

**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

**FINAL
DETERMINATION
AFTER
HEARING**

Adjud. Case #:

██████████

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

Justice Center for the Protection of People with
Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Juliane O' Brien, Esq.

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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 █, █, █, dated and received on █ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse.

The substantiated report is properly categorized, as a Category 2 act.

NOW THEREFORE IT IS DETERMINED that the record of this report shall be retained in part by the Vulnerable Person's 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: April 21, 2015
Schenectady, New York



David Molik
Administrative Hearings Unit

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 report "substantiated" on [REDACTED], [REDACTED] [REDACTED], dated and received on [REDACTED] of abuse by the Subject of a Service Recipient.
2. On or about [REDACTED], the Justice Center substantiated the report against the Subject. The Justice Center concluded that:

Offense

It was alleged that on [REDACTED], at [REDACTED], [REDACTED] [REDACTED], located at [REDACTED], while acting as a custodian (Teacher's Aide), you committed acts of physical abuse on a service recipient when you entered the service recipient's room, knocked him to the floor and/or choked him.

The allegations of physical abuse have been SUBSTANTIATED as a Category 2 offense pursuant to Social Services Law § 493.

3. An Administrative Review was conducted and as a result the substantiated report was retained.
4. The facility, located at [REDACTED], is a [REDACTED] which is operated by [REDACTED], and is a facility

or provider agency that is subject to the jurisdiction of the Justice Center. At the time of the incident the Subject was employed as a Teacher's Aide. This facility contained a school and a residential living component. (Hearing testimony of Justice Center investigator [REDACTED])

5. The Service Recipient, who was 15 years of age at the time of the report, is a young person with a past history of violence, property destruction and sexual aggression. (Justice Center Exhibit 13) At the time of the incident the Service Recipient was less than 5 feet 4 inches tall and was of very slight build. (Hearing testimony of Justice Center Investigator [REDACTED])

6. On the morning of [REDACTED], the Service Recipient awoke. All of the Service Recipient's peers at the cottage had taken their medications, but the Service Recipient refused to take his medication. One of the other youth residents encouraged the Service Recipient to take his medication. This encouragement provoked the Service Recipient. Some issue arose with the Service Recipient's flip-flops being placed on top of a trash can. The Service Recipient became very agitated and aggressive toward another youth resident. A staff member directed the Service Recipient to go to his room. (Justice Center Exhibit 14; audio interview with the Service Recipient)

7. Some time elapsed and the Service Recipient did not "calm down" and continued to come out of his room in an agitated state. The Service Recipient went into his room for a brief period of time and then exited again into the common area. The Subject eventually entered the Service Recipient's room with the intention of redirecting the Service Recipient by engaging him to speak about a pet fish which the Service Recipient kept in his room. (Hearing testimony of Subject)

8. Upon entering the room, the Service Recipient told the Subject to leave. The Service Recipient then tried pushing the Subject out of his room and grabbed onto the Subject's shirt. The Subject then pushed the Service Recipient to the ground. The Subject lifted the Service Recipient and pinned him against a wall. (Justice Center Exhibit 14: audio interview with Service Recipient) The Subject then placed both of his hands on the Service Recipient's neck and the Service Recipient's face was "beet red." (Justice Center Exhibit 14: audio interview with ██████████) ██████████ and another staff member entered the room. Immediately thereafter, the Subject released one hand from the Service Recipient, but then with his left hand the Subject twisted the shirt collar of Service Recipient, a maneuver¹ which likely impeded the carotid artery of the Service Recipient. The Service Recipient began to feel that he was going to lose consciousness. (Justice Center Exhibit 14: audio interview with Service Recipient)

9. ██████████ told the Subject to "get out" and then she helped release the Service Recipient's grip on the Subject. (Hearing testimony of the Subject) ██████████ was able to de-escalate the Service Recipient without restraining him. The Service Recipient had visible red marks, including finger marks on his neck. (Justice Center Exhibit 14: audio interview with ██████████)

10. Later on that date, the Service Recipient was observed by his clinician to have red marks on his neck. (Justice Center Exhibit: audio interview with Clinician ██████████)

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.

