

**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]

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: Theresa Wells, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

By: John Stebe, Esq.
26 Court Street, Suite 1507
Brooklyn, New York 11242-0606

██████████

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 and/or neglect.

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: August 24, 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
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, NY 10977
On: [REDACTED]

Parties:

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

New York State Justice Center for the Protection
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161 Delaware Avenue
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By: Theresa Wells, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: John Stebe, Esq.
26 Court Street, Suite 1507
Brooklyn, New York 11242-0606

JURISDICTION

The New York State Vulnerable Persons' Central Register (the "VPCR") maintains a report substantiating [REDACTED] (the "Subject") for abuse. The Subject requested that the VPCR amend the report to reflect that the Subject is not a subject of the substantiated report. The VPCR did not do so, and a hearing was then scheduled in accordance with the requirements of Social Services Law (SSL) § 494 and Part 700 of 14 NYCRR.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. The VPCR contains a "substantiated" report dated [REDACTED], [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 between [REDACTED] and [REDACTED], at the [REDACTED] located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you learned of allegations of neglect of a service recipient, but failed to report the incidents to the Justice Center.

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 an [REDACTED] operated by [REDACTED] and certified by the Office for People With Developmental Disabilities (OPWDD), which is a facility or provider agency that

is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse, the Subject was employed by [REDACTED] for approximately a year and a half. The Subject worked as a program director/manager at the [REDACTED].

6. At the time of the alleged abuse, the Service Recipient was an adult male, and had been receiving services from [REDACTED] since 1999. The Service Recipient is non-ambulatory with a diagnosis of a mild intellectual disability and T7 paraplegia. (Justice Center Exhibit 20)

7. On [REDACTED], a Nurse at [REDACTED] discovered that the Service Recipient was awake in his bed at approximately 4:15 a.m. The Nurse also noticed that the Service Recipient's colostomy bag had come undone and both the Service Recipient and his bed were soiled. (Justice Center Exhibit 7)

8. The Service Recipient reported to the Nurse that he had been calling for help since 2:15 a.m. (Justice Center Exhibit 7)

9. The Subject, who was explicitly told by the Service Recipient himself about the incident on [REDACTED], did not report the incident internally at [REDACTED] until [REDACTED]. The Subject failed to report the incident to the Justice Center. (Justice Center Exhibit 7)

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 in a facility or provider agency is defined by SSL § 488, and obstruction of reports of reportable incidents 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)(c), 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 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))

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 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, 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 1-22) The investigation underlying the substantiated report was conducted by [REDACTED] Quality Improvement Manager [REDACTED] who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in her own behalf and also called three additional witnesses, including [REDACTED] a Supervising Psychologist at [REDACTED] [REDACTED] and [REDACTED]. The Subject did not enter any additional documentary evidence into the record.

The Justice Center has the burden to show that the Subject was a mandated reporter who is a custodian as defined in subdivision two of this section, and that the Subject failed to report a reportable incident upon discovery.

The Justice Center alleges that, as a mandated reporter, the Subject failed to immediately report a reportable incident to the Justice Center as required by law. Specifically, the Justice Center

alleges that the Subject failed to immediately report an incident involving the Service Recipient. (Justice Center Exhibit 7)

The Subject contends confusion and ignorance of the law, claiming that she was unaware of the requirements to immediately report the incident specifically to the Justice Center. This is particularly her contention given the newness of the statute. (Hearing Testimony of the Subject)

To prove abuse (obstruction of reports of reportable incidents), the Justice Center must first establish that the Subject is a mandated reporter, as that term is defined in the statute. (*See* SSL § 488(2)) As the Subject was acting in her official capacity as a facility manager at the time of the alleged abuse, the Justice Center has sufficiently established that the Subject was a mandated reporter as established by statute.

The Justice Center must next establish that there was a reportable incident which was not reported by the Subject. The record reflects, and there is no contention between the parties, that a reportable incident occurred on [REDACTED] when the Service Recipient was found with his colostomy bag undone and soiled at 4:15 a.m., particularly when the Service Recipient had been calling for staff help since 2:15 a.m. (Justice Center Exhibit 7) The record further reflects, and there is no contention between the parties, that this incident was not reported internally until [REDACTED] (Justice Center Exhibit 7) Consequently, the Justice Center has shown the existence of a reportable incident by a preponderance of the evidence.

Finally, the Justice Center must show by a preponderance of the evidence that the Subject failed to report the reportable incident to the Justice Center. In the case at hand, there is no question of fact between the parties, as the Subject admits failing to report the incident to the Justice Center because the Subject claims she was unaware and incorrectly informed of the new laws, at that time over four months old, requiring the Subject to report incidents directly to the Justice Center.

(Hearing Testimony of the Subject) This is further confirmed in writing by the Subject, who filled out an Incident/Occurrence Reporting Form on [REDACTED] detailing exactly what happened to the Service Recipient. (Justice Center Exhibit 14) In addition, it is uncontested between the parties that the Subject failed to report the incident internally at [REDACTED] until [REDACTED], and it is uncontested between the parties that the Subject failed to report the incident to the Vulnerable Persons' Central Register at the New York State Justice Center. (Justice Center Exhibit 7) While the Subject testified in her defense as to her confusion over procedures, the lack of any factual contention between the parties that the Subject waited from [REDACTED] until [REDACTED] to even report the incident internally, let alone the subject failure to report the incident externally to the Justice Center, shows an abrogation of the Subjects duty to immediately report incidents under the law. (Justice Center Exhibits 7 and 14)

While the admission of the failure to report is enough to show a violation of the law, the Justice Center's evidence and testimony go much further. The legislation enabling the creation of the New York State Justice Center, dated June 17, 2012, is exceedingly clear as to when the law creating a duty to report comes into effect. As for Part B, Article 11 of the Social Services Law, Section 491 is clear that, "Mandated reporters shall report allegations of reportable incidents to the vulnerable persons' central register as established by section four hundred ninety-two of his article and in accordance with the requirements set forth herein... Allegations of reportable incidents shall be reported immediately to the vulnerable persons' central register upon discovery." (SSL § 491(a – b)) Furthermore, the law is explicit that it "shall take effect June 30, 2013." *See Id.* This is further supported by the Justice Center's Exhibit 23, unequivocally outlining the requirements to report incidents specifically to the Justice Center. (Justice Center Exhibit 23) Finally, the Subject's own handwriting establishes her failure to comply with the law, as she specifically wrote

“N/A” next to the “Justice Center Hotline” portion of the “████████ OPWDD programs Reportable Cover Sheet.” (Justice Center Exhibit 15) The Justice Center has shown by a preponderance of the evidence that the Subject failed to report a reportable incident as required by law.

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 or neglect 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 ██████████ 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 and/or neglect.

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

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

DATED: August 9, 2016
Schenectady, New York



Jean T. Carney
Administrative Law Judge