

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**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 C. Parisi, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

██████████

The Findings of Fact and Conclusions of law are incorporated from the Recommendations of the presiding Administrative Law Judge's Recommended Decision.

**ORDERED:**

The request of ██████████ that Allegation 1 of 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 should be properly categorized as a Category 3 act.

The request of ██████████ that Allegation 2 of 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 2 act.

The request of ██████████ that Allegation 3 of 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 (unlawful use or administration of a controlled substance).

The substantiated report is properly categorized as a Category 1 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report as to Allegation 1, abuse (obstruction of reports of reportable incidents), shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(c).

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 this report in Allegation 2 for abuse (obstruction of reports of reportable incidents) shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

NOW, THEREFORE, IT IS DETERMINED that reports resulting in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list of the Vulnerable Persons' Central Register (VPCR), and the report to be permanently retained. Thus, the record of this report in Allegation 3 for abuse (unlawful use or administration of a controlled substance) shall be permanently retained by the VPCR, and the Subject's name shall be placed permanently on the staff exclusion list, pursuant to SSL §§ 493(5)(a) and 495.

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 black ink, appearing to read "David Molik", written over a horizontal line.

David Molik  
Administrative Hearings Unit

**STATE OF NEW YORK  
JUSTICE CENTER FOR THE PROTECTION OF PEOPLE  
WITH SPECIAL NEEDS**

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Jean T. Carney  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
4 Burnett Boulevard  
Poughkeepsie, New York 12601  
On: [REDACTED]

Parties:

Vulnerable Persons' Central Register  
New York State Justice Center for the Protection  
of People with Special Needs  
161 Delaware Avenue  
Delmar, New York 12054-1310  
Appearance Waived

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

[REDACTED]  
[REDACTED]  
[REDACTED]

### **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] 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 multiple undetermined dates, at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to report incidents of abuse, including one in [REDACTED] in which you observed a coworker push a service recipient.

This allegation has been SUBSTANTIATED as Category 2 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(b).

#### **Allegation 2**

It was alleged that on multiple undetermined dates during [REDACTED] at the [REDACTED], located at [REDACTED] while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you observed but failed to report incidents of both the unlawful use and distribution of a schedule I controlled substance at the workplace, despite your duty as a mandated reporter.

This allegation has been SUBSTANTIATED as Category 2 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(b).

### **Allegation 3**

It was alleged that on multiple undetermined dates, including on [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (unlawful use or administration of a controlled substance) when you used a schedule I controlled substance while on duty.

This allegation has been SUBSTANTIATED as Category 1 serious conduct pursuant to Social Services Law § 493(4)(a)(viii).

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

4. The facility, located at [REDACTED], is an [REDACTED] for adults with intellectual disabilities, and is operated by [REDACTED]. [REDACTED] is a not-for-profit organization certified by the Office for People With Developmental Disabilities (OPWDD), 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 had been employed by [REDACTED] as a Direct Support Professional (DSP) since [REDACTED] (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipients were all of the residents of the [REDACTED] and of varying ages and intellectual capacities. (Justice Center Exhibit 6)

7. [REDACTED] operates several programs in [REDACTED] including a day habilitation program and at least [REDACTED] IRAs. The [REDACTED] houses approximately 11 or 12 adults with moderate to profound intellectual disabilities who require constant supervision. (Hearing testimony of Justice Center Investigator [REDACTED], Justice Center Exhibit 6)

8. DSP [REDACTED] worked the day shift at [REDACTED] and used the [REDACTED] as her base of

operations to sell and distribute marijuana to other employees of [REDACTED]. She would keep the drugs in her vehicle, scaling and selling the marijuana from the [REDACTED] parking lot. On occasion, DSP [REDACTED] would take her 1:1 service recipient with her to deliver marijuana to employees who worked at other programs operated by [REDACTED] (Hearing testimony of Investigator [REDACTED] and Justice Center Exhibits 6, and 11)