¹ The Service Recipient reported to his clinician that the Subject twisted the Service Recipient's shirt collar near his neckline and that caused the Service Recipient to feel that he was going to pass-out. (Justice Center Exhibit 14: audio interview Clinician ██████████)

- 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 evidence that the alleged act or acts of abuse or neglect occurred...” (Title 14 NYCRR 700.3(f))

Pursuant to SSL §§ 494(1)(a)(b) and (2), and Title 14 NYCRR § 700.6(b), this hearing decision will determine: 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, and if there is a finding of a preponderance of the evidence; whether the substantiated allegations constitute abuse and/or neglect; and pursuant to Social Services Law § 493(4), the category of abuse and/or neglect that such act or acts constitute.

The abuse and/or neglect of a person in a facility or provider agency is defined by SSL § 488:

- 1 "Reportable incident" shall mean the following conduct that a mandated reporter is required to report to the vulnerable persons' central register:
 - (a) "Physical abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by physical contact, physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient or causing the likelihood of such injury or impairment. Such conduct may include but shall not be limited to: slapping, hitting, kicking, biting, choking, smothering, shoving, dragging, throwing, punching, shaking, burning, cutting or the use of corporal punishment. Physical abuse shall not include reasonable emergency interventions necessary to protect the safety of any person.

- (b) "Sexual abuse," which shall mean any conduct by a custodian that subjects a person receiving services to any offense defined in article one hundred thirty or section 255.25, 255.26 or 255.27 of the penal law; or any conduct or communication by such custodian that allows, permits, uses or encourages a service recipient to engage in any act described in articles two hundred thirty or two hundred sixty-three of the penal law. For purposes of this paragraph only, a person with a developmental disability who is or was receiving services and is also an employee or volunteer of a service provider shall not be considered a custodian if he or she has sexual contact with another service recipient who is a consenting adult who has consented to such contact.
- (c) "Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.
- (d) "Deliberate inappropriate use of restraints," which shall mean the use of a restraint when the technique that is used, the amount of force that is used or the situation in which the restraint is used is deliberately inconsistent with a service recipient's individual treatment plan or behavioral intervention plan, generally accepted treatment practices and/or applicable federal or state laws, regulations or policies, except when the restraint is used as a reasonable emergency intervention to prevent imminent risk of harm to a person receiving services or to any other person. For purposes of this subdivision, a "restraint" shall include the use of any manual, pharmacological or mechanical measure or device to immobilize or limit the ability of a person receiving services to freely move his or her arms, legs or body.
- (e) "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.

- (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.
- (h) "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 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).

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493:

4. Substantiated reports of abuse or neglect shall be categorized into one or more of the following four categories, as applicable:
 - (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
 - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;
 - (ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor; or is likely to result in either;
 - (iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;
 - (iv) engaging in or encouraging others to engage in cruel or degrading treatment, which may include a pattern of cruel and degrading physical

contact, of a service recipient, that results in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

(v) engaging in or encouraging others to engage in any conduct in violation of article one hundred thirty of the penal law with a service recipient;

(vi) any conduct that is inconsistent with a service recipient's individual treatment plan or applicable federal or state laws, regulations or policies, that encourages, facilitates or permits another to engage in any conduct in violation of article one hundred thirty of the penal law, with a service recipient;

(vii) any conduct encouraging or permitting another to promote a sexual performance, as defined in subdivision one of section 263.00 of the penal law, by a service recipient, or permitting or using a service recipient in any prostitution-related offense;

(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;

(ix) unlawfully administering a controlled substance, as defined by article thirty-three of the public health law to a service recipient;

(x) intentionally falsifying records related to the safety, treatment or supervision of a service recipient, including but not limited to medical records, fire safety inspections and drills and supervision checks when the false statement contained therein is made with the intent to mislead a person investigating a reportable incident and it is reasonably foreseeable that such false statement may endanger the health, safety or welfare of a service recipient;

(xi) knowingly and willfully failing to report, as required by paragraph (a) of subdivision one of section four hundred ninety-one of this article, any of the conduct in subparagraphs (i) through (ix) of this paragraph upon discovery;

(xii) for supervisors, failing to act upon a report of conduct in subparagraphs (i) through (x) of this paragraph as directed by regulation, procedure or policy;

(xiii) intentionally making a materially false statement during an investigation into a report of conduct described in subparagraphs (i) through (x) of this paragraph with the intent to obstruct such investigation; and

(xiv) intimidating a mandated reporter with the intention of preventing him or her from reporting conduct described in subparagraphs (i) through (x) of this paragraph or retaliating against any custodian making such a report in good faith.

