

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

In the Matter of the Appeal of

██████████

Pursuant to § 494 of the Social Services Law

**FINAL
DETERMINATION
AFTER HEARING**

Adjud. Case #:

██████████

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: Jennifer Oppong, Esq.

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By: Lee Nuwesra, Esq.
60 East 42nd Street, Suite 1132
New York, New York 10165

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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: February 26, 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

██████████

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

██████████

Before:

Jean T. Carney
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building
163 West 125th Street
New York, New York 10027
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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By: Lee Nuwesra, Esq.
60 East 42nd Street, Suite 1132
New York, NY 10165

JURISDICTION

The New York State Vulnerable Persons' Central Register (the VPCR) maintains a report substantiating [REDACTED] (the Subject) for 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] [REDACTED] of neglect by the Subject of a Service Recipient.

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

Allegation 2¹

It was alleged that on [REDACTED], at [REDACTED] [REDACTED], located at [REDACTED] [REDACTED], while acting as a custodian, you committed neglect when you spoke inappropriately to a service recipient, which resulted in the service recipient becoming agitated, having to be medicated and placed in a timeout room.

This allegation has been SUBSTANTIATED as Category 3 neglect pursuant to Social Services Law § 493.

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

4. The facility, located at [REDACTED] [REDACTED], is a maximum security forensic psychiatric center, operated by the Office of Mental Health (OMH),

¹ Allegation 1 was unsubstantiated.

which is a facility or provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged neglect, the Subject had been employed by [REDACTED] since [REDACTED] 2010. The Subject was appointed to the position of Social Worker II on [REDACTED] 2013.

6. At the time of the alleged neglect, the Service Recipient had been a resident of the facility for approximately three months for fitness restoration. The Service Recipient is an adult male with a diagnosis of psychotic mood disorder. (Justice Center Exhibit 17)

7. On [REDACTED], the Subject was facilitating a weekly meeting, the purpose of which was to address community concerns on the ward (TC meeting). This meeting was scheduled to begin at 9:45 in the morning. Earlier in the week, the Service Recipient had been caught with a balloon of drugs that had passed through his digestive tract after being swallowed. This issue had been addressed with the Service Recipient privately, resulting in the Service Recipient being placed under constant observation. (Hearing testimony of Psychologist [REDACTED])

8. The Service Recipient appeared calm as he entered the meeting, shortly after it had begun. However, when the Subject mentioned drugs being smuggled onto the ward, the Service Recipient confronted her. The Subject reacted by reverting to street language, calling the service recipients on the ward “fucking crack heads”, using profanity, and swearing directly at the Service Recipient, saying “Don’t fucking interrupt me.” (Justice Center Exhibit 4)

9. The Service Recipient became agitated, and the Subject asked a Secure Hospital Treatment Assistant (SHTA) to remove him from the meeting and put him in time out. (Hearing testimony of Psychologist [REDACTED] and Assistant Director of Risk Management [REDACTED]; and Justice Center Exhibits 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14) The Service

Recipient was given an additional dose of Risperidone and Diphenhydramine, and had calmed down by 11:15 a.m. (Justice Center Exhibit 17)

10. Prior to this incident, on [REDACTED], the Subject was assaulted by a different service recipient during a group session that she was leading. Subsequent to the incident on [REDACTED], the Subject was directed to obtain an evaluation by the Department of Civil Service Employee Health Service. As a result of that evaluation, the Subject was diagnosed with anxiety disorder and began counseling. (Hearing testimony of Subject, Subject Exhibit B, and Justice Center Exhibit 2)

11. [REDACTED] trains its employees in Preventing and Managing Crisis Situations (PMCS) and the Subject attended a refresher class in PMCS on [REDACTED], about six months prior to this incident. (Justice Center Exhibits 18 and 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 report of 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)(h), to include:

- (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(s) committed the act or acts of neglect alleged in the substantiated report that is the subject of the proceeding and that such act or acts constitute the category of neglect as set forth in the substantiated report. Title 14 NYCRR § 700.10(d).

██████████

If the Justice Center proves the alleged 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 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 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 a prohibited act, described as “Allegation 2” 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 1-20) The investigation underlying the substantiated report was conducted by ██████████ Assistant Director of Risk Management, ██████████, who testified at the hearing on behalf of the Justice Center along with Psychologist ██████████.

The Subject testified in her own behalf and provided certain documents. (Subject Exhibits A and B) Additionally, Substance Abuse Counselor ██████████, Forensic Social Worker ██████████, and SHTA ██████████ testified on behalf of the Subject at the hearing.

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect when she swore at the Service Recipient in front of the other service recipients during a community meeting, which agitated him so much that he needed to be removed from the meeting to the time out room and given medication.

In order to sustain a finding of neglect, the Justice Center must show that the Subject

breached her duty to the Service Recipient. The Justice Center must further show that this breach either resulted in, or was likely to result in, physical injury or serious or protracted impairment of the Service Recipient's physical, mental or emotional condition. Here, the evidence showed that the Service Recipient suffered a serious or protracted impairment of his mental or emotional condition.

When the Service Recipient joined the TC meeting that morning, it was already in progress and he took his seat. By all accounts, the Service Recipient was calm at that time. It was not until the Subject began cursing, became angry and expressed her disappointment that the Service Recipient had smuggled drugs onto the ward, that the Service Recipient became agitated. The Service Recipient jumped up from his chair and would not sit down again. The Subject told the Service Recipient that her grandmother had always told her "you do not shit where you eat." At that point the Service Recipient became so agitated that he had to be escorted out of the meeting and to the time out room. (Hearing testimony of Subject, Hearing testimony of Psychologist [REDACTED], Justice Center Exhibits 2 and 4)

The Subject's actions escalated the Service Recipient's agitation. As part of her PCMS training, she was taught to recognize her triggers, and not react defensively. (Justice Center Exhibit 18) However, when the Service Recipient became upset, the Subject failed to adhere to this training and lashed out at the Service Recipient. As a result, the Service Recipient's behavior escalated. The Subject's conduct breached her duty to the Service Recipient.

The uncontroverted evidence shows that after being escorted to the time out room, the Service Recipient was offered, and accepted, Risperidone and Diphenhydramine in order to calm himself down. The evidence shows that the Service Recipient reported having calmed down at 11:15 a.m., more than one hour after being escorted from the TC meeting. This constitutes a

serious or protracted impairment of the Service Recipient's mental or emotional condition.

In her defense, the Subject argues that she felt threatened by the Service Recipient. She points to her subsequent diagnosis of anxiety and her previous assault as justification for her behavior. In her testimony, she said that she froze and reverted back to the confrontational techniques she learned while in substance abuse treatment more than twenty years ago. (Hearing testimony of Subject)

While the previous assault and anxiety may explain the Subject's behavior, they do not excuse it. The Subject had worked at this facility for more than one year by the time this incident occurred. She was fully familiar with the type of service recipient she worked with. The Subject had been fully trained on de-escalation techniques. She should have relied on her training, which was geared toward the type of service recipient in this ward, rather than her prior personal experience from years past.

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 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 level of 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.

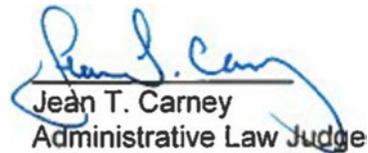
DECISION: The request of [REDACTED] that the substantiated report dated [REDACTED] [REDACTED] be amended and sealed is denied.

The Subject has been shown by a preponderance of the evidence to have committed abuse and/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: February 10, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge