

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

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In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**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: Juliane O'Brien, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By: Jared R. Mack, Esq.  
Levene Gouldin & Thompson, LLP  
P.O. Box F-1706  
Binghamton, New York 13902

**ORDERED:**

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.

  
David Molik  
Administrative Hearings Unit

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

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In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

██████████

Before:

John T. Nasci  
Administrative Law Judge

Held at:

New York State Office Building  
44 Hawley Street, Room 1701  
Binghamton, New York 13901  
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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████████████████████

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Binghamton, New York 13902

### **JURISDICTION**

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse (obstruction of reports of reportable incidents). 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], of abuse (obstruction of reports of reportable incidents) 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] and on [REDACTED], at [REDACTED], located at [REDACTED], while acting as a custodian, you committed abuse (obstruction of reports of reportable incidents) when you falsified your report of a physical intervention that was performed on a service recipient and made false statements during your interrogation by investigators about that intervention.

These allegations have 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, [REDACTED] located at [REDACTED] is a secure residence and intensive treatment center for

adults with psychological and developmental disabilities, and is operated by the New York State Office for People With Developmental Disabilities (the OPWDD), which is a facility or provider agency that is subject to the jurisdiction of the Justice Center. (Justice Center Exhibit 6 and Hearing testimony of [REDACTED], OPWDD Internal Investigator)

5. At the time of the alleged abuse, the Subject had been employed by the OPWDD since 2002, and was assigned to work at the [REDACTED] Cottage as a Developmental Disability Secure Care Treatment Aide 1 (DDSCTA1). (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2) and a mandated reporter.

6. At the time of the alleged abuse, the Service Recipient was a thirty-four year old male, and had been a resident of the facility since [REDACTED]. The Service Recipient was diagnosed with: mild mental retardation; mild cerebral palsy; impulse control disorder, NOS; intermittent explosive disorder; and pervasive developmental disorder. The Service Recipient resided in [REDACTED] Cottage with eight other service recipients. (Justice Center Exhibits 6 and 22, and Hearing testimony of [REDACTED], OPWDD Internal Investigator)

7. The Service Recipient had a history of lying to avoid responsibilities, to solicit sympathy and attention, and to manipulate others for his benefit or enjoyment. (Justice Center Exhibit 6, 22 and 23)

8. In the evening of [REDACTED], at [REDACTED] Cottage, the Service Recipient became agitated, and he threatened other service recipients and staff. The Subject and other staff attempted calming techniques, proximity control and redirecting the Service Recipient to a calming area, but these efforts were unsuccessful and the Service Recipient's behavior continued to escalate. When the Service Recipient started swinging his arms at staff, staff used front deflection, which involved holding the palms of their hands in front of them and waving them back and forth in front of themselves to deflect the Service Recipient's punches. (Justice Center Exhibits 9, 11, 12 and 24 –

audio recording of the OPWDD interrogation of the Subject)

9. When the Service Recipient's behavior escalated further and became more assaultive, the Subject attempted to put the Service Recipient into a one person standing wrap. The Service Recipient responded to the Subject's efforts by head-butting the Subject with the front right side of his head. The Subject and another facility staff, Staff B, took the Service Recipient by the Service Recipient's arms and performed a two person takedown. (Justice Center Exhibits 9, 11, 12 and 24 – audio recording of the OPWDD interrogation of the Subject)

10. After the Service Recipient was taken to the floor, the Subject and other Staff put the Service Recipient into a three person supine restraint. After approximately ten minutes, the Service Recipient had calmed down and was released, and allowed to independently walk to the calming area. During the wrap, takedown and restraint, the Service Recipient struggled, physically fought staff, hit his head repeatedly on the floor and attempted to bite the Subject and other staff. (Justice Center Exhibits 9, 11, 12 and 24 – audio recording of the OPWDD interrogation of the Subject)