- (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.
- (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.
- (d) Category four shall be conditions at a facility or provider agency that expose service recipients to harm or risk of harm where staff culpability is mitigated by systemic problems such as inadequate management, staffing, training or supervision. Category four also shall include instances in which it has been substantiated that a service recipient has been abused or neglected, but the perpetrator of such abuse or neglect cannot be identified.

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 evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has established by a preponderance of evidence that the Subject

committed a prohibited act, described in the substantiated report. The act committed by the Subject constitutes abuse. The category of the affirmed substantiated abuse that such act constitutes is Category 2.

In support of its substantiated findings, the Justice Center presented Justice Center Exhibits 1-15. The investigation underlying the substantiated report was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. The Subject testified on his own behalf.

At the hearing the Subject testified that he never choked the Service Recipient and that he never placed his hand or hands on the neck of the Service Recipient. The Subject testified that his own back was facing [REDACTED] when she entered the room and that she could not have observed, as she had claimed, that both of the Subject's hands were around the neck of the Service Recipient.

There are multiple hearsay statements in the record which, if credited, establish that the Subject choked the Service Recipient. The pivotal hearsay statement is the recorded interview with [REDACTED] who alleges that she observed the Subject choking the Service Recipient with two different techniques. Hearsay is admissible in administrative proceedings and an administrative determination may be based solely upon hearsay evidence under appropriate circumstances. *Gray v. Adduci*, 73 N.Y.2d 741 (1988), *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 N.Y.2d 176 (1978), *Eagle v. Patterson*, 57 N.Y.2d 831 (1982), *People ex rel Vega v. Smith*, 66 N.Y.2d 130 (1985). A crucial concern with respect to hearsay evidence is the inability to cross-examine the person who originally made the statement in order to evaluate his or her credibility. Such evidence, then, must be carefully scrutinized and weight attributed to it would depend upon its degree of apparent reliability. Factors to be

considered in evaluating the reliability of hearsay include the circumstances under which the statements were initially made, information bearing upon the credibility of the person who made the statement and his or her motive to fabricate, and the consistency and degree of inherent believability of the statements. The AJL presiding over the hearing, having listened to the recorded interview of [REDACTED] and having also listened to and observed in-person, the hearing testimony of the Subject, finds that the statement of [REDACTED] is credited evidence and the hearing testimony of the Subject, specifically his denial that he choked or put his hands on the Service Recipient, is incredible. Additionally, the allegation of choking is corroborated by the Service's Recipient's hearsay statement as well as the observation of the therapist that the Service Recipient had red marks, and more specifically finger marks on his neck. (See generally Justice Center Exhibit 14)

The Justice Center proved, by a preponderance of the evidence, meaning that the facts adduced at the hearing show that the Justice Center's position is the more plausible one based upon the evidence, that the Subject entered the Service Recipient's room and choked the Service Recipient, and that the act of choking was not a reasonable emergency intervention necessary to protect the safety of any person, including the Subject.

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.

The next issue to be resolved is whether the substantiated report constitutes the category of abuse and/or neglect set forth in the substantiated report. It is concluded that this report is properly categorized as a Category 2.

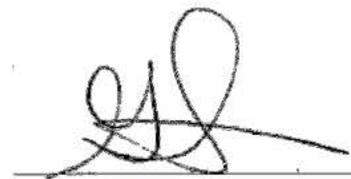
DECISION:

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

The substantiated report is properly categorized, as a Category 2 act.

This decision is recommended by Gerard D. Serlin, Administrative
Hearings Unit.

DATED: March 30, 2015
Schenectady, New York



Gerard D. Serlin, ALJ