

**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: Robert DeCataldo, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By:

[REDACTED]

[REDACTED]

[REDACTED]

ORDERED:

NOW, THEREFORE, IT IS ALSO DETERMINED that the record of this report, dated [REDACTED] [REDACTED] 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: December 28, 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**

In the Matter of the Appeal of

[REDACTED]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #s:

[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
2165 Brighton Henrietta Town Line Rd
Rochester, New York, 14623-2755
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
of People with Special Needs
161 Delaware Avenue
Delmar, New York 12054-1310
By: Robert DeCataldo, Esq.

[REDACTED]

[REDACTED]

[REDACTED]

By:

[REDACTED]

[REDACTED]

[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains two reports substantiating [REDACTED] (the Subject) for abuse and neglect. The Subject requested that the VPCR amend the reports to reflect that the Subject is not a subject of the substantiated reports. 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 two substantiated reports both dated [REDACTED] [REDACTED] of abuse and neglect by the Subject of a Service Recipient. The two reports stem from the same incident. However, for reasons not entirely clear, each of the two reports was maintained under their own VPCR Master Case number. The hearing of both reports was consolidated into one proceeding.

2. The Justice Center substantiated two reports against the Subject. The Justice Center concluded that:

Allegation 1

([REDACTED] -Justice Center Exhibit 4)

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED] [REDACTED] while acting as a custodian, you committed abuse (use of aversive conditioning) when you sprayed water on a service recipient with a hose in order to control his behavior.

This allegation was assigned to the Justice Center for investigation as [REDACTED] [REDACTED] The determination for this allegation was included in the notifications sent to you for that case.

Allegation 2

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed physical abuse when you hit a service recipient with a broom.

This allegation has been SUBSTANTIATED as Category 2 physical abuse pursuant to Social Services Law § 493(4) (b).

Allegation 1

([REDACTED] -Justice Center Exhibit 1)

It was alleged that on [REDACTED] at the [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed abuse (use of aversive conditioning) and/or neglect when you sprayed water on and/or near a service recipient with a hose in order to control his behavior.

These allegations have been SUBSTANTIATED as Category 3 abuse (use of aversive conditioning) and 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, [REDACTED] located at [REDACTED] [REDACTED], is a bilingual [REDACTED] for adults with developmental disabilities. The facility is operated by [REDACTED] and is certified by the New York State Office for People With Developmental Disabilities (OPWDD), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged abuse and neglect, the Subject was employed by [REDACTED] [REDACTED] The Subject worked as a Direct Care Staff (DCS). (Hearing testimony of [REDACTED] Investigator: [REDACTED] The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged abuse and neglect, the Service Recipient was an adult male and had been a resident of the facility for approximately nine years. (Justice Center Exhibit

21) The Service Recipient's relevant diagnoses included post-traumatic stress disorder, attention deficit hyperactivity disorder and autism. (Justice Center Exhibit 20)

7. The Service Recipient engaged in physical aggression and disruptive behaviors without warning. (Justice Center Exhibit 21, p.2) The Service Recipient weighed approximately 200 lbs, (Hearing testimony of the Subject) and stood approximately six feet tall. (Justice Center Exhibit 25, first page)

8. Historically, some staff at the facility used the threat of spraying water, or may have actually sprayed water on the Service Recipient to gain his compliance because the Service Recipient was deterred by such threat or action. (Justice Center Exhibit 14) However, this technique was not an authorized intervention. (Justice Center Exhibit 28, p.4) The Subject completed her most recent Strategies for Crisis Intervention and Prevention training (SCIP) on [REDACTED]. (Justice Center Exhibit 31)

9. On [REDACTED], Staff -1, Staff-2, and the Subject had gone on an outing with the service recipients, including the Service Recipient. Shortly after returning to the facility, the Subject opted to clean the facility living room and dining room. (Hearing testimony of the Subject and Justice Center Exhibit 13) Staff-2 remained outside of the residence in order to supervise two service recipients. (Justice Center Exhibit 25, third page)

