

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

In the Matter of the Appeal of
[REDACTED]

**FINAL
DETERMINATION
AND ORDER
AFTER HEARING**

Pursuant to § 494 of the Social Services Law

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]

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 [REDACTED] that the substantiated report dated [REDACTED]
[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.

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: October 3, 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]

**RECOMMENDED
DECISION
AFTER
HEARING**

Pursuant to § 494 of the Social Services Law

Adjud. Case #:
[REDACTED]

Before:

Louis P. Renzi
Administrative Law Judge

Held at:

New York State Justice Center for the Protection
of People with Special Needs
4 Burnett Boulevard
Poughkeepsie, New York, 12601
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: Juliane O'Brien, Esq.

[REDACTED]
[REDACTED]
[REDACTED]

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for abuse and/or neglect. 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 and 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 (use of aversive conditioning) and/or neglect when you gave a service recipient a cold shower because she talked back to you.

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, located at [REDACTED], is a [REDACTED]
[REDACTED] operated by the Subject, overseen by voluntary agency [REDACTED]
[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 and/or neglect, the evening of [REDACTED] the Subject had been providing services to the Service Recipient in her [REDACTED] for approximately fifteen (15) years. (Subject Exhibit B) The Subject administered the Service Recipient's medications and provided assistance with showering, including monitoring the water temperature. (Justice Center Exhibit 18) The Service Recipient required 24 hour supervision. (Justice Center Exhibit 12)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 51 years of age, and had been diagnosed with moderate intellectual disorder, bipolar disorder and schizoaffective disorder. She had a history of behavior difficulties and fragile psychological states. (Justice Center Exhibit 5) The Service Recipient shared her room with another service recipient ("B"); they were the only service recipients living in the [REDACTED] (Hearing Testimony of Subject; Justice Center Exhibit 5)

7. At the time of the alleged abuse and/or neglect, the Service Recipient entered her bedroom crying, and told "B" that the Subject had given her a cold shower because the Service Recipient had "talked back to her". (Justice Center Exhibits 5, 9)

8. On the morning following the alleged abuse and/or neglect, [REDACTED], the Service Recipient spoke to the transport bus monitor [REDACTED] and later that morning approached Psychologist [REDACTED] at the [REDACTED]. She reported to both of them essentially the same information; i.e., that the Subject had given her a cold shower the evening prior because the Service Recipient had talked back to her. On the afternoon of [REDACTED] the Service Recipient was interviewed by [REDACTED],

[REDACTED] Quality Improvement Analyst, and gave the same report of events. Again, on [REDACTED] during a second interview by [REDACTED] in the presence of [REDACTED], [REDACTED] Home Liaision, the Service Recipient reported having been given a cold shower by the Subject as punishment for “talking back”. Including the initial report to her roommate, “B”, the Service Recipient reported essentially the same facts to five different people on five occasions over six days. (Justice Center Exhibits 5, 11)

9. Immediately following the alleged abuse and/or neglect, both service recipients were removed from the [REDACTED] and, when questioned subsequently about returning, the Service Recipient stated that she did not want to go back. The Service Recipient stated on [REDACTED] to [REDACTED] that she was very happy in her respite home, and did not want to return to the Subject’s [REDACTED]. When asked the reason, she replied that she was scared of the Subject because the Subject “yells at me”. (Justice Center Exhibit 5, 8, 10)

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), to include:

- (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 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 Subject 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- 18) The investigation underlying the substantiated report was completed by [REDACTED] Quality Improvement Analyst [REDACTED] [REDACTED], who was the only witness who testified at the hearing on behalf of the Justice Center.¹

The Subject testified in her own behalf and presented [REDACTED] [REDACTED] as witnesses. The Subject also presented a number of documents. (Subject Exhibits A -

¹ The investigation was begun by [REDACTED] who subsequently left [REDACTED]

F)

Allegation of Abuse (Use of Aversive Conditioning)

In order to sustain an allegation of abuse (use of aversive conditioning), the Justice Center must prove that the Subject was a custodian who applied a physical stimulus to the Service Recipient, intending to induce pain or discomfort for the purpose of modifying or changing the Service Recipient's behavior, without authority by the agency to use the stimulus on the affected service recipient. (SSL § 488(1)(e))

At the time of the alleged abuse, the Subject was working as a [REDACTED] Provider and was a custodian as that term is defined in Social Services Law § 488(2). The Subject applied a physical stimulus to the Service Recipient by giving her a cold shower, intending to induce pain or discomfort for the purpose of modifying the Service Recipient's behavior, as the Service Recipient had talked back to the Subject. (Justice Center Exhibits 4, 5, 8, 11) The Service Recipient entered her bedroom crying. (Justice Center Exhibits 4, 9) The Subject did not have authority from the agency to give the Service Recipient a cold shower. (Hearing Testimony of Quality Improvement Analyst [REDACTED]) The Subject was responsible for monitoring the water temperature for the Service Recipient. (Justice Center Exhibit 18)

