

**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: Robert DeCataldo, Esq.

[REDACTED]

By: Steven M. Klein, 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 Allegation 1 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is granted.

The request of [REDACTED] that Allegation 2 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

It is agreed that Allegation 2 of the substantiated report should be categorized as a Category 2 act.

NOW, THEREFORE, IT IS DETERMINED that the record of this report is substantiated in part. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of these reports shall be retained in part by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

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 19, 2016
Schenectady, New York



David Molik
Administrative Hearings Unit

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

In the Matter of the Appeal of

[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.

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By: Robert DeCataldo, Esq.

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143 Washington Avenue
Capitol Station Box 7125
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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 upon consideration of a stipulation of facts, it is hereby found:

1. On [REDACTED], an allegation was reported to the VPCR that [REDACTED] (the Subject), an employee of the Office for People With Developmental Disabilities (OPWDD), [REDACTED], assigned to work at the [REDACTED] located at [REDACTED], [REDACTED], had abused and neglected service recipients who were residents of this [REDACTED]. The Justice Center classified this report as an abuse and neglect case, and assigned [REDACTED] to the report.

2. On [REDACTED], the Justice Center substantiated the report against the Subject for abuse and neglect. The Justice Center concluded that:

Allegation 1

It was alleged that on or about [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed physical abuse when, under circumstances in which a service recipient has a history of two punctured ear drums, is very susceptible to ear infections, has a medical order prohibiting him from having water in his ears, and has special ear plugs made to prevent water from entering his ear, you used a syringe to flush the service recipient's ears with water and then "cleaned" his ears by inserting a paper clip into his ear canal.

These allegations have been SUBSTANTIATED as Category 2 physical abuse

pursuant to Social Services Law § 493.

Allegation 2

It was alleged that on or about [REDACTED], and on other undetermined dates on or after [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed neglect when you engaged in a course of conduct, which included breaching your duties to three service recipients by: (1) using a syringe of water and a paper clip to “clean” one service recipient’s ears, in violation of his treatment plan; (2) using a paper clip to “clean” the ears of two other service recipients, causing them discomfort; and (3) referring to service recipients as “good girls,” which caused at least one service recipient embarrassment and upset.

These allegations have been SUBSTANTIATED as a Category 2 neglect with respect to each of the three service recipients pursuant to Social Services Law § 493.

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

4. Notwithstanding that the Subject was entitled to a full evidentiary hearing, the Subject elected to waive his rights to an evidentiary hearing on the relevant issues and instead the Subject 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 of Facts, 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 2 finding of neglect, and that the Category 2 finding of abuse will be unsubstantiated.

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 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 and/or neglect of a person in a facility or provider agency is defined in relevant parts by SSL § 488 (1) (a) and (h).

Substantiated reports of abuse and neglect are categorized into categories pursuant to SSL § 493(4), including Category 2 abuse or neglect, which is defined, as relevant here, as follows:

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.

DISCUSSION

The stipulated facts agreed to by the parties establish by a preponderance of evidence that the Subject committed the neglect that was alleged in the substantiated report as contained in Allegation 2. Although the stipulated facts may also support a determination that the Subject committed physical abuse, the parties have asked that the finding of physical abuse be dismissed. Because dismissal of the physical abuse determination, under these circumstances, is not inconsistent with the public policy set forth in the PPSNA, I am recommending that the

Executive Director accept so much of the stipulated outcome as would uphold the finding of neglect and dismiss the finding of physical abuse.

The parties also have requested, as part of the proposed stipulated resolution of this case, that the substantiated finding of neglect remain a Category 2 finding. A report is properly categorized as Category 2 when the conduct of a custodian seriously endangered the health, safety or welfare of a service recipient. (See NYS SSL §493(4)(b)) The stipulated facts agreed to by the parties establish that the Subject did use water to flush the ears of a Service Recipient who had a standing medical order prohibiting the use of water in his ears. The stipulated facts also establish that the Subject would refer to the Service Recipients as “good girls” even though he was asked by a Service Recipient on more than one occasion to stop. The Subject’s conduct constitutes a serious endangerment to the health, safety and welfare of the Service Recipient. Therefore, based upon the parties’ stipulated facts, it is determined that the substantiated report is properly categorized as a Category 2 act.

A Category 2 finding could cause a Subject to be placed on the Justice Center’s Staff Exclusion List (SEL), but only if he were to commit a second Category 2 act within three years of a previous finding that the Subject engaged in Category 2 conduct. Unless a Category 2 finding is elevated to a Category 1 finding, a Category 2 finding will be sealed after five years. (SSL § 493(4) (b) and (c))

DECISION: The request of [REDACTED] that Allegation 1 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is granted.

The request of [REDACTED] that Allegation 2 of the substantiated report dated [REDACTED], [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed neglect.

It is agreed that Allegation 2 of the substantiated report should be categorized as a Category 2 act.

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

DATED: April 12, 2016
Schenectady, New York



John T. Nasci, ALJ

STATE OF NEW YORK – NYS JUSTICE CENTER
ADMINISTRATIVE HEARINGS BUREAU

In the Matter of the Administrative Appeal of

██████████,

Subject.

