

**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: Jennifer Zegarelli, Esq.  
CSEA, Inc.  
143 Washington Avenue  
Capitol Station Box 7125  
Albany, New York 12224-0125

██████████

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 (both allegations), dated ██████████ ██████████ be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (unlawful use or administration of a controlled substance.)

The substantiated report is properly categorized as a Category 1 act.

NOW, THEREFORE, IT IS DETERMINED that reports resulting in a Category 1 finding shall cause the Subject's name to be permanently placed on the staff exclusion list of the Vulnerable Persons' Central Register (VPCR), and the report to be permanently retained. Thus, the record of this report for abuse (unlawful use or administration of a controlled substance) shall be permanently retained by the VPCR, and the Subject's name shall be placed permanently on the staff exclusion list, pursuant to SSL §§ 493(5)(a) and 495.

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:** October 3, 2016  
Schenectady, New York

A handwritten signature in black ink, appearing to read "David Molik", is written over a horizontal line.

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

[REDACTED]

Pursuant to § 494 of the Social Services Law

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**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Jean T. Carney  
Administrative Law Judge

Held at:

New York State Justice Center for the Protection  
of People with Special Needs  
401 State Street  
Schenectady, New York 12305  
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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By: Juliane O'Brien, Esq.

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## **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] [REDACTED] of abuse and/or neglect 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] [REDACTED], while acting as a custodian, you committed abuse (unlawful use or administration of a controlled substance) when you distributed marihuana, a schedule I controlled substance, to a service recipient, at the workplace and/or while on duty.

This allegation has been SUBSTANTIATED as Category 1 serious conduct pursuant to Social Services Law § 493(4)(a)(viii).

### **Allegation 2**

It was alleged that on [REDACTED], at the [REDACTED] located at [REDACTED] [REDACTED], while acting as a custodian, you committed abuse (unlawful use or administration of a controlled substance) when you used marihuana, a schedule I controlled substance, at the workplace and/or while on duty.

This allegation has been SUBSTANTIATED as Category 1 serious conduct

pursuant to Social Services Law § 493(4)(a)(viii).

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

4. The facility, located at [REDACTED] is an [REDACTED] for adults with intellectual disabilities, and is operated by the New York State 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 had been employed by OPWDD since 2003 as a Direct Support Assistant (DSA). (Hearing testimony of Subject)

6. At the time of the alleged abuse, the Service Recipient was 21 years of age, and had been a resident of the facility for approximately four months. The Service Recipient is an adult male, approximately five feet two inches tall, weighing about 230 pounds. He had diagnoses of mild mental retardation, personality disorder, bipolar disorder, attention deficit hyperactivity disorder (ADHD), and impulse control disorder. (Justice Center Exhibits 18 and 19)

7. During the afternoon of Monday, [REDACTED] the Service Recipient admitted to the Developmental Assistant II (DA II), [REDACTED], that he had smoked marijuana with the Subject during the overnight shift. The Service Recipient was taken to [REDACTED] Hospital the next morning, [REDACTED], and tested positive for marijuana. (Hearing testimony of DA II [REDACTED]; Justice Center Exhibits 5 and 15)

8. The Service Recipient's Behavior Support Plan (BSP) contains a smoking protocol outlining his cigarette consumption. This plan was implemented because the Service Recipient would consume an entire month's allotment of cigarettes within a few days. Due to financial constraints, the Service Recipient bought pouch tobacco and paper tubes. He was allowed to roll

five cigarettes in the morning, and five in the afternoon. At the time of the incident, the tobacco and paper were kept downstairs in a safe. The rolling machine was accessible in the dining room of the [REDACTED] (Justice Center Exhibit 18; Hearing testimony of Subject, and DA II [REDACTED])

9. The Service Recipient had neither the opportunity nor the means to obtain marijuana between the time that he disclosed his use to the DA II [REDACTED] on [REDACTED], and the time that he tested positive on [REDACTED]. (Justice Center Exhibits 9, 10, 11, and 12; Subject Exhibits C, E, and F)

10. At the time of the incident, four service recipients resided in the [REDACTED]. Sunday afternoon, [REDACTED], a fifth service recipient came to spend the night because she was interested in perhaps moving in. Protocol dictates that whenever a guest spends the night, staff must conduct a fire drill to ensure that all the service recipients know how to safely vacate the house in case of fire. In this instance, the fire drill occurred between 1:00 a.m. and 2:00 a.m. (Hearing testimony of [REDACTED])

