

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

Dated: May 31, 2018
Schenectady, New York



David Molik
Administrative Hearings Unit

CC. Vulnerable Persons' Central Register
Administrative Appeals Unit
[REDACTED], Subject
[REDACTED], Subject
[REDACTED], Subject

**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:

Gerard D. Serlin
Administrative Law Judge

Held at:

Administrative Hearings Unit
New York State Justice Center for the Protection
of People with Special Needs
333 East Washington Street
Syracuse, New York 13202
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: Kristin Kopach, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] for abuse and neglect. The Subjects requested that the VPCR amend the report to reflect that the Subjects are not the subjects 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 and neglect by the Subjects of various Service Recipients.
2. The Justice Center substantiated the report against Subject [REDACTED]¹. The Justice Center concluded that:

Allegation 2²

It was alleged that on [REDACTED], in the agency van, away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient scratched another service recipient in the face.

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

Allegation 3

It was alleged that on [REDACTED], in the agency van, away from the [REDACTED], located at [REDACTED], while a custodian, you committed physical abuse and/or abuse (deliberate inappropriate use of restraints)

¹ [REDACTED] is Subject [REDACTED].

² Allegation 1 was unsubstantiated upon administrative review.

when you conducted an unwarranted restraint with excessive force and/or improper technique, which included placing a service recipient in a choke hold.

These allegations have been SUBSTANTIATED as Category 3 physical abuse and Category 3 abuse (deliberate inappropriate use of restraints) pursuant to Social Services Law § 493(4)(c).

Allegation 4

It was alleged that on unspecified dates between [REDACTED],³ at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you directed derogatory and/or inappropriate language at a service recipient.

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

The Justice Center substantiated the report against Subject [REDACTED].⁴ The Justice Center concluded that:

Allegation 3

It was alleged that on unspecified dates between [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you directed derogatory and/or inappropriate language at a service recipient.

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

The Justice Center substantiated the report against Subject [REDACTED].⁵ The Justice Center concluded that:

Allegation 2

It was alleged that on [REDACTED], in the agency van, away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you failed to provide proper supervision, during which time a service recipient scratched another service recipient in the face.

³ The substantiation letter is incorrect, the year is [REDACTED], not [REDACTED].

⁴ [REDACTED] is Subject [REDACTED].

⁵ [REDACTED] is Subject [REDACTED].

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

Allegation 3

It was alleged that following [REDACTED], in the agency van, away from the [REDACTED], located at [REDACTED], while a custodian, you committed abuse (obstruction of reports of reportable incidents) when you failed to timely report a reportable incident involving a service recipient to the Vulnerable Persons Central Registry.

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

Allegation 4

It was alleged that on [REDACTED], at the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you shut a service recipient's foot in a door, causing a fractured toe.

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

Allegation 5

It was alleged that on an unspecified date between [REDACTED] [REDACTED],⁶ in the community, away from the [REDACTED], located at [REDACTED], while a custodian, you committed neglect when you drove the agency van in a reckless manner swerving and/or braking suddenly cause a service recipient to hit his head on the window.

This allegation has been SUBSTANTIATED as Category 3 neglect 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, the [REDACTED] (IRA) located at [REDACTED], is operated by [REDACTED] and is licensed by the Office for People With Developmental Disabilities (OPWDD) a provider agency that is

⁶ The substantiation letter is incorrect, the year is [REDACTED], not [REDACTED].

subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse or neglect, the Subjects were all employed in various direct support personnel capacities. (Hearing testimonies of the Subjects)

6. At the time of the alleged abuse and neglect, Service Recipient ■⁷ was of an unspecified age, and had been a resident of the facility since 2013. Service Recipient ■ was essentially nonverbal but made sounds and facial expressions to show his emotions. Service Recipient ■ had relevant diagnoses of autism and severe intellectual disorder, and was prone to physical aggression. (Justice Center Exhibit 47)

7. At the time of the alleged abuse and neglect, Service Recipient ■⁸ was of an unspecified age, and had been a resident of the facility since 2001. Service Recipient ■ was prone to attack others without warning. (Justice Center Exhibit 45) Service Recipient ■ was subject to one-to-one supervision. (Justice Center Exhibit 57, second audio interview of Subject ■ and Hearing testimony of the Justice Center Investigator)