11. As a result of the Service Recipient head-butting the Subject, the Service Recipient suffered abrasions on his right temple and petechiae on his right cheek and chin. (Justice Center Exhibits 13, 14 and 15)

12. The physical intervention by the Subject and other staff was warranted under provider agency policy and was properly performed. (Hearing testimony of [REDACTED] OPWDD Internal Investigator)

13. The Service Recipient stated in his interview with OPWDD Internal Investigator that it was the Subject alone who brought him to the floor and that the Subject took him down face-first and placed his arm on the Service Recipient's forehead. (Justice Center Exhibit 24 – audio recording of the OPWDD interview of the Service Recipient)

14. Staff A stated in his written statement that he was involved in the supine restraint that followed the takedown of the Service Recipient and that the Service Recipient “end[ed] up face on the floor.” (Justice Center Exhibit 11)

15. Staff B stated in his interview with the OPWDD Internal Investigator that he executed a two person takedown of the Service Recipient with the Subject, that the steps of the Service Recipient’s Behavioral Management Plan were followed, but that, due to the intervening time between the incident and the interview together with the numerous restraints that he was involved in since the incident, he was unable to recall details of the takedown or restraint of the Service Recipient. (Justice Center Exhibit 6)

16. Staff C stated in his written statement that he was not involved in either the takedown or the supine restraint but he witnessed both, and that what he witnessed was a two person takedown in which the Service Recipient was able to twist and land sideways on his right side then he was turned onto his back. (Justice Center Exhibit 12)

17. The Subject prepared the [REDACTED] Intervention Report in which he wrote that a “2 person take down to 3 person supine w/assist was implemented” and that the Service Recipient “struggled with staff during intervention.” The Subject made no mention of the Service Recipient’s position as he was taken to or landed on the floor. (Justice Center Exhibit 9)

18. The Subject stated in his interrogation that he and Staff B utilized a two person takedown. The Subject described in detail how they used the two person take down to take the Service Recipient to the floor. Although the Subject did not indicate the Service Recipient’s position as he landed on the floor, he did state that the Service Recipient did not fall face-first. (Justice Center Exhibit 24 – audio recording of OPWDD interrogation of the Subject).

19. The Subject testified at the hearing that he and Staff B executed a two person takedown of the Service Recipient, that the Service Recipient did not fall during the restraint, and that he and Staff B gained control of the Service Recipient and placed him down. Although the Subject did not indicate the Service Recipient's position as he landed on the floor, he unequivocally stated that the Service Recipient did not fall face-first. (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 (obstruction of reports of reportable incidents) 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 not established by a preponderance of the evidence that the Subject committed an act, described as “Allegation 1” in the substantiated report. The Justice Center did not sufficiently establish that the Subject intentionally made a false statement during his

interrogation or that the Subject intentionally withheld material information from the Intervention Report.

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-19 and 21-23<sup>1</sup>) The Justice Center also presented an audio recording of the OPWDD Internal Investigator's interview of the Service Recipient and interrogation of the Subject. (Justice Center Exhibit 24) The investigation underlying the substantiated report was conducted by [REDACTED], OPWDD Internal Investigator, who was the only witness who testified at the hearing on behalf of the Justice Center.

The Subject testified in his own behalf and provided no other evidence.

In order to prove abuse (obstruction of reports of reportable incidents) as it was alleged in this report, the Justice Center must establish by a preponderance of the evidence that the Subject impeded the "... investigation of the treatment of a service recipient by ... intentionally making a false statement," and that the Subject impeded the "... investigation of the treatment of a service recipient by ... intentionally withholding material information during an investigation into such a report ..." (SSL §488(1)(f))

The Justice Center contends that the Subject intentionally failed to report, in the [REDACTED] Intervention Report and in his interrogation, that it was the Subject alone who took the Service Recipient to the floor and that he took the Service Recipient to the floor face-first. However, the evidence in the record does not support the conclusion that the Service Recipient was taken down by the Subject alone but instead that the Subject and Staff B utilized a two person takedown of the Service Recipient. Furthermore, evidence in the record is not sufficient to support the Justice Center's contention that the Service Recipient was taken to the floor face-first.