9. When the Subject started working at the [REDACTED] he reported DSP [REDACTED] illegal activity to his supervisor, House Manager [REDACTED], but no further action was taken. The Subject also reported to [REDACTED] that other employees were smoking marijuana during their shifts, but no investigation was conducted. Sometime after the inception of the Justice Center on [REDACTED] the Subject became aware of the Justice Center reporting requirements and had observed that there were notices posted in the [REDACTED] advising employees to call the VPCR regarding suspected reportable incidents. (Hearing testimony of Subject)

10. The Subject purchased marijuana from DSP [REDACTED] on more than one occasion. Additionally, DSP [REDACTED] attempted to recruit the Subject to sell marijuana on her behalf, but he refused to do so. The Subject did not use marijuana during his shifts, but he would smoke prior to his shift, and smoked synthetic cannabis while working. (Hearing testimony of Subject; Justice Center Exhibit 6)

11. The Subject regularly smoked synthetic cannabis, also known as K2. Synthetic cannabis was previously sold at convenient stores, gas stations, and was available online. (Hearing testimony of Subject) Synthetic cannabis was designated a Schedule I controlled substance in 2012. (NY Public Health Law § 3306(21)(2012))

12. Sometime in [REDACTED], the Subject observed a co-worker push a service recipient. The Subject reported this incident to the house manager, but no further action was taken.



The Subject did not report this incident to the Justice Center until he was interviewed by investigators regarding the allegations of illegal activity occurring at the [REDACTED].

(Hearing testimony of Subject; Hearing testimony of Investigator [REDACTED])

### **ISSUES**

- Whether the Subject has been shown by a preponderance of the evidence to have committed the act or acts giving rise to the substantiated report.
- Whether the substantiated allegations constitute abuse and/or neglect.
- Pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

### **APPLICABLE LAW**

The Justice Center is responsible for investigating allegations of abuse and/or neglect in a facility or provider agency. (SSL § 492(3)(c) and 493(1) and (3)) Pursuant to SSL § 493(3), the Justice Center determined that the initial report of abuse and neglect presently under review was substantiated. A “substantiated report” means a report “... wherein a determination has been made as a result of an investigation that there is a preponderance of the evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

The abuse of a person in a facility or provider agency is defined by SSL § 488(1), 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.

- (g) "Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 1, which is defined in pertinent part as follows:

- (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
- (viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

Category 2, which is defined as follows:

- (b) 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.

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 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 acts, described as “Allegation 1”, “Allegation 2”, and “Allegation 3” 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 1-10 and 13) Additionally, the Justice Center presented two audio recordings of interviews and interrogations of witnesses and subjects of the report. (Justice Center Exhibits 11 and 12) The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED] who was the only witness who testified at the hearing on behalf of the Justice Center. The Subject testified in his own behalf and provided two documents (Subject Exhibits A and B).

#### **Allegation 1**

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) when, as a mandated reporter, he failed to report a co-worker pushing a service recipient in [REDACTED]

In order to sustain a case of failure to report a reportable incident under SSL § 488(1)(f), the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian as defined by SSL § 488(2), and that he failed to report a reportable incident upon discovery.

There is no dispute in the record that the Subject was a custodian as defined in the statute. He was employed by a provider agency, and as such, he was a mandated reporter with an affirmative duty to call reportable incidents to the VPCR.

The Justice Center must next establish by a preponderance of the evidence that there was a suspected reportable incident which was not reported by the Subject. The Subject disclosed this incident during his interview with Justice Center investigators during the course of the investigation regarding illegal activity at [REDACTED]. Investigator [REDACTED] called the allegation in to the VPCR and the incident was investigated, but no other evidence regarding the incident was introduced at the hearing. (Hearing testimony of Investigator [REDACTED])

In his defense, the Subject testified that he had been told by [REDACTED] administrators to report such incidents to the house manager, which is what he did. In hindsight, when no further action was taken, the Subject admitted that he should have called the Justice Center. (Hearing testimony of Subject)

Therefore, the Justice Center has shown by a preponderance of the evidence that the Subject failed to report a reportable incident upon discovery and that allegation will be sustained. However, there was no evidence introduced at the hearing to show that this failure to report rises to the level of a Category two finding. There was no evidence indicating that the allegation was substantiated, much less that the conduct seriously endangered the health, safety or welfare of the service recipient. Certainly, this could have been the case, but there was no evidence in the record to sustain this conclusion. Absent evidence regarding that conduct, the allegations should be

properly substantiated as Category three conduct. A substantiated Category three 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 SSL § 496(2). This report will be sealed after five years.