8. Service Recipient ■⁹ was of an unspecified age, and had been a resident of the facility since 2013. Service Recipient ■ had relevant diagnoses of reactive attachment disorder, attention deficit hyperactivity disorder, oppositional defiant disorder, pervasive developmental disorder, and intellectual impairment. (Justice Center Exhibit 46)

9. Service Recipient ■¹⁰ was of an unspecified age, and had been a resident of the facility since approximately 2001. The Service Recipient had relevant diagnoses of post traumatic stress syndrome, moderate intellectual deficit and phonological disorder. (Justice Center Exhibit 48) Service Recipient ■ was verbally limited and difficult to understand when speaking, however,

⁷ Service Recipient ■ is ■ and is identified in Justice Center Exhibit 47.

⁸ Service Recipient ■ is ■ and is identified in Justice Center Exhibit 45.

⁹ Service Recipient ■ is ■ and is identified in Justice Center Exhibit 46.

¹⁰ Service Recipient ■ is ■ and is identified in Justice Center Exhibit 48.

he could read, although his level of literacy was unclear. He could also identify colors and count. Service Recipient [REDACTED] communicated largely using index cards with preprinted messages. (Justice Center Exhibit 57, audio interview of Service Recipient [REDACTED], first interview)

10. Service Recipient [REDACTED] regularly threw himself back and forth in his seat while he was seated in the agency van, and at times rocked back and forth so violently that he would shake the van. (Hearing testimony of Staff A) On [REDACTED], Service Recipient [REDACTED] was rocking back and forth in the seat of the agency van. In doing so, he struck his face on a plastic piece of the restraint system (seat belt) and sustained a minor laceration. (Justice Center Exhibit 42, pp. 463-464; Justice Center Exhibit 43, p. 578; Hearing testimony of Subject [REDACTED])

11. On [REDACTED], Service Recipient [REDACTED] was a passenger in the agency van. Staff A was assigned to supervise Service Recipient [REDACTED], when he began to strike Staff A. Subject [REDACTED], who was also in the van, intervened and used an approved seated restraint on Service Recipient [REDACTED]. (Hearing testimony of Subject [REDACTED] and Justice Center Exhibit 43, p. 603) Staff A became upset and began to cry. Subject [REDACTED], who was driving the van, stopped the van, and both Staff A and Subject [REDACTED] exited the van, at which time Subject [REDACTED] consoled Staff A. (Hearing testimonies of Staff A, Subject [REDACTED], Subject [REDACTED], and Justice Center Exhibit 40, p. 318)

12. On [REDACTED], Service Recipient [REDACTED], who was wearing flip-flops, struck his big toe on a door frame in the Facility. As a result, Service Recipient [REDACTED] fractured his toe. (Justice Center 42, p. 533 and hearing testimony of Subject [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 and/or neglect of a person is defined in relevant part by SSL §§ 488(1)(a)(d)(f) and (h) as follows:

(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.

(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.

(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.

(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.

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 Subjects committed the act or acts of abuse and 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 neglect as set forth in the substantiated report. (Title 14 NYCRR § 700.10(d))

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

If the Justice Center did not prove the abuse and neglect by a preponderance of the evidence, the substantiated report must be amended and sealed.

DISCUSSION

The Justice Center has not established by a preponderance of the evidence that the Subjects committed any of the acts set forth in substantiated report and multiple findings.

In support of its substantiated findings, the Justice Center presented fifty-seven exhibits obtained during the investigation. (Justice Center Exhibits 1-57) The exhibits included twenty-three recorded audio interviews and five video/audio recordings obtained by a non-subject, former employee (Staff A)¹¹, one-hundred eighty six pages of printed text/social media communications and several photographs.

The investigation underlying the substantiated report was initially conducted by two investigators employed by the provider agency who acted on behalf of the OPWDD; thereafter, Staff A, unsatisfied with the outcome of the Investigation, called the Justice Center and made additional allegations and possibly realleged the allegations previously deemed unfounded. Ultimately, a Justice Center Investigator investigated the newly alleged matters and conducted a re-investigation of some or all of the original allegations. Staff A and Justice Center Investigator [REDACTED]¹², testified at the hearing on behalf of the Justice Center

Most of the evidence against the Subjects was based upon testimony and statements provided by Staff A, who was employed at the Facility from [REDACTED] until [REDACTED]

¹¹ Staff A is [REDACTED].