10. The Subject was sweeping the dining room, when the Service Recipient came into the room with his fists clenched and charged toward her. (Justice Center Exhibit 13) The Service Recipient then attempted to punch the Subject, who used the broom she was holding to block the punches. (Hearing testimony of the Subject) The Service Recipient attempted to grab the broom from the Subject. (Justice Center Exhibit 25, third page) The Subject yelled, "Don't touch me, don't touch me, don't touch me." (Justice Center Exhibit 19) While attempting to block the

punches with the broom, the Subject retreated toward a large sliding door, at which time the Service Recipient grabbed the Subject's finger and bit it. (Hearing testimony of the Subject and Justice Center Exhibit 25, third page) Staff-1, who had been changing service recipient-2's diaper, heard the Subject's screams and responded to the area. Upon arrival, he directed other staff to go outdoors. (Justice Center Exhibit 19) The Subject sustained a bite to the right hand or a finger on that hand, a contusion to the forearm and hand and an abrasion to the hand. (Subject Exhibit #1)

11. The Subject retreated from the residence on to a porch through the sliding doors. (Hearing testimony of the Subject) As she exited the facility by way of the patio sliding glass door, the Subject closed the door. (Justice Center Exhibit 19) Staff-2 then instructed the Subject to take the garden hose and wet the porch with water in order to scare the Service Recipient into retreating into the house, or staying in the house. (Justice Center Exhibit 25, third page) The Subject used the garden hose to wet both the porch and the Service Recipient, as the Service Recipient attempted to step from the residence to the porch. (Justice Center Exhibits 13, 16 and 25, third page) The Service Recipient then retreated into the house and locked the sliding glass door. (Justice Center Exhibits 16 and 25, third page)

12. Staff -1, who was still in the house, was confronted by the Service Recipient who picked up an orange and made a gesture as though he was going to throw the orange at Staff-1, who then retreated to a bedroom where service recipient-2 was located. The Service Recipient attempted to enter the bedroom, but Staff-1 held the door from the inside to keep him from entering the bedroom. Staff-1 eventually exited the bedroom and found the Service Recipient near the sliding glass doors. When Staff-1 got close to the Service Recipient, the Service Recipient slapped Staff-1's left hand and Staff-1 backed away from the Service Recipient. The Service Recipient then took Staff-1's coat off the couch and swung it at Staff-1, whereupon Staff-1 retreated to

service recipient-2's bedroom. A short time later, Staff-2 was able to calm the Service Recipient. Staff-1 then exited the bedroom and walked out to dining room area where he observed the Service Recipient calmly eating a bowl of cereal. (Justice Center Exhibit 19)

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 reports of abuse and neglect presently under review were 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) (a), (e) and (h), to include:

(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.

(e) "Use of aversive conditioning," which shall mean the application of a physical stimulus that is intended to induce pain or discomfort in order to modify or change the behavior of a person receiving services in the absence of a person-specific authorization by the operating, licensing or certifying state agency pursuant to governing state agency regulations. Aversive conditioning may include but is not limited to, the use of physical stimuli such as noxious odors, noxious tastes, blindfolds, the withholding of meals and the provision of substitute foods in an unpalatable form and movement limitations used as punishment, including but not limited to helmets and mechanical restraint devices.

(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 Categories 2 and 3, which are defined as follows:

(b) Category two is substantiated conduct by custodians that is not otherwise described in category one, but conduct in which the custodian seriously endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. Category two conduct under this paragraph shall be elevated to category one conduct when such conduct occurs within three years of a previous finding that such custodian engaged in category two conduct. Reports that result in a category two finding not elevated to a category one finding shall be sealed after five years.