11. After the fire drill concluded, the Service Recipient complained to the Subject that his tooth hurt. The Subject had already given the Service Recipient ibuprofen for his tooth pain earlier in the shift. The Subject went to her car, and brought in a bag of marijuana. The Subject gave some marijuana to the Service Recipient who mixed it with his tobacco and rolled the combination into a cigarette. The Subject and the Service Recipient smoked the cigarette laced with marijuana. (Justice Center Exhibit 5)

12. Marijuana is a Schedule I controlled substance. (Public Health Law § 3306(d)(13))

### **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(1) (g), to include:

"Unlawful use or administration of a controlled substance," which shall mean any administration by a custodian to a service recipient of: a controlled substance as defined by article thirty-three of the public health law, without a prescription; or other medication not approved for any use by the federal food and drug administration. It also shall include a custodian unlawfully using or distributing a controlled substance as defined by article thirty-three of the public health law, at the workplace or while on duty.

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including Category 1 which is defined as follows:

(a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:

(viii) using or distributing a schedule I controlled substance, as defined by article thirty-three of the public health law, at the work place or while on duty;

The Justice Center has the burden of proving at a hearing by a preponderance of the evidence that the Subject 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, described as “Allegation 1” in the substantiated report.

In support of its substantiated findings, the Justice Center presented a number of Exhibits obtained during the investigation. (Justice Center Exhibits 1-26) The investigation underlying the substantiated report was conducted by OPWDD Investigator [REDACTED] who testified at the hearing on behalf of the Justice Center. In addition, DSP [REDACTED] and DA II [REDACTED] testified on behalf of the Justice Center.

The Subject testified in her own behalf and presented a number of documents. (Subject Exhibits A-F) In addition, [REDACTED], EDD testified on behalf of the Subject at the hearing.

The Justice Center proved by a preponderance of the evidence that the subject distributed marijuana to the Service Recipient during the overnight shift on [REDACTED]. The Justice Center further proved by a preponderance of the evidence that the Subject used marijuana with the Service Recipient during the overnight shift on [REDACTED] while she was on duty and acting as a custodian. Although the allegations have been separated into one allegation of

██████████ distribution and one allegation of use, the analysis remains the same for both and therefore will be set forth together. There is no dispute that marijuana is a Schedule I controlled substance, and that it was not legally prescribed to the Service Recipient.

The evidence presented at the hearing shows that the Service Recipient tested positive for Carboxy-THC as a result of a blood test conducted on ██████████. Carboxy-THC is a metabolite that attaches to the fat cells, and may stay in the system for a significant period of time after ingesting marijuana. Carboxy-THC levels depend on many factors, including the chronicity of the user, the amount inhaled by the user, how well the user's liver functions, the weight of the user, and generally, how that user's body functions. (Justice Center Exhibits 15 and 16; Hearing testimony of ██████████ EDD)

██████████ testified that the Carboxy-THC level in the Service Recipient's test was high for a one time user, having ingested the marijuana 36 hours prior to the test. However, his opinion did not take into account the Service Recipient's height and weight. In addition, while the evidence shows that the marijuana was mixed with tobacco, there is no evidence to show exactly what ratio of each was ingested by the Service Recipient. Further, there is no evidence to show that the Service Recipient only rolled one cigarette laced with the marijuana given to him by the Subject; or that he smoked only one time prior to reporting the incident to the DA II ██████████. In fact, the evidence indicates that the Service Recipient smoked the marijuana sometime after the fire drill, and before he went to bed at 5:00 a.m. on ██████████. The drug test was administered to him before 10:00 a.m. on ██████████, approximately 29 hours after the Service Recipient went to bed. In conclusion, ██████████ testified that there are so many variables to consider, it is difficult to determine how long the Carboxy-THC had been in the Service Recipient's body. (Hearing testimony of ██████████ Hearing testimony of ██████████; Justice Center

Exhibit 5)

██████████ and therefore there was no program that day. The Service Recipient slept late and did not leave the house for any activity. (Justice Center Exhibit 8; Hearing testimony of Subject) Therefore, it was not likely that the Service Recipient obtained marijuana during the day on ██████████. It is likely that the Service Recipient obtained and smoked the marijuana, that he ultimately tested positive for, during the early morning hours of ██████████.

In her defense, the Subject contends that the Service Recipient had ample opportunity to obtain marijuana from a different source, and not from the Subject. The Service Recipient is allowed up to an hour of alone time as a means of calming himself down if he feels agitated. The record reflects that prior to this incident, the Service Recipient had alone time on ██████████ and ██████████ for about 10 – 15 minutes. The Subject asserts that the Service Recipient could have obtained marijuana during one of those times. While that is possible, it is not likely that the Service Recipient would wait up to two weeks before smoking marijuana that he had obtained during one of his alone times. It is uncontroverted that the Service Recipient behaves impulsively. He has been placed on a cigarette schedule because otherwise he will smoke his monthly allotment within a few days. (Hearing testimony of ██████████; Justice Center Exhibits 5 and 21) Therefore, if the Service Recipient had obtained marijuana prior to ██████████, he would most likely have used it prior to ██████████.

The Subject also asserts that it would be possible for the Service Recipient to obtain marijuana while attending his day program. However, there is no evidence to suggest that this is likely. The record reflects that the Service Recipient did not leave the day program unattended since ██████████. Again, if he had obtained marijuana at that time, he would most likely

have used it prior to [REDACTED]

Finally, the Service Recipient's report to DA II [REDACTED] the day after the incident, and all subsequent interviews regarding the incident, were substantially consistent. Notably, the Service Recipient's interview with the Justice Center Investigator occurred more than one month after the incident, and then a follow up interview was conducted on [REDACTED]. Each time the Service Recipient reported that the Subject offered to give him marijuana after he complained of tooth pain. The Subject brought the marijuana in a bag from her car, the Service Recipient mixed the marijuana with tobacco, rolled it into a cigarette, and they both smoked the marijuana. During an interview conducted on [REDACTED], one of the other service recipients residing in the house reported to OPWDD Investigator [REDACTED] that after the fire drill, the Service Recipient came to her bedroom and told her that he had smoked "weed" with the Subject. (Justice Center Exhibit 5; Hearing testimony of OPWDD Investigator [REDACTED])

The Subject asserted at the hearing that the Service Recipient had a history of lying. While the record reflects that the Service Recipient does tend to aggrandize and enjoys a certain amount of drama, his exaggerations fall apart with time and questioning. (Hearing testimony of DA II [REDACTED] Hearing testimony of Investigator [REDACTED]) Here, the Service Recipient's version of events remained substantially the same, and did not fall apart under scrutiny. Therefore the Service Recipient's recitation of the incident is credited evidence.

Lastly, the Subject claimed that the Service Recipient fabricated this allegation against her out of vindictiveness because she had, on occasion, withheld cigarettes from him as a means of punishment. (Hearing testimony of Subject) Aside from the fact that withholding cigarettes from the Service Recipient violates his BSP, there is no evidence to suggest that he has the wherewithal to plot and carry out such a plan. (Justice Center Exhibit 18) On the other hand, the record is

replete with evidence that the Service Recipient acts impulsively. For example, on one occasion when the Subject refused to give him his morning cigarettes, he called the police and accused the Subject of assaulting him. Within an hour after making the accusation, the Service Recipient admitted the truth. Therefore, it is found that this assertion is self-serving and not credited testimony.

The Service Recipient's statements are given full weight. Although the Subject has denied distributing marijuana to the Service Recipient, and had denied using marijuana with the Service Recipient, her testimony is not credited evidence. Based on the record as a whole, it is more likely than not that the Subject provided marijuana for the Service Recipient and smoked it with him in the early morning hours of [REDACTED]

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. Because the report will remain substantiated pursuant to SSL § 493(4)(a)(viii), it is properly categorized as a Category 1 act.

A substantiated Category 1 finding of abuse will result in the Subject being permanently placed on the VPCR Staff Exclusion List, and the fact that the Subject has a substantiated Category 1 report will be disclosed to entities authorized to make inquiry to the VPCR.

**DECISION:**

The request of [REDACTED] that the substantiated report (both allegations), dated [REDACTED] [REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse (unlawful use or administration of a controlled substance.)

The substantiated report is properly categorized as a Category 1 act.

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

**DATED:** September 19, 2016  
Schenectady, New York



Jean T. Carney  
Administrative Law Judge