

**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
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: Laurie Cummings, 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 ██████████ 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: March 14, 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]

Pursuant to § 494 of the Social Services Law

**RECOMMENDED
DECISION
AFTER
HEARING**

Adjud. Case #:

[REDACTED]

Before:

Jean T. Carney
Administrative Law Judge

Held at:

Office of Children and Family Services
Spring Valley Regional Office
11 Perlman Drive
Spring Valley, New York 10977
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
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New York State Justice Center for the Protection
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By: Laurie Cummings, 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/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 a medical appointment from the [REDACTED], located at [REDACTED], while acting as a custodian, you committed psychological abuse and/or neglect when you engaged a service recipient in an argument during which you used inappropriate language, made degrading comments, and threatened to leave him at the doctor's office.

This allegation has been SUBSTANTIATED as Category 3 psychological abuse 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 an [REDACTED], and is operated by [REDACTED], an agency certified by the 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/or neglect, the Subject was employed by [REDACTED] as a Direct Support Professional (DSP). The Subject had been working there for five years prior to this incident. (Hearing testimony of Subject)

6. At the time of the alleged abuse and/or neglect, the Service Recipient was 50 years old, and had been a resident of the facility for approximately five years. The Service Recipient is a non-ambulatory adult male with a diagnosis of cerebral palsy, moderate mental retardation, and psychosis. (Justice Center Exhibits 12, and 13)

7. On [REDACTED], the Subject transported the Service Recipient to a regularly scheduled, one hour therapy session with his psychologist, [REDACTED]. The Service Recipient is confined to a wheelchair, so the Subject uses a portable ramp to assist the Service Recipient in getting into the doctor's office. The Subject then left the Service Recipient at the office and went to McDonald's to get some food. (Hearing testimony of Subject, Justice Center Exhibits 2, 6, and 15)

8. After the therapy session concluded, [REDACTED] noticed that the Subject was not in either the waiting room or the parking lot, so he called the [REDACTED] to see if the Subject had returned there. The Residential Coordinator, [REDACTED], attempted to call the Subject on his cell phone, but was unable to reach him because they had an outdated phone number for him. (Justice Center Exhibits 6, 7, and 15)

9. The Service Recipient was upset that the Subject was not waiting for him, as he needed to use the bathroom. According to the Service Recipient's Individualized Service Plan (ISP), he needs assistance with activities of daily living (ADLs) such as transferring from his wheelchair to the toilet. The Service Recipient waited 15 to 20 minutes before the Subject

returned to the doctor's office. (Justice Center Exhibits 6, 7, 12, and 22)

10. Upon the Subject's return, he and the Service Recipient began to argue, and their raised voices were disruptive to the other patients in the office. The Subject had positioned the portable ramp so that the Subject could maneuver his wheelchair to the van. When the Service Recipient told the Subject that he had needed to use the bathroom, the Subject told the Service Recipient "You have a diaper use it" and "[REDACTED] means being independent." The Subject then folded up the portable ramp and said that he would leave the Service Recipient in the doctor's office. By this time, the Service Recipient had urinated on himself. [REDACTED] asked both of them to calm down, so the Subject replaced the portable ramp, and tried to assist the Service Recipient into the van. The Service Recipient was still very agitated, spitting at the Subject and trying to hit him. (Justice Center Exhibits 15 and 22)

11. Because of the Service Recipient's increasing agitation and violent behaviors, the Subject called Residential Coordinator, [REDACTED], for guidance on how to handle the situation. [REDACTED] told the Subject that he should not have left the Service Recipient alone. He was asked if he wanted another DSP to come to the doctor's office and drive the Service Recipient home, but the Subject refused, saying that he would prefer to try and work with the Service Recipient. The Service Recipient continued to throw things at the Subject and spit at him during the ride back to the [REDACTED]. (Hearing testimony of Subject, and Justice Center Exhibit 21)

12. On [REDACTED], the Service Recipient was seen by a licensed psychologist, [REDACTED], to assess whether the Service Recipient was distressed as a result of the incident. The Service Recipient has a history of fabricating allegations of abuse against staff. [REDACTED] determined that while the Service Recipient may have embellished some details of

the event, he was genuinely upset, embarrassed, and emotionally distressed for several days after the incident. (Justice Center Exhibits 13 and 14)

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)(c), and/or § 488(1)(h) to include:

(c)"Psychological abuse," which shall mean conduct by a custodian intentionally or recklessly causing, by verbal or non-verbal conduct, a substantial diminution of a service recipient's emotional, social or behavioral development or condition, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor, or causing the likelihood of such diminution. Such conduct may include but shall not be limited to intimidation, threats, the display of a weapon or other object that could reasonably be perceived by a service recipient as a means for infliction of pain or injury, in a manner that constitutes a threat of physical pain or injury, taunts, derogatory comments or ridicule.