(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 Subject committed the act or acts of abuse and/or neglect alleged in the substantiated reports that are 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 reports. (Title 14 NYCRR § 700.10(d))

If the Justice Center proves the alleged abuse and/or neglect, the reports 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 acts of abuse and/or neglect cited in the substantiated reports constitute the category of abuse and/or neglect as set forth in the substantiated reports.

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

DISCUSSION

The Justice Center has established by a preponderance of the evidence that the Subject committed the prohibited act described in Allegation 1 of the substantiated report under the [REDACTED] (use of aversive conditioning and neglect).

The Justice Center has not established by a preponderance of the evidence that the Subject committed the acts described in Allegation 2 of the substantiated report under the [REDACTED] (physical abuse).

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation. (Justice Center Exhibits 1-38) The investigation underlying the substantiated report under [REDACTED] was conducted by Investigator [REDACTED] a Quality Assurance (QA) Specialist employed by [REDACTED], who testified at the hearing on behalf of the Justice Center. The investigation underlying the substantiated report

under [REDACTED] was conducted by Justice Center Investigator [REDACTED], who testified at the hearing on behalf of the Justice Center. The Subject testified in her own behalf and submitted Subject Exhibit 1.

Allegation 2

The Justice Center's case relied primarily upon the statement of Staff-2, who wrote that she saw the Subject hit the Service Recipient with the broom and then drop the broom and run off the porch during the incident. (Justice Center Exhibit 25, third page) The Subject testified credibly that she never struck the Service Recipient with the broom, but that she did hold the broom up and attempted to deflect physical aggression from the Service Recipient. The Subject's testimony on this material issue is largely corroborated by the statement of Staff-1. (Justice Center Exhibit 19)

Staff-2 wrote in her statement that she observed the Subject strike the Service Recipient with a broom and observed that the Subject was bitten by the Service Recipient, and that all of this activity had occurred on the porch and not inside the residence. (Justice Center Exhibit 16) Staff-2's timeline of events is contradicted by Staff-1 who describes that, after the Subject exited the residence, the Subject closed the door and shortly thereafter the Service Recipient turned his attention to Staff-2, making gestures as though he was going to throw an orange at him and also attempted to push his way into a bedroom in which the Staff-1 had taken safe harbor. (Justice Center Exhibit 19)

After considering all of the evidence and having had the opportunity to consider and evaluate the hearing testimony of the Subject, the ALJ presiding over the hearing concludes that the entirety of the Subject's hearing testimony on this material issue is credited evidence. Consequently, it is concluded that Staff-2 observed the Subject using the broom to block the attack by the Service Recipient as it occurred just inside the house by the large sliding glass doors that

led to the porch, and erroneously concluded that the Subject struck the Service Recipient with the broom.

The Justice Center did not establish by a preponderance of the evidence that the Subject committed physical abuse by hitting the Service recipient with a broom.

Allegation 1

In her written statement of [REDACTED] Staff-2 alleged that, after she instructed the Subject to wet the porch with the garden hose, the Subject sprayed water on both the porch and the Service Recipient. In her statement, Staff-2 wrote: "I grab [sic] the water hole [sic] and told her to wet the floor, and she did and she also wet him." (Justice Center Exhibit 16) Staff-2 provided this written statement during or shortly after her interrogation with [REDACTED] Investigator: [REDACTED]. Staff-2 was subsequently terminated from her employment with the provider agency on [REDACTED]. (Justice Center Exhibit 25, third page)

On [REDACTED], the Staff-2 was again interviewed by Justice Center Investigator [REDACTED]. During that interview, Staff-2 alleged that [REDACTED] Investigator [REDACTED] had, on [REDACTED], pressured her into stating that the Subject had sprayed water on the Service Recipient. Staff-2 then retracted her allegation. (Justice Center Exhibit 25, third page-last paragraph)

On [REDACTED] the Subject was interrogated by [REDACTED] Investigator [REDACTED]. The Subject provided a written statement in which she indicated that she took the water hose and sprayed it on the Service Recipient "once or twice," when the Service Recipient had attempted to come onto the porch. (Justice Center Exhibit 13, p. 3) The Subject's written statement of [REDACTED] [REDACTED] is credited evidence.