¹² At the time of the investigation [REDACTED] was employed by the Justice Center. However, at the time of the hearing she was employed by the OPWDD as an Investigator.

██████████. (Justice Center Exhibit 57, audio interview of Staff A, first interview) Almost from the onset of her employment at the Facility, Staff A struggled with Service Recipient ██████████, (Justice Center Exhibit 57, audio interview of Staff A, first interview) and routinely requested that she not be assigned to supervise Service Recipient ██████████, (Justice Center Exhibit 57, audio interview with Investigators ██████████¹³ and ██████████¹⁴, second audio interview with Supervisor A¹⁵)

Staff A made a series of allegations over the span of several weeks. From the record it was unclear if all allegations were initially reported to the Justice Center, though all allegations made on ██████████ and ██████████, were investigated by investigators employed by the provider agency and were documented on an OPWDD sanctioned report form which appears to have been transmitted to the Justice Center. (Justice Center Exhibit 11)

Ultimately, those allegations were deemed unfounded after investigation by two provider agency investigators operating on behalf of the OPWDD. The Justice Center characterized the initial allegations as significant incidents. (Justice Center Exhibit 57, audio interview with Investigators ██████████ and ██████████)

Staff A began employment with the provider agency on ██████████. (Justice Center Exhibit 57, audio interview of Staff A, first interview) On ██████████, Staff A provided one month notice of her intent to resign. (Justice Center Exhibit 57, audio interview with Staff A, first interview) At the time of her departure notice, Staff A wrote a complimentary resignation letter stating that her “heart belongs to (the Facility); thank you for this great training opportunity.” (Justice Center Exhibit 57, audio interview with Investigator ██████████)

During the weeks before Staff A’s planned departure, the provider agency hired another

¹³ ██████████ is ██████████.
¹⁴ ██████████ is ██████████.

¹⁵ Supervisor A is ██████████

staff, in anticipation of Staff A's departure. The provider agency shuffled staffing schedules and shifts to accommodate this change. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED]) On [REDACTED], Staff A rescinded her resignation. On [REDACTED], a plan was established to assist Staff A with her apprehension about working with Service Recipient [REDACTED]. (Justice Center Exhibit 11, p. 80) During the months preceding her resignation, Staff A's concern about working with Service Recipient [REDACTED] created a scheduling issue as well. Ultimately, Staff A disclosed to Investigator [REDACTED] that she was afraid to work with Service Recipient [REDACTED]. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED])

After Staff A rescinded her resignation, the Facility was unable to restore her previous shift schedule, though they did continue her employment. (Justice Center Exhibit 57, audio interview with Staff A, first interview) The shift change angered Staff A because her new shift schedule interfered with her custodial parenting time, particularly on Saturdays. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED] and Staff A, first interview)

During the course of the initial investigation, provider agency Investigator [REDACTED] concluded that there was likely some type of relationship between Staff A and Subject [REDACTED], although when interviewed, both Staff A and Subject [REDACTED] characterized the relationship as a close friendship. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED] and Staff A, first interview) At the hearing, Staff A testified that it was "the [Facility] joke that [REDACTED] and I had something going on." When interviewed by the Justice Center Investigator, Staff A stated that for a time she "hung out" with Subject [REDACTED] at work, and that they were close. Staff A intimated that she had been romantically interested in him, but that Subject [REDACTED] had lied and stated that he was single, when in fact he was not. (Justice Center Exhibit 57, audio interview Staff A, first interview)

Although there was some evidence in the record that, as Staff A made complaints to her

supervisor about possible abuse and neglect at the Facility as early as [REDACTED], this evidence was not persuasive or credited. The convincing evidence in the record was that the first time Staff A made such allegations was [REDACTED].