The Subject denied the incident had ever taken place, testifying that the Service Recipient had been in her care for a long time and was like family. The Subject's friend and character witness [REDACTED] also testified that cold water cannot come out of the shower when the spigot is in position and that she herself had tested this very shortly after the Service Recipient was removed from the Subject's home. However, there was no evidence presented that [REDACTED] was a plumber or had any specialized skill with which to test a spigot, nor was any evidence presented of how the water spigot was used during the time of the alleged incident. [REDACTED] testified to the outstanding

[REDACTED] character of the Subject and the esteem with which her community held her.

The Subject's testimony as to the facts surrounding the cold shower itself is not credited, based upon all of the evidence presented. The Service Recipient reported the incident consistently on five different occasions: 1) To her roommate and fellow service recipient ("B"); 2) to the bus monitor the following morning; 3) to Psychologist [REDACTED] at the [REDACTED] the day following the alleged incident; 4) during her interview on [REDACTED] and 5) during her interview on [REDACTED] [REDACTED]. The Service Recipient entered her bedroom crying. Psychologist [REDACTED] noted that the Service Recipient looked sad on the day following the alleged abuse. The Service Recipient did not want to return to the Subject's home following her removal. Service recipient ("B") stated that the Subject gets angry. The Service Recipient stated that she was scared of the Subject and when asked why, responded that the Subject yells at her when she talks back. (Justice Center Exhibit 5, 10)

The statements attributed to the Service Recipient are credited evidence due to timeliness, consistency over time, and the lack of any evidence which would tend to portray this Service Recipient as a habitual false reporter. A meeting was held at the [REDACTED] on [REDACTED] [REDACTED] to discuss why the Service Recipient and "B" should possibly be placed in another residential setting. (Subject Exhibit B) This meeting raises on this record a question as to whether the approach used by the Subject in caring for the Service Recipient was consistent with the Service Recipient's Individualized Service Plan or [REDACTED] and Habitation Plan. (Justice Center Exhibits 12, 18) The record supports a conclusion that the question should be answered in the negative and in favor of the Service Recipient.

Accordingly, the Justice Center has proved by a preponderance of the evidence that the Subject committed abuse (use of aversive conditioning) when the Subject gave the Service

Recipient a cold shower because she talked back to the Subject.

Allegation of Neglect

In order to sustain an allegation of neglect, the Justice Center must prove that the Subject was a custodian who owed a duty to the Service Recipient, that she breached that duty, and that this breach either resulted in or was likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of the Service Recipient. (SSL § 488(1)(h))

On the day of the alleged neglect, the Subject was employed as a [REDACTED] Provider and was clearly a custodian as that term is defined by Social Services Law § 488(2). As part of her protective oversight, the Subject was to provide assistance with showering and was to monitor the water temperature. (Justice Center Exhibit 18) The Subject breached this duty of care by giving the Subject a cold shower. This resulted in the protracted impairment of the mental and emotional condition of the Service Recipient. Immediately following the alleged incident, the Service Recipient entered her bedroom crying and told her roommate that the Subject had given her a cold shower because she talked back to her. On the day following the alleged incident, Psychologist [REDACTED] stated that the Service Recipient looked sad and told him that the Subject had given her a cold shower because she talked back to her. (Justice Center Exhibit 11) When interviewed about the alleged incident, the Service Recipient stated that she was scared of the Subject and that she did not want to return to the Subject's home. (Justice Center Exhibit 5)

Although the Subject vehemently denied the allegations, her testimony is not credited. The Service Recipient's actions and behaviors support the conclusion that the Subject's conduct was a breach of duty owed to the Service Recipient and that such conduct resulted in the protracted impairment of the mental or emotional condition of the Service Recipient.

Thus, the evidence establishes that the Subject committed neglect when the Subject gave the service recipient a cold shower because she talked back to her.

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 and neglect 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 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 of abuse and neglect is properly categorized as Category 3 conduct.

DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED]
[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 Category 3 conduct.

This decision is recommended by Louis P. Renzi, Administrative Hearings Unit.

DATED: September 20, 2016
Schenectady, New York



Louis P. Renzi, ALJ

A handwritten signature in blue ink, appearing to read "Renzi". Below the signature, the name "Louis P. Renzi, ALJ" is printed in a smaller, sans-serif font.