(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 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 1-26) The investigation underlying the substantiated report was conducted by [REDACTED] Investigator [REDACTED], 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.

The Justice Center proved by a preponderance of the evidence that the Subject committed neglect when he left the Service Recipient at the doctor’s office, requiring the Service Recipient to wait 15-20 minutes after his appointment, causing the Service Recipient to urinate on himself.

The Justice Center further proved by a preponderance of the evidence that the Subject committed psychological abuse by threatening to leave the Service Recipient at the doctor’s office, causing the likelihood of a substantial diminution of the Service Recipient’s emotional condition.

Neglect

According to the Service Recipient’s IPOP, he can be left unsupervised for 2-4 hours when in familiar places, such as the mall. (Justice Center Exhibit 11) Because of this provision, the Subject thought it would be fine to leave the Service Recipient in the doctor’s office while the Subject went to McDonald’s on a break. However, it is against [REDACTED] policy to use agency vehicles for personal use. (Justice Center Exhibit 8) In addition, the Residential Manager, [REDACTED]

██████████, and the Residential Coordinator, ██████████ have made it clear to staff that service recipients should not be left alone at appointments. Indeed, when the Subject called ██████████ during this incident, seeking guidance as to how to handle the situation, she told him that he should not have left the Service Recipient in order to get food. (Justice Center Exhibits 7 and 21) Furthermore, the therapy session lasted one hour, and the Service Recipient waited for the Subject for about 20 minutes after the session was over. Therefore, leaving the Service Recipient alone at the doctor's office, and not returning until well after the therapy session was over, constitutes a breach of duty owed to the Service Recipient.

This breach was likely to, and in fact did, result in a serious or protracted impairment of this Service Recipient's emotional condition. The facts regarding the Service recipient's emotional distress and agitation are undisputed. The Service Recipient emerged from his therapy session to find no one waiting for him, no ride, no one who could help him go to the restroom. Another service provider from a different agency was in the waiting room, and she offered to help the Service Recipient use the bathroom, but he declined her offer because he did not know her. (Justice Center Exhibit 22)

In addition, when the Subject did return, he engaged in a verbal altercation wherein he disparaged and demeaned the Service Recipient in a public waiting room. The Service Recipient's psychologist could hear their raised voices from his office, and came out to intervene. This behavior violates ██████████ guidelines for staff interactions with service recipients. (Justice Center Exhibits 15, 23, and 24) The Subject's comments added to the Service Recipient's distress and exacerbated an already tense situation.

Psychological Abuse

When the Subject removed the portable ramp from the step at the doctor's office, and

threatened to leave the Service Recipient there, the Subject acted with intent. That act caused the likelihood of a substantial diminution of the Service Recipient's emotional condition.

The Subject had worked with the Service Recipient for several years and was fully aware of the Service Recipient's targeted behaviors. The Subject should not have reacted to those targeted behaviors. Rather, the Subject should have utilized the intervention strategies set forth in the Service Recipient's Behavior Plan. In addition, the Subject was fully familiar with the Service Recipient's physical limitations. The Service Recipient is confined to a wheelchair, and needs assistance with activities of daily living. He cannot be left alone overnight, and he sleeps in a hospital bed with bed rails on both sides. (Hearing testimony of Subject, Justice Center Exhibits 11, and 13) Therefore, the threat of being left at the doctor's office, with no transportation back to the [REDACTED], certainly could have caused a substantial diminution of the Service Recipient's emotional condition.

The evidence introduced at the hearing shows that the Service Recipient was visibly upset when he was interviewed by Investigator [REDACTED] on [REDACTED]. In addition, the Service Recipient was assessed by a psychologist on [REDACTED], who concluded that the Service Recipient was genuinely distressed and embarrassed by the incident. (Hearing testimony of Investigator [REDACTED], and Justice Center Exhibit 14)

In his defense, the Subject points out that the Service Recipient has a history of fabricating allegations of abuse against staff. However that is not the case here. [REDACTED] came out of his office when he heard raised voices in his waiting room. He saw and heard the Subject threaten to leave without the Service Recipient. That threat constitutes an intentional act, causing the likelihood of a substantial diminution of the Service Recipient's emotional condition.

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/or neglect alleged. The substantiated report will not be amended or sealed.

The report will remain substantiated. The next question to be decided is whether the substantiated report constitutes the category of abuse or 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: March 4, 2016
Schenectady, New York


Jean T. Carney
Administrative Law Judge