Staff A was interviewed by provider agency investigator [REDACTED], on [REDACTED]. During that interview, Staff A did not make any allegations concerning neglect or abuse in the agency van. This interview took place at a location away from the Facility. Staff A's allegations on [REDACTED] included allegations that Facility Staff verbally intimidated and threatened to take outings away from Service Recipient [REDACTED], and intentionally made Service Recipient [REDACTED] angry, in order to justify using a restraint on him. Staff A also alleged that Subject [REDACTED] committed neglect when he shut Service Recipient [REDACTED] foot in a door causing a fractured toe, and that Service Recipient [REDACTED] had been "trained" to claim that he broke his toe by bumping into the door. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED]) Staff A further alleged that staff at the facility struck service recipients in the face and placed pillows over their mouths. However, the staff member whom Staff A claimed to have observed strike service recipients in the face and cover them with pillows, had been terminated before the investigation. (Justice Center Exhibit 57, audio interview with Staff A, first interview)

On [REDACTED], Staff A called Investigator [REDACTED] and stated that she wanted to meet again. On [REDACTED], Staff A and Investigator [REDACTED] met again. During that interview Staff A alleged for the first time that staff at the facility had been making service recipients shower together and shower naked outside. During this interview, Staff A did not make any allegations concerning the agency van. (Justice Center Exhibit 57, audio interview with Investigator and [REDACTED])

At this juncture, another provider agency Investigator was brought into the case, Investigator [REDACTED]. He joined the investigation around the first week of [REDACTED], and was

assigned to investigate the most recent allegations which included not only showering allegations, but also the allegation that staff had thrown a service recipient's bed mattress out of a second story window and withheld food from service recipients, possibly as punishment.

However, when interviewed by Investigator [REDACTED], Staff A retreated from the showering allegation, and denied that she was ever aware of service recipients even being in the bathroom together. Staff A then claimed that the only remotely similar issue that she witnessed was horse play with a hose during the summer, which occurred outside between the service recipients. (Justice Center Exhibit 57, audio interview with Investigator [REDACTED])

An in-depth investigation, which included interviews with every staff employed during the relevant time, was completed. The allegations were deemed unsubstantiated and provider agency Investigator [REDACTED] determined that Staff A had fabricated the allegations of abuse. (Justice Center Exhibit 11, p. 87) Staff A was terminated on [REDACTED]; the provider agency cited to Staff A's fabrication of allegations as justification for termination. (Hearing testimony of Staff A)

Shortly thereafter, Staff A made additional allegations to the Justice Center which were ultimately investigated by Justice Center Investigators. (Hearing testimony of the Justice Center Investigator and Staff A) The Justice Center re-investigated most, if not all, of Staff A's allegations of [REDACTED] and [REDACTED], as well as new allegations. (Hearing testimony of the Justice Center Investigator)

Alleged Neglect in the van - Subjects [REDACTED] and [REDACTED]

Subjects [REDACTED] and [REDACTED] were alleged to have committed neglect when they failed to provide proper supervision, during which time a service recipient scratched another service recipient in the face. The Justice Center concluded that the neglect took place on [REDACTED], in the agency van, away from the [REDACTED]. Subjects [REDACTED] and [REDACTED] were alleged to have stopped the van on a

bridge, exited the van to look at a fishing spot, and in doing so it was alleged that they left Staff A to supervise Service Recipient [REDACTED] and Service Recipient [REDACTED] in the van. During the Subjects' absence, Service Recipient [REDACTED] allegedly scratched Service Recipient [REDACTED].

Despite the fact that the substantiation letter concluded that a Service Recipient had scratched another Service Recipient, at the hearing, Staff A testified that Service Recipient [REDACTED] had punched Service Recipient [REDACTED], and that Service Recipient [REDACTED] sustained a laceration to the face as a result. (Hearing testimony of Staff A)

Staff A testified that she was probably assigned one-to-one supervision of one of the two Service Recipients, as both Service Recipients required one-to-one supervision while in a vehicle. (Hearing testimony of Staff A) However, the evidence established that Service Recipient [REDACTED] was on two-to-one supervision. (Hearing testimony of the Justice Center Investigator) It was never established what level of supervision was required for Service Recipient [REDACTED]. Vehicle logs utilized by the Facility did not identify the service recipients who were in the van on any given trip, and apparently only identified the staff driver. (Hearing testimony of the Justice Center Investigator and Justice Center Exhibit 37) Consequently, the logs were of little value in corroborating the allegation.