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<sup>1</sup> The Justice Center did not offer Justice Center Exhibit 20.

The Justice Center relied almost exclusively on the Service Recipient's statement to the OPWDD Internal Investigator which, upon scrutiny, cannot be accepted as credited evidence. The Service Recipient's claim, that the Subject alone took him down face-first with the Subject's arm placed on the Service Recipient's forehead, is not supported by any other evidence in the record.

Credible evidence in the record reflects that two other staff participated in the intervention along with the Subject, and a fourth staff witnessed the intervention but did not participate. Although Staff B could not recall the details of the intervention, the Subject and the other two staff witnesses all described the takedown as a two person takedown and none of the witnesses stated that the Subject's arm was on the Service Recipient's forehead.

The lack of corroboration of the Service Recipient's statement does not by itself completely diminish the Service Recipient's credibility. However, taken together with the Service Recipient's well-documented history of lying (Justice Center Exhibit 6, 22 and 23), the credibility of the Service Recipient's statement is greatly diminished.

Additionally, the interview technique used by the investigator to question the Service Recipient also makes it difficult to credit the Service Recipient's version of events. During the interview, the investigator asked unnecessarily leading and suggestive questions, as illustrated below:

Q: "He took, just one person takedown?"

A: "Yes."

...

Q: "Then he took you down? Did he trip, did he bump any part of your body to get you to the ground?"

A: "He tripped me."

Q: "Tripped your knee?"

A: "Yep."

(Justice Center Exhibit 24 – audio recording of the OPWDD interview of the Service Recipient)

The record reflects that the Service Recipient had a mild level of developmental disability

and that his treatment issues were more behavioral than cognitive. It is clear from a review of the recording of the interview that the Service Recipient understood the reason for the interview and the questions that were asked of him by the OPWDD Internal Investigator. It is also clear that the Service Recipient understood and could identify improper intervention techniques. Consequently, the use of leading questions was not necessary to elicit pertinent and useful responses from the Service Recipient, but instead acted to further diminish the Service Recipient's credibility.

Given the discrepancy between the Service Recipient's version of events and those of the other witnesses, the investigator's use of leading questions and the Service Recipient's propensity to lie, the Service Recipient's statement is not credited evidence in this recommended decision.

While all staff who were involved in or witnessed the takedown and restraint of the Service Recipient provided differing details of the intervention, they all agreed that a two person takedown had transpired. The differences in the precise details of the individual statements are not material because none of the credited statements described the Service Recipient being taken down face-first and by the Subject alone.

Additionally, it is reasonable to conclude that all of the staff who were involved in or witnessed the intervention could have understandably recalled some of the details of the intervention differently. The extreme physical nature of the incident, the staff's relative positions and vantage points during the event, and the staff's focus on different aspects of the intervention likely contributed to or resulted in the staff's varying perceptions and recollections of the details of the intervention.

Because none of the statements and reports given by the Subject and the other staff witnesses agreed with each other on details of the Service Recipient's position as he was taken down during the intervention, it cannot be concluded that the Subject's statements and report of the takedown was intentionally falsely made. Consequently, the record does not support the

conclusion that the Subject falsified the Intervention Report or made false statements during the OPWDD interrogation of the Subject regarding the intervention.

Accordingly, it is determined that the Justice Center has not met its burden of proving by a preponderance of the evidence that the Subject committed the abuse (obstruction of reports of reportable incidents) alleged. The substantiated report will be amended or sealed.

**DECISION:**

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

The Subject has not been shown by a preponderance of the evidence to have committed abuse (obstruction of reports of reportable incidents).

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

**DATED:** September 16, 2016  
Schenectady, New York



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John T. Nasci, ALJ