verbally aggressive to staff during every shift; that during her attempts to redirect the Service Recipient, she had cleared the area out of concern that the Service Recipient would become violent and that she removed the other service recipients from the area, as the Service Recipient and another service recipient were a very explosive combination. The negativity of these comments supports the substance of the allegation, particularly in light of the fact that the young Service Recipient was admitted to the facility on [REDACTED] (Justice Center Exhibits 7 and 8) only five days before the incident and that other staff provided much more positive statements about her. (Justice Center Exhibit 11)

The Subject's pride in the fact that she had been assigned to the unit to bring stability and control to an unmanageable group of service recipients, a task that others had failed, indicates that

the Subject saw herself as someone capable of compelling good behavior from difficult cases, which supports the substance of the allegation.

Regarding the Subject's argument that the Nurse had a motive to fabricate the substance of the allegation, MHTAs 1, 2 and 3 had no plausible motive for fabricating their consistent accounts of the incident (Justice Center Exhibit 11), which were corroborated by the Physician Assessment/Examination (Justice Center Exhibit 13).

For all of these reasons, the Subject's denial of the substance of the allegation and her defense that the allegation was retaliatory and fabricated by the Nurse are not credited. Accordingly, it is found that the Subject told the Service Recipient that if she did not carry out her morning routine and do all the chores, then she could not have her breakfast.

Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that the breach either 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)).

It is clear that the facility policy did not sanction the withholding of food from service recipients to compel their compliance under any circumstances. Accordingly, the Subject had a duty to redirect the Service Recipient using only authorized means, and not by using her breakfast as an incentive. Furthermore, the Subject had a duty to engage with the Service Recipient in a therapeutic and nonthreatening manner. By telling the Service Recipient that if she did not perform her morning routine and carry out the chores, she would not get her breakfast, the Subject breached her duty to the Service Recipient.

Having found that the Subject breached her duty to the Service Recipient, the next step is

the determination of whether the breach of duty either 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. Here, it was established that the Service Recipient became visibly upset, which was described by the Nurse who also stated that it took some time for the Service Recipient to shake off her upset (Justice Center Exhibit 11: audio interview of the Nurse) and by MHTA 3 (Justice Center Exhibit 11: audio interview of MHTA 3). Based on the evidence, the degree of distress experienced by the Service Recipient constituted a serious impairment of her mental and emotional condition.

Consequently, it is concluded that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed neglect under SSL § 488(1)(h), as specified in Allegation 1 of the substantiated report.

Abuse (Use of Aversive Conditioning)

In order to sustain an allegation of abuse (use of aversive conditioning), the Justice Center must prove that, without specific authorization, the Subject applied a physical stimulus that was intended to induce pain or discomfort in order to modify or change the Service Recipient's behavior. The legislation provides the withholding of meals used as punishment as one of the explicit examples of the use of aversive conditioning. (SSL § 488(1)(e)).

When asked about the role of aversive conditioning at the facility, the Subject testified that there is no use of aversive conditioning because it's negative and detrimental to the child.

It has already been determined herein that the Subject told the Service Recipient that if she did not perform her morning routine and carry out the chores, she would not get her breakfast. The evidence shows that the Subject was already upset as a result of her verbal conflicts with the Nurse and that she repeatedly and unsuccessfully attempted to redirect the Service Recipient appropriately and that the Subject then resorted to threatening the Service Recipient with the

withholding of her breakfast as an apparent incentive to follow the morning program.

In this case, it was not established by a preponderance of the evidence that the Subject intended to induce pain or discomfort in order to modify or change the Service Recipient's behavior by threatening to withhold her breakfast. The evidence showed that, beyond the threat to withhold the Service Recipient's breakfast, the Subject took no steps in furtherance of the threatened withholding of the meal. In fact, after uttering the threat, the Subject immediately returned her attention to the issues with which she had been engaged when MHTA 1 had requested her assistance and the Subject did not object to or interfere with the Service Recipient receiving her breakfast, which was provided to her almost immediately after she reported the Subject's threat to the Nurse. As a result, no physical stimulus was actually applied. Given the totality of the circumstances present in this case, as set forth above, it was not established by a preponderance of evidence that the Subject committed abuse (use of aversive conditioning).

Conclusion

The report will remain substantiated for neglect and the next issue to be determined is whether the substantiated report constitutes the category of 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. A substantiated Category 3 finding of 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 NY SSL § 496(2). This report will be sealed after five years.

DECISION:


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

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

The request of [REDACTED] that the substantiated report dated [REDACTED], be amended and sealed is granted with respect to the abuse (use of aversive conditioning).

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: September 13, 2019
Plainview, New York



Sharon Golish Blum, Esq.
Administrative Law Judge