Staff A testified that, after the incident, Subjects [REDACTED] and [REDACTED] made a false entry into the relevant records (Justice Center Exhibit 42, pp. 463-464) to explain the injury sustained by Service Recipient [REDACTED] as having been caused by Service Recipient [REDACTED] rocking back and forth and then striking his face on a plastic piece of the vehicle restraint system. (See Justice Center Exhibits 42 and 43) At the hearing, Staff A testified that, while Service Recipient [REDACTED] did regularly throw himself back and forth in his seat, she did not "recall" Service Recipient [REDACTED] doing so that day, and that she did not "recall" him ever bumping his head while rocking in the seat of the van. On cross-examination,

Staff A acknowledged that Service Recipient ■ rocked back and forth so violently that he would shake the van. (Hearing testimony of Staff A)

On further direct examination, Staff A was asked to read the characterization of events set forth in Justice Center Exhibit 43 which was created by Subject ■ and ■ to memorialize how Service Recipient ■ sustained the injury, specifically from rocking back and forth and injuring himself. Staff A was then asked if she recalled this event happening as documented. Staff A testified, "I don't recall this, no." Then, when asked if she was in the vehicle with Service Recipient ■ on that date, Staff A testified, "I don't remember, we sometimes went for rides prior to taking him to his mom's house." (Hearing testimony of Staff A)

Staff A was interviewed on two occasions by the provider agency investigator: ■ and ■. The second interview on ■ was specifically scheduled at the request of Staff A who wanted to report additional allegations. During those interviews, Staff A made no mention of any allegation involving an agency van. (Justice Center Exhibit 57, audio interviews with Investigator ■)

At the onset of the first two allegations made in ■ and on ■, Subjects ■ and ■ were interviewed by provider agency investigative staff once or perhaps twice. After the report to the Justice Center, the Subjects were interrogated two additional times by the Justice Center Investigator. The two interrogations conducted by the Justice Center Investigator were recorded and the Subjects credibly denied all the allegations, made over a span of several weeks. Likewise, at the hearing, Subjects ■ and ■ testified credibly and denied the substantiated allegations. After considering all the evidence and, in particular, the hearing testimony of Staff A, which is not credited evidence, as well the credible hearing testimony of Subjects ■ and ■, the Justice Center did not prove this allegation by a preponderance of the evidence.

Alleged abuse in the van - Subject [REDACTED]

The Justice Center alleged that, on [REDACTED], Subject [REDACTED] committed physical abuse and/or abuse (deliberate inappropriate use of restraints) by conducting an unwarranted restraint with excessive force and/or improper technique, which included placing Service Recipient [REDACTED] in a choke hold.

The evidence in support of this allegation consisted entirely of the statements made by Staff A at the time of investigation and Staff A's hearing testimony.

This allegation, like the previous allegation of neglect, was not made by Subject [REDACTED] at the time of her first or second interview with provider agency Investigator [REDACTED]. At the hearing, Staff A testified that Subjects [REDACTED] and [REDACTED] were in the provider agency van, as well as Staff B.¹⁶ Subject [REDACTED] was driving the van and Subject [REDACTED] was in the back of the van with Service Recipient [REDACTED]. (Hearing testimony of Staff A)

Staff A testified that Subject [REDACTED] struck Service Recipient [REDACTED] several times with shin guards. Staff assigned to supervise the Service Recipient routinely wore shin guards on their arms for protection from assault by Service Recipient [REDACTED]. (Hearing testimony of Staff A) However, when interviewed by the Justice Center Investigator, Staff A claimed that it was Staff B, (not Subject [REDACTED]), who had struck Service Recipient [REDACTED] with the shin guards. (Justice Center Exhibit 57, audio interview of Staff A, second interview)

In any event, Staff A testified that she was sitting behind the driver, Subject [REDACTED], and that she witnessed Service Recipient [REDACTED] being hit with the shin guards. Staff A testified that she did not turn around and observe Service Recipient [REDACTED] being choked by Subject [REDACTED], and only heard the Service Recipient [REDACTED] make "choking noises." On cross examination, Staff A acknowledged that

¹⁶ Staff B is [REDACTED].

Service Recipient [REDACTED] routinely made noises. Likewise, at the hearing, Staff A unequivocally denied having seen the Service Recipient being choked by Subject [REDACTED], going so far as to claim that she never “turned her head around.” (Hearing testimony of Staff A)

However, when interviewed the first time by a Justice Center Investigator, on [REDACTED] [REDACTED], Staff A reported that she witnessed Subject [REDACTED] place Service Recipient [REDACTED] in a “complete choke hold”; Staff A claimed she could hear Service Recipient [REDACTED] “gasping.” (Justice Center Exhibit 57, audio interview of Staff A, first interview) During a second interview with the Justice Center she described Service Recipient [REDACTED] as “bright red” as a result of being choked. (Justice Center Exhibit 57, audio interview of Staff A, second interview)

Subject [REDACTED] testified credibly at the hearing that initially Staff A had been responsible for supervision of Service Recipient [REDACTED], but that he punched Staff A multiple times, and that Subject [REDACTED] stepped in and performed a seated restraint wrap. Subject [REDACTED] testified credibly that upon return to the Facility, he documented the incident in the Therap progress notes. (Justice Center Exhibit 43) Subject [REDACTED] maintained this same characterization of events throughout the investigation, specifically that Service Recipient [REDACTED] acted-out violently in the van and, as a result, he initiated a prescribed seated wrap restraint of Service Recipient [REDACTED]. (Hearing testimony of Subject [REDACTED], and Justice Center Exhibit 42, p. 463)

Subject [REDACTED] testimony and log entry into Therap on the relevant date also explains, or puts in context, Staff A’s Facebook messages with Subject [REDACTED] regarding the events of [REDACTED]. (See Justice Center Exhibit 40, p. 318) While the Justice Center argues that the Facebook communications between Subject [REDACTED] and Staff A corroborate Staff A’s allegations that Subject [REDACTED] choked and assaulted the Service Recipient, those messages do not specify any such event. Considering all the evidence in the record, the plausible explanation for those communications is

that Staff A was dismayed after having been assaulted by the Service Recipient, and began to cry. Subject [REDACTED], who was operating the van, then pulled the van over and exited the van with Staff A, to “speak” with her. In the text messages that follow between the two, Staff A wrote: “they know.” (Justice Center Exhibit 40, p. 318)

While the record is not clear as to who “they” are, or as to “what” they know, it certainly was not a reference that there was abuse of the Service Recipient in the van, as the Justice Center argues. The probable explanation for this remark is that other staff in the van might have found it curious that Subject [REDACTED] pulled the van over and exited the van with Staff A to console her, and that such event was completely consistent with the rumors circulating at that time, that a romantic relationship had developed between Staff A and Subject [REDACTED].

After considering all the evidence, and in particular the hearing testimony of Staff A, which is not credited evidence, as well the credible hearing testimony of Subject [REDACTED], the Justice Center did not prove by a preponderance of the evidence this allegation.

Alleged failure to report - Subject [REDACTED]

The Justice Center alleged that, on [REDACTED], Subject [REDACTED] committed obstruction insofar as he witnessed Subject [REDACTED] conduct an unwarranted restraint with excessive force and/or improper technique, which included placing Service Recipient [REDACTED] in a choke hold, and that Subject [REDACTED] did not immediately (upon discovery) report the incident to the VPCR. Inasmuch as the Justice Center did not establish by a preponderance of the evidence that Subject [REDACTED] discovered or witnessed a suspected reportable incident, the Justice Center has not established this substantiated allegation by a preponderance of the evidence.

Alleged Neglect - Subject [REDACTED]

The Justice Center alleged that on, [REDACTED], Subject [REDACTED] committed neglect when he closed Service Recipient [REDACTED] foot in a door, causing a fractured toe. The evidence in support of this allegation consisted entirely of the statements made by Staff A at the time of investigation and Staff A's hearing testimony. During her first interview with the Justice Center Investigator, Staff A told the investigator that it was "rumored that" Subject [REDACTED] had shut Service Recipient [REDACTED] toe in the door causing a toe fracture. (Justice Center Exhibit 57, audio interview of Staff A, first interview) However, at the hearing, Staff A testified that, throughout her first shift following Service Recipient [REDACTED] toe fracture, Subject [REDACTED] communicated to her that Subject [REDACTED] had shut the door on his foot. (Hearing testimony of Staff A)

At the hearing, the Justice Center Investigator testified that Staff A had a conversation with Staff C,¹⁷ about the broken toe allegation, "that correlated with the fracture toe." The Investigator elaborated no further. (Hearing testimony of the Investigator) Staff C was interviewed by the Justice Center Investigator and the interview was recorded. (Justice Center Exhibit 57, audio interview of Staff C) During that interview, Staff C denied ever witnessing or having knowledge of abuse or neglect. In fact, Staff C made no mention of having a conversation with Staff A about Service Recipient [REDACTED] broken toe, and the Investigator did not inquire about the broken toe.

Service Recipient [REDACTED] was interviewed by the Justice Center Investigator and did not offer any corroboration for this allegation. (Justice Center Exhibit 57, two audio interviews with Service Recipient [REDACTED]) The credible evidence in the record established that on [REDACTED], Service Recipient [REDACTED] struck his toe on a door or door jamb and fractured same. (Justice Center 42, p. 533 and hearing testimony of Subject [REDACTED])

¹⁷ Staff C is [REDACTED].

Alleged Neglect, derogatory language - Subjects [REDACTED] & [REDACTED]

The Justice Center concluded that, on [REDACTED], Subject [REDACTED] directed derogatory and/or inappropriate language to a service recipient. At the hearing, Staff A testified that she did not “remember exactly” what derogatory language she reported, but that she witnessed “them constantly telling [Service Recipient [REDACTED]] his mother was dead.” Staff A then described the “hand of Jesus”, which was apparently some threat or activity where “they go in [Service Recipient [REDACTED]] room and um, they’re going to lay the hand of Jesus on him, [Service Recipient [REDACTED]] will scream, or whatever, and after that he’s pretty mellow and everything is fine.” (Hearing testimony of Staff A)

The ALJ presiding over the hearing asked Staff A to identify the person who told Service Recipient [REDACTED] that his mother was dead. Staff A replied, “I don’t know exactly, I don’t remember.” The ALJ presiding over the hearing then asked Staff A to identify the person or persons who threatened to use the “hand of Jesus.” Staff A replied: “that started out as a [Staff B] thing ... I have heard [all of the Subjects] say it ... It stretched out to everyone in the home ... I have heard everyone say it.” (Hearing testimony of Staff A) Staff A’s hearing testimony on this issue, like her hearing testimony on other issues, was wholly incredible.

Service Recipient [REDACTED] was interviewed on two occasions by the Justice Center Investigator. Service Recipient [REDACTED] was limited verbally and difficult to understand, though he could provide one-word discernable answers to questions. He also used a series of cards with preprinted phrases to communicate his needs or feelings. Through his cards, he communicated to the Investigator that he wanted to go to a less restrictive facility to live on his own.

The Investigator then asked Service Recipient [REDACTED] to pick a card (happy face, sad face) to express his feelings about individual staff members which she identified by name. The Service

Recipient expressed a “happy face” toward all staff mentioned, including Subject [REDACTED], except for Staff [REDACTED] whom he identified by pointing to his “stop and think card,” to which the Investigator responded, “does he make you stop and think?” and the Service Recipient acknowledged that Subject [REDACTED] does.

Ultimately, Service Recipient [REDACTED] expressed that Subject [REDACTED] made him happy as well. The Service Recipient also expressed that the only people who laughed at him were the other service recipients. Service Recipient [REDACTED] appeared to be able to read, though the level of literacy was unclear, identify colors, and count. For all intents and purposes, Service Recipient [REDACTED] denied being taunted by staff. (Justice Center Exhibit 57, audio interview of Service Recipient [REDACTED], first interview)

Service Recipient [REDACTED] was interviewed twice by the Justice Center Investigator and both interviews were recorded. (Justice Center Exhibit 57, audio interviews with Service Recipient [REDACTED]) Service Recipient [REDACTED] could not tell time, and did not know the date but he did know that he lived at the [REDACTED].

Service Recipient [REDACTED] was relatively easy to understand. During the first interview, the Service Recipient was accompanied by a staff person,¹⁸ at his request. During the second interview, Service Recipient [REDACTED] again wanted a staff member to sit with him during the interview. This time a different staff, Supervisor A (who was identified by Staff A as having been involved in one of the incidents in the van) sat with Service Recipient [REDACTED] during the interview.

During the first interview, Service Recipient [REDACTED] said he did not like living at the Facility because there was nothing to do there. When asked how he liked the staff, the Service Recipient said that he liked the staff. Next, the Investigator asked specifically about Subject [REDACTED] and the Service Recipient replied: “he’s a pain in the butt ... he likes hugs.” The Investigator then asked

¹⁸ [REDACTED] (Last name unknown) who was employed at the Service Recipient’s day program.

him, “is he mean to you?” to which the Service Recipient replied “No.” He identified that Subject [REDACTED] “was cool, he likes fishing.” The Service Recipient also said that he liked Subject [REDACTED]; Service Recipient [REDACTED] stated that he “loves all of them” referring to staff. He described Staff A as talking on her phone to her boyfriend frequently and indicated that other Staff did not get along with Staff A.

