

**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
AND ORDER
AFTER HEARING**

Adjud. Case #:

████████████████

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: 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 ██████████ 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 3 act.

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

This decision is ordered by David Molik, Director of the Administrative Hearings Unit, who has been designated by the Executive Director to make such decisions.

DATED: May 6, 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

████████████████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before: John T. Nasci
Administrative Law Judge

Held at: Administrative Hearings Unit
New York State Office Building
333 East Washington Street
Syracuse, New York 13202
On: ██████████

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
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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/or 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 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 [REDACTED], at the [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to timely and accurately document or report that a service recipient had been punched and/or restrained.

This allegation has been SUBSTANTIATED as Category 3 abuse (obstruction of reports of reportable incidents) pursuant to Social Services Law § 493(4)(c).

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

4. The facility, located at [REDACTED], is a secure residential facility for male youths thirteen to eighteen years of age who are placed in the facility by Family Court. The facility is operated by the New York State Office of Children and Family

Services, which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Hearing testimony of Justice Center Internal Investigator [REDACTED])

5. At the time of the alleged abuse, the Subject was employed by the facility as a Teacher IV. (Hearing testimony of the Subject)

6. On [REDACTED] at approximately 7:34 a.m., the Subject entered the common area of the Service Recipient's residential unit for the purpose of talking with one of his students, who was a service recipient who resided in the unit. As the Subject entered the common area and walked to his left, toward his student's bedroom, he looked to his right and saw two Youth Division Aides (YDAs) and the Service Recipient on the other side of the common area¹ in the Service Recipient's bedroom. Because the Subject did not see anything out of the ordinary, he continued walking to the door of his student's bedroom. While he was speaking with his student, the Subject had his back turned to the two YDAs and the Service Recipient. (Justice Center Exhibits 7, 10 and 11; Subject Exhibit B; and Hearing testimony of the Subject)

7. At approximately 7:36 a.m., a physical altercation commenced between the Service Recipient and the two YDAs. While still talking with his student, the Subject heard the commotion made by the altercation and turned to see the two YDAs attempting to restrain the Service Recipient inside the Service Recipient's bedroom. After securing his student inside the student's bedroom, the Subject walked across the common area to the Service Recipient's bedroom, calling a code while in transit. The Subject then entered the Service Recipient's bedroom where he found the YDAs struggling with the Service Recipient on the floor. The Subject's intention was to determine if the YDAs needed help and to make sure that everyone was safe. (Justice Center Exhibits 7, 10 and 11; Subject Exhibit B; and Hearing testimony of the

¹ Although there was no testimony about the dimensions of the common area, it is estimated from a review of the video recording by the Administrative Law Judge that the distance across the common area (from the bedroom of the Subject's student to the bedroom of the Service Recipient) is twenty-five to thirty feet. (Justice Center Exhibit 11)

Subject)

8. While in the Service Recipient's bedroom, the Subject heard the Service Recipient say: "Did you see that? They are punching me. You saw them punching me, right?" (Justice Center Exhibits 7, 10 and 11; Subject Exhibit B; and Hearing testimony of the Subject)

9. The two YDAs got the Service Recipient off the floor, into a one person standing restraint, out of the bedroom, into the common area and onto the floor in a two person sitting restraint. At the same time, the Subject exited the Service Recipient's bedroom and went immediately to secure another service recipient who had just entered the common area. (Justice Center Exhibits 7, 10 and 11; Subject Exhibit B; and Hearing testimony of the Subject)

10. At approximately 7:37 a.m., the Administrator On Duty (AOD) walked into the common area. At the same time, the Subject secured the other service recipient in his bedroom. Thereafter, the Subject walked over to his student's bedroom and then out of common area of the unit at approximately 7:38 a.m. (Justice Center Exhibits 7, 10 and 11; Subject Exhibit B; and Hearing testimony of the Subject)

11. The Subject did not report the incident to the VPCR and did not include the Service Recipient's statement: "Did you see that? They are punching me. You saw them punching me, right?" in the original incident report that he filed with the facility. (Hearing testimony of the Subject)

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 (obstruction of reports of reportable incidents) 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 by SSL § 488(1)(f), to include:

"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.

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:

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(s) 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 an act of abuse (obstruction of reports of reportable incidents), described as “Allegation 1” 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 1-9) The Justice Center also presented an audio recording of the Justice Center Internal Investigator’s interrogation of the Subject and visual only video of the incident. (Justice Center Exhibits 10 and 11) The investigation underlying the substantiated report was conducted by Justice Center Internal 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 presented two exhibits. (Subject Exhibits A and B)

The Justice Center proved by a preponderance of the evidence that the Subject, who was a mandated reporter, failed to report a reportable incident. Specifically, the evidence establishes that the Subject failed to report the [REDACTED] incident to the VPCR, and that he failed to

include in his incident report a notation that during the incident he heard the Service Recipient say: “Did you see that? They are punching me. You saw them punching me, right?”

At the hearing, the Subject admitted that he failed to report the incident to the VPCR and that he failed to include the Service Recipient’s statement in the original incident report which he prepared. The Subject explained in his hearing testimony that he realized he had not included the Service Recipient’s statement in the incident report when he was asked by the Justice Center Internal Investigator during the [REDACTED] interview if he heard the Service Recipient say anything. (Justice Center Exhibits 10 and 11; Subject Exhibit B; and Hearing testimony of the Subject)

To prove abuse (obstruction of reports of reportable incidents), the Justice Center must establish that the Subject was a mandated reporter who failed to report a reportable incident upon discovery. (SSL §488(1)(f)) The record reflects that the Subject is a mandated reporter. (Justice Center Exhibit 9 and Hearing testimony of the Subject) The record also reflects that the Subject witnessed the restraint of the Service Recipient during which the Service Recipient claimed to have been punched by a YDA. The Service Recipient’s claim of having been punched by a YDA during a restraint incident is sufficient to establish that the incident was a reportable incident. Because the Subject heard the claim during the incident, he had a legal obligation to immediately report the incident, including the Service Recipient’s statement. Finally, the record reflects that the Subject did not report the incident to the VPCR and did not report the Service Recipient’s claim, of having been punched by a YDA, in his initial incident report. Consequently, the Justice Center has sufficiently established that the Subject has committed abuse (obstruction of reports of reportable incidents).

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.

Although the report will remain substantiated, the next question to be decided is whether the substantiated report constitutes the category of abuse 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.

DECISION: The request of [REDACTED] that 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.

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

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

DATED: May 3, 2016
Schenectady, New York



John T. Nasci, ALJ