STIPULATION OF FACTS

██

Whereas, the New York State Vulnerable Persons' Central Register (the VPCR) maintains a report dated ██████████ substantiating ██████████ (the Subject), for Category 2 offenses for abuse and neglect under ██████████; and

Whereas, the Subject requested that the Justice Center, Administrative Appeals Unit amend the report to reflect that the Subject is not a subject of the substantiated report; and

Whereas, the Subject's request for amendment was denied, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR; and

Whereas, a full evidentiary hearing was scheduled in this matter to determine:

1. 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?
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; and

Whereas, the parties, by and through their attorneys, Steven M. Klein, Esq., for the Subject, ██████████, and Robert T. DeCataldo, Esq., for the New York State Justice Center, each having full authority to do so desire to resolve this matter on the instant **Stipulation of Facts**; and

Whereas, the Subject, notwithstanding that he is entitled to a full evidentiary hearing, has knowingly elected to waive his right to an evidentiary hearing on the aforesaid issues and instead has elected to proceed to a decision based upon the within **Stipulation of Facts**; and

Whereas, the Subject understands and agrees that the report will continue to be maintained by the VPCR as a Category 2 finding of neglect as more particularly set forth below.

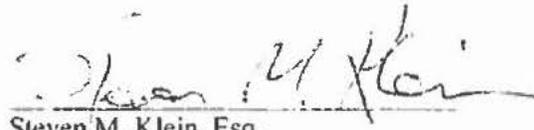
Now, therefore it is hereby STIPULATED and AGREED as follows:

1. The presiding Justice Center Administrative Law Judge (ALJ) will draft and recommend a hearing decision based upon the **Stipulation of Facts**.
2. The final authority to approve the hearing decision is vested with the Executive Director of the Justice Center. Therefore, any hearing decision which may be recommended based upon this stipulation is subject to the approval of the Executive Director of the Justice Center.
3. By executing this Stipulation, through his attorney, the Subject hereby waives any right he may have in law to appeal the finding(s) of abuse and/or neglect and the Category determination as set out herein.
4. 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. Furthermore, this document shall not be used for any purpose whatsoever, at the evidentiary hearing and the appeal waiver shall be null and void.
5. At all times relevant herein, Subject [REDACTED] was employed as an LPN by the Office for People with Developmental Disabilities (OPWDD), [REDACTED] [REDACTED].
6. At all times relevant herein, the [REDACTED], located at [REDACTED] [REDACTED], was a facility operated, licensed and/or certified by OPWDD to provide services to people with developmental disabilities and subject to the jurisdiction of the Justice Center.

7. At all times relevant herein, the Subject's work assignment, among others, included providing services at the [REDACTED] to the residents of that house.
8. At all times relevant hereto, the Subject was a custodian pursuant to Social Services Law § 488(2) and a mandated reporter pursuant to Social Services Law § 488(5).
9. At all times relevant herein, Service Recipients [REDACTED] were residents at the [REDACTED].
10. At all times relevant herein, [REDACTED] suffered from bilateral punctured ear drums and was highly susceptible to recurrent ear infections.
11. At all times relevant herein, the Service Recipient [REDACTED] had a standing medical order prohibiting the use of water in his ears and he required both special ear plugs to prevent water from entering his ears and frequent drying of his ears.
12. On or about [REDACTED], the Subject, contrary to the standing medical order forgot that order and did flush [REDACTED] ears with water.
13. The Subject had a duty to perform his duties consistent with the medical orders in place for [REDACTED] and he was aware of the medical orders for [REDACTED] prohibiting water in the ears.
14. The Subject admits that his conduct outlined above constitutes a breach of his duty of care to [REDACTED].
15. That given [REDACTED] medical history, the foregoing conduct seriously endangered the health, safety or welfare of [REDACTED].
16. That at all times relevant herein, the Subject would refer to [REDACTED] as "good girls".
17. That on one or more occasions, [REDACTED] requested the subject to stop referring to him as a "good girl".
18. The Subject admits that his conduct outlined above constitutes a breach of his duty of care to [REDACTED].

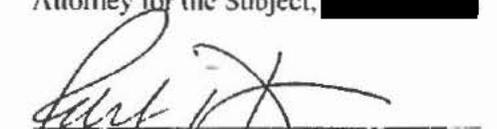
19. That the foregoing conduct seriously endangered the health, safety or welfare of [REDACTED]
20. The Subject, [REDACTED] does not and will not contest that a preponderance of the evidence as set forth in the **Stipulation of Facts** supports a finding of a Category 2 offense for neglect as alleged in "Allegation 2" pursuant to Social Services Law §488(1)(h).
21. That "Allegation 1" of the substantiated report will be sealed.

Dated: April 11, 2016



Steven M. Klein, Esq.
Attorney for the Subject, [REDACTED]

Dated: April 12, 2016



Robert T. DeCataldo, Esq.
Attorney for the New York State Justice
Center for the Protection of People
With Special Needs

Approved for recommendation:

Dated: 4/12/16, 20



John T. Nasci,
Administrative Law Judge
New York State Justice Center for the
Protection of People with Special Needs