Later during the first interview, Service Recipient [REDACTED] said that some staff members had called him fat and “dirty man.” The staff he identified included Subject [REDACTED], and other non-Subject staff. The Service Recipient said that he reported this to Supervisor A. (Justice Center Exhibit 57, audio interviews with Service Recipient [REDACTED])

It is noteworthy that Supervisor A was interrogated twice. At no time during either interview did the Justice Center Investigator specifically ask Supervisor A if Service Recipient [REDACTED] reported to her that anyone was calling him fat or “dirty man.” (Justice Center Exhibit 57, audio interviews with the Supervisor) Throughout each of the interviews with Service Recipient [REDACTED], he would change his answers to the questions posed, first saying “no” then quickly saying “yes” or vice versa. At times it appeared that Service Recipient [REDACTED] was not offering a candid answer, but the answer that he believed the interviewer was looking for. Service Recipient [REDACTED] contradicted himself multiple times

The Justice Center Investigator testified that, when she interviewed Service Recipient [REDACTED], he identified Subject [REDACTED] as having called him fat and “dirty man.” However, it is clear from the recorded interview that Service Recipient [REDACTED] identified another staff with the same first name as Subject [REDACTED] nickname.¹⁹ Finally, at the hearing, on cross-examination, the Justice Center

¹⁹ The Service Recipient identified a non-Subject employee, [REDACTED], and did not identify Subject [REDACTED]. (Justice Center Exhibit 57, audio interview of Service Recipient [REDACTED], second interview, 17 minutes and 40 seconds)

Investigator acknowledged that Service Recipient [REDACTED] suffered a mood disorder and has a history of fabrication. After considering all the evidence, it is not possible to allocate any weight to the statements of Service Recipient [REDACTED].

At the hearing, and always during the investigation, Subjects [REDACTED] and [REDACTED] credibly denied these allegations. The Justice Center has not established by a preponderance of the evidence these substantiated allegations.

Alleged neglect, driving agency van recklessly - Subject [REDACTED]

When interviewed, Service Recipient [REDACTED] communicated that he liked to be driven around in the van by Subject [REDACTED] and Subject [REDACTED]. He denied that Subject [REDACTED] ever swerved the vehicle while driving. The Service Recipient denied that he or anyone else ever hit their head on the window while in the van. (Justice Center Exhibit 57, audio interview of Service Recipient [REDACTED], second interview)

During his second interview, Service Recipient [REDACTED] was asked who was the best driver. He responded that Supervisor A was. Next, he was asked who the worst driver was, and he replied "[Subject [REDACTED]], he is a bad driver forever ... he swerves and stops and hits the brakes." When asked why he stops, the Service Recipient said that Subject [REDACTED] stops for "fun."

The Investigator asked him if he ever hit his head when Subject [REDACTED] stops fast and Service Recipient [REDACTED] said that he did not. The Investigator then asked if anyone else hit their head, to which the Service Recipient replied: "[REDACTED]," who was apparently neither a staff nor service recipient at the Facility. The Justice Center Investigator then asked Service Recipient [REDACTED] if it was "[REDACTED] or [Service Recipient [REDACTED]]?", to which the Service Recipient replied that it was Service Recipient [REDACTED].

At the hearing, and always during the investigation, Subject [REDACTED] credibly denied these allegations. The Justice Center has not established by a preponderance of the evidence these

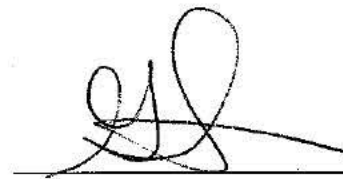
substantiated allegations. Accordingly, it is determined that the Justice Center has met not its burden of proving by a preponderance of the evidence that the Subjects committed the abuse and neglect alleged. The substantiated report will be amended and sealed.

DECISION:

The requests of [REDACTED]
[REDACTED] that the substantiated report dated [REDACTED], [REDACTED]
[REDACTED] be amended and sealed is granted. The Subjects have not
been shown by a preponderance of the evidence to have committed the abuse
and neglect alleged.

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

DATED: May 9, 2018
Schenectady, New York


Gerard D. Serlin, ALJ