On [REDACTED], the Subject was interviewed by Justice Center Investigator [REDACTED] and, during that interview; she alleged that on [REDACTED] [REDACTED] Investigator [REDACTED] had pressured her into saying that she had sprayed water on the Service Recipient. The Subject then retracted her admission that she had sprayed water on the Service Recipient. (Justice Center Exhibit 25, fourth and fifth page) The Subject testified at the hearing that she was pressured by [REDACTED] Investigator [REDACTED] into admitting that she had sprayed water on the Service Recipient when, in fact, she did not spray water on the Service Recipient. The Subject's assertion that she was pressured into making this statement is not credited evidence.

The Subject testified that she held the hose in her hand and that she used the Service Recipient's fear of water to compel him to retreat into house. The Subject also pointed to the fact that Staff-1 provided a written statement to [REDACTED] Investigator [REDACTED] and, in that statement, he wrote that he did not see any water on the porch, kitchen floor or on the Service Recipient on the day of incident at issue, to support her position. (Justice Center Exhibit 19, statement of 9-23-14) It should be noted that there is no allegation that the Subject "soaked" the Service Recipient with water. The evidence that the Subject sprayed water on the Service Recipient under the circumstances alleged is adequate for the Justice Center to establish their case.

After considering all of the evidence and having had the opportunity to consider and evaluate the hearing testimony of the Subject, the ALJ presiding over the hearing concludes that the entirety of the Subject's hearing testimony on this material issue is not credited evidence. The Justice Center has established by a preponderance of the evidence that the Subject sprayed water, a physical stimulus, on the Service Recipient and that this action was intended to induce discomfort in order to modify or change the behavior of the Service Recipient. The use of this physical stimulus was not authorized by the operating, licensing or certifying state agency.

The Justice Center has established by a preponderance of the evidence that the Subject used aversive conditioning (abuse) on the Service Recipient. The substantiated report will not be amended or sealed.

The Service Recipient had diagnoses of post-traumatic stress disorder, attention deficit hyperactivity disorder and autism. (Justice Center Exhibit 20) The Service Recipient had some fear or reaction to being sprayed by water and staff had used this threat to deter his behaviors in the past. (Justice Center Exhibit 14) After considering all of these factors, the Justice Center proved by a preponderance of the evidence not only that spraying water on the Service was a breach of her duty to the Service Recipient, but also that the likely result of this breach was serious or protracted impairment of the mental or emotional condition of the Service Recipient. Accordingly, it is determined that the Justice Center has also met its burden of proving by a preponderance of the evidence that the Subject committed the neglect alleged. The substantiated report will not be amended or sealed.

The reports will remain substantiated and the next question to be decided is whether the substantiated report constitutes the category of abuse and 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. Substantiated Category 3 findings of abuse and neglect will not result in the Subject's name being placed on the VPCR Staff Exclusion List and the fact that the Subject has a substantiated Category 3 report will not be disclosed to entities authorized to make inquiry to the VPCR. However, the reports remain subject to disclosure pursuant to SSL § 496(2). The reports will be sealed after five years.

DECISION:

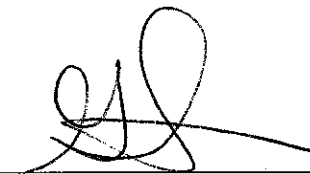
The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] be amended and sealed is granted. The Subject has not been shown by a preponderance of the evidence to have committed physical abuse.

The request of [REDACTED] that the substantiated report dated [REDACTED]
[REDACTED] be amended and sealed is denied. The Subject has been shown by a preponderance of the evidence to have committed abuse and neglect.

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

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

DATED: December 14, 2016
Schenectady, New York



Gerard D. Serlin, ALJ