### **Allegation 2**

The Justice Center proved by a preponderance of the evidence that the Subject committed abuse (obstruction of reports of reportable incidents) when, as a mandated reporter, he failed to report other staff engaging in illegal activity on the premises.

In order to sustain a case of failure to report a reportable incident under SSL § 488(1)(f), the Justice Center must prove by a preponderance of the evidence that the Subject was a custodian as defined by SSL § 488(2), and that he failed to report a reportable incident upon discovery.

There is no dispute in the record that the Subject was a custodian as defined in the statute. He was employed by a provider agency, and as such, he was a mandated reporter with an affirmative duty to call reportable incidents to the VPCR.

The Justice Center must next establish by a preponderance of the evidence that there was a suspected reportable incident which was not reported by the Subject. The Subject admitted to purchasing marijuana from DSP [REDACTED] while on the [REDACTED] premises. In addition, he testified that it was common knowledge that DSP [REDACTED] sold marijuana to employees, and that several employees used marijuana during their shifts. The Subject knew that this activity seriously endangered the health, safety, and welfare of the service recipients at under his care. (Hearing testimony of Subject)

There is no dispute in the record that the Subject never called the Justice Center. In his

defense, the Subject asserts that in the past, he reported incidents internally, but that management had not responded with any significant investigation. Staff were allowed to ignore policies and procedures with impunity. (Hearing testimony of Subject) However frustrating that may have been, once SSL § 488 was enacted, and a mechanism through which reporting acts of suspected neglect and abuse was created, the Subject had a duty to report such suspected incidents to the Justice Center. To his credit, the Subject testified at the hearing that in hindsight, he should have called the Justice Center, and he regretted not reporting these incidents. (Hearing testimony of Subject) The record establishes by a preponderance of the evidence that the Subject failed to report a reportable incident upon discovery, sustaining this allegation against the Subject.

The evidence shows that DSP [REDACTED] distributed and used marijuana in the presence of service recipients for whose care she was responsible. She transported service recipients in an agency vehicle while under the influence of marijuana. Engaging in illegal activity such as using and distributing marijuana while caring for service recipients seriously endangers the health, safety or welfare of those service recipients. Therefore, this allegation was properly categorized as Category two conduct and as such, it 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 Category two finding not elevated to a Category one finding shall be sealed after five years.

### **Allegation 3**

The Justice Center proved by a preponderance of the evidence that the Subject used a Schedule I controlled substance, namely synthetic cannabis, while on duty. The Subject testified that he routinely smoked synthetic cannabis, also known as K2, during his shifts at the [REDACTED]

[REDACTED] In his defense, the Subject believed that K2 was legal at the time. (Hearing

testimony of Subject) However, synthetic cannabis was placed on the Schedule I list of controlled substances in 2012, [REDACTED] prior to the time that the Subject is alleged to have used it during his shift. (NY Public Health Law § 3306) Using a Schedule I controlled substance meets the criteria for substantiation as a Category one act pursuant to SSL § 493(4)(a)(viii).

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 alleged. The substantiated report will not be amended or sealed.

A substantiated Category one finding of abuse will result in the Subject being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category one report will be disclosed to entities authorized to make inquiry to the VPCR.

**DECISION:**

The request of [REDACTED] that Allegation 1 of the substantiated report dated [REDACTED] 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 should be properly categorized as a Category 3 act.

The request of [REDACTED] that Allegation 2 of the substantiated report dated [REDACTED] 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 2 act.

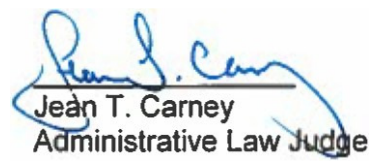
The request of [REDACTED] that Allegation 3 of the substantiated report dated [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (unlawful use or administration of a controlled substance).

The substantiated report is properly categorized as a Category 1 act.



This decision is recommended by Jean T. Carney, Administrative Hearings  
Unit.

**DATED:** September 20, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge