

**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: Jeffrey Schonbrun, Esq.  
14 South Main Street  
New City, New York 10956

██████████

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 with respect to Offense 1. The Subject has been shown by a preponderance of the evidence to have committed serious physical abuse and serious conduct of neglect.

Offense 1 of the substantiated report is properly categorized as a Category 1 act.

The request of ██████████ that the "substantiated" report dated ██████████ ██████████ be amended and sealed is granted in part with respect to Offense 2. The Subject has been shown by a preponderance of the evidence to have committed psychological abuse and serious conduct of neglect.

The allegation of serious conduct of neglect in Offense 2 of substantiated report is properly categorized as a Category 1 act and the allegation of psychological abuse is amended to be a Category 2 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 In Offense 1 for serious physical abuse and serious conduct of neglect, and Offense 2 for serious conduct of neglect 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.

NOW, THEREFORE, IT IS DETERMINED that reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years. The record of this report in Offense 2 for psychological abuse shall be retained by the Vulnerable Persons' Central Register, and will be sealed after five years pursuant to SSL § 493(4)(b).

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:** September 23, 2016  
Schenectady, New York

  
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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

---

**RECOMMENDED  
DECISION  
AFTER  
HEARING**

**Adjud. Case #:**

[REDACTED]

Before:

Sharon Golish Blum  
Administrative Law Judge

Held at:

Adam Clayton Powell State Office Building  
163 West 125th Street  
New York, New York 10027  
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  
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161 Delaware Avenue  
Delmar, New York 12054-1310  
By: Juliane O'Brien, Esq.

[REDACTED]  
[REDACTED]  
[REDACTED]

By: Jeffrey Schonbrun, Esq.  
14 South Main Street  
New City, New York 10956

### **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:

#### **Offense 1**

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED] [REDACTED] while acting as a custodian (Community Socio-Therapist), you committed physical abuse and/or neglect when you punched a service recipient in the eye. This action intentionally or recklessly caused physical injury, or consciously disregarded a substantial and unjustifiable risk such injury would occur, and/or constituted a knowing, reckless or criminally negligent failure to perform a duty that resulted in, or was likely to result in, physical injury that created a substantial risk of death, caused serious disfigurement, serious impairment of health or loss or impairment of the function of a bodily organ or part or a substantial and protracted impairment of a service recipient's psychological or intellectual functioning.

This allegation has been SUBSTANTIATED as Category 1 physical abuse and/or neglect pursuant to Social Services Law § 493(4)(a)(i) and (ii).

## Offense 2

It was alleged that on [REDACTED], at [REDACTED], located at [REDACTED] while acting as a custodian (Community Socio-Therapist), you committed psychological abuse and/or neglect when you, in the presence of other service recipients, threatened a service recipient with a kitchen knife and said in a raised voice, "I'm going to kill you." This action was likely to result in a substantial and protracted diminution of service recipients' psychological or intellectual functioning, and/or constituted a knowing, reckless or criminally negligent failure to perform a duty that resulted in, or was likely to result in, a substantial and protracted impairment of service recipients' psychological or intellectual functioning.

This allegation has been SUBSTANTIATED as Category 1 psychological abuse and/or neglect pursuant to Social Services Law § 493(4)(a)(ii), (iii).

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

4. The facility, [REDACTED], which operates the [REDACTED] is located at [REDACTED], is a non-secure placement for youth, and is licensed by the New York State Office of Children and Family Services (OCFS), which is a provider agency that is subject to the jurisdiction of the Justice Center.

5. At the time of the alleged acts, the Subject had been employed at the facility as a Socio-therapist for a period of six months. On [REDACTED] the Subject and another staff member were assigned to provide general supervision to the six facility service recipients, including the Service Recipient. (Hearing testimony of the Subject) The Subject was a custodian as that term is so defined in Social Services Law § 488(2).

6. At the time of the alleged acts, the Service Recipient was a fifteen year female resident of the facility. (Justice Center Exhibit 18)

7. On [REDACTED], the Service Recipient became angry because she did not want to eat the dinner that was being served and a dispute arose between her and the Subject regarding the alternative meal option. (Hearing testimony of the Subject)

8. The Service Recipient entered the facility kitchen and began taking pots of food from the stove and throwing them into a nearby garbage can. Socio-therapist [REDACTED] executed an authorized standing upper torso restraint on the Service Recipient to prevent the Service Recipient from continuing to throw food into the garbage. (Justice Center Exhibit 22)

9. When it appeared that the Service Recipient had calmed down sufficiently and under pressure from the other service recipients, Socio-therapist [REDACTED] released the Service Recipient from the restraint and the Service Recipient walked away into the common room. (Justice Center Exhibit 22)

10. The Service Recipient immediately circled around and reentered the kitchen where she resumed throwing food from the stove into the garbage. The Service Recipient then approached the counter that was near the open back door of the kitchen. The Service Recipient took different items such as food and dishes off of the counter and threw them outside through the open door. After the fourth item was thrown by the Service Recipient, the Subject attempted to execute an authorized standing upper torso restraint on her. The Service Recipient forcefully resisted the restraint, broke free and spun around to face the Subject. The Service Recipient lunged at the Subject and attacked her. The Service Recipient struck the Subject repeatedly while grabbing at her clothes and pushing her around violently against the cabinets and oven. The Subject responded to being punched in the face by raising her arms to block her own face and by striking back at the Service Recipient. (Justice Center Exhibit 22)

11. Socio-therapist [REDACTED] and another service recipient separated the Service Recipient from the Subject. Socio-therapist [REDACTED] restrained the Service Recipient and moved her into the common room. The other service recipient escorted the Subject away from the kitchen, down the front hallway. (Justice Center Exhibit 22)

12. A few moments later, while still in the hallway, the Subject verbally threatened to

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kill the Service Recipient and she then pushed past the other service recipient who was still standing nearby, rushed back into the kitchen and picked up a knife that had been on the counter. Socio-therapist ██████████ rushed over to the Subject and wrapped his arms around her from behind. As he held the Subject in this position, the Service Recipient came up behind them and threw a large object and a roll of paper towel at the back of the Subject's head. Socio-therapist ██████████ did not release the Subject and she was unable to respond. Socio-therapist ██████████ eased the knife away from the Subject, as he walked her back down the hallway, away from the all of the service recipients and the kitchen. (Justice Center Exhibit 22)

13. When Socio-therapist ██████████ released her, the Subject called her supervisor, facility Manager ██████████ from the hallway on her cellphone, told him that she had assaulted the Service Recipient and that she was going to be fired. She then exited the facility. (Hearing testimony of the Subject)

### **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:

- (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.
- (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...

Substantiated reports of abuse and/or neglect shall be categorized into categories pursuant to SSL § 493(4), including the following:

- (a) Category one conduct is serious physical abuse, sexual abuse or other serious conduct by custodians, which includes and shall be limited to:
  - (i) intentionally or recklessly causing physical injury as defined in subdivision nine of section 10.00 of the penal law, or death, serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, or consciously disregarding a

substantial and unjustifiable risk that such physical injury, death, impairment or loss will occur;

(ii) a knowing, reckless or criminally negligent failure to perform a duty that: results in physical injury that creates a substantial risk of death; causes death or serious disfigurement, serious impairment of health or loss or impairment of the function of any bodily organ or part, a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, 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 is likely to result in either;

(iii) threats, taunts or ridicule that is likely to result in a substantial and protracted diminution of a service recipient's psychological or intellectual functioning, supported by a clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor;

- (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.

SSL § 493(4)(a)(i) refers to subdivision nine of Section 10.00 of the Penal Law for the definition of “physical injury”. Under New York Penal Law 10.00(9), “physical injury” is defined as follows:

“Physical injury” means impairment of physical condition or substantial pain.

SSL § 493(4)(a)(i) requires that a Subject’s actions be “intentional” or “reckless.” SSL § 488(16) defines “intentional” and “reckless” as follows:

"Intentionally" and "recklessly" shall have the same meanings as provided in subdivisions one and three of section 15.05 of the penal law.

New York Penal Law 15.05 provides the following definitions:

(1) "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

(3) "Recklessly." A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation...

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**

With respect to Offense 1, the Justice Center established by a preponderance of the evidence that the Subject committed serious physical abuse and the serious conduct of neglect as described. With respect to Offense 2, the Justice Center established by a preponderance of the evidence that the Subject committed the serious conduct of neglect as described, but not psychological abuse under SSL § 493(4)(a)(iii). However, with respect to Offense 2, it was established by a preponderance of the evidence that the Subject committed the act of psychological

abuse pursuant to SSL § 488(1)(c).

In support of its substantiated findings, the Justice Center presented a number of documents obtained during the investigation, as well as five visual only videos of events. (Justice Center Exhibits 1-22) The investigation underlying the substantiated report was conducted by then Justice Center Investigator [REDACTED] who, together with Socio-therapist [REDACTED] testified at the hearing on behalf of the Justice Center.

The Subject testified at the hearing on her own behalf and she provided no other evidence.

### **Offense 1: Allegation of Serious Physical Abuse**

Because the Justice Center substantiated this allegation of physical abuse as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(i) must be met. Although other scenarios are contemplated by the provisions of SSL § 493(4)(a)(i), given the facts herein, the most applicable wording under the definition of serious physical abuse is that that the Subject intentionally or recklessly caused the Service Recipient physical injury as defined in Penal Law 10.00(9), being impairment of physical condition or substantial pain, or that the Subject consciously disregarded a substantial and unjustifiable risk that such physical injury would occur.

In this case, the video evidence (Justice Center Exhibit 22) and the hearing testimony of Socio-therapist [REDACTED] that he observed that when the Service Recipient punched the Subject, the Subject punched her back, are sufficient to establish that the Subject did strike the Service Recipient in the face.

Regarding whether the Subject acted intentionally or recklessly, her own evidence, which was offered in a candid and forthright manner, provides the most accurate insight into her mindset at the time that she struck the Service Recipient during the physical altercation.

The Subject testified that she did not “know how the situation spun out of control so

██████████ quickly,” that she had been “angry” and that she could not “remember anything.” The Subject testified that her attempt to restrain the Service Recipient was unsuccessful because the Service Recipient forcefully resisted and had turned around quickly and punched the Subject in the face. The Subject testified that her hands went up automatically, that she did not think that she had punched the Service Recipient, and that the only reason that she had initially told her supervisor, facility Manager ██████████, that she had punched the Service Recipient was because the Service Recipient had said so at the time. (Hearing testimony of the Subject)

New York Penal Law 15.05(1) states that “(a) person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.” In this case, the evidence in the record does not support a finding that it was the Subject’s “conscious objective” to cause physical injury to the Service Recipient.

New York Penal Law 15.05(3) states that “(a) person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation...”

In this case, the evidence in the record establishes that the Subject did act recklessly by allowing herself to become involved in a physical altercation with the Service Recipient, when she had the option of retreating in safety. By standing up to the Service Recipient’s aggression, the Subject’s conscious disregard of the substantial and unjustifiable risk that the Service Recipient might be injured, did constitute a gross deviation from the standard of conduct that a reasonable person would have observed in that situation, as required under New York Penal Law 15.05(3).

Pursuant to SSL § 493(4)(a)(i), a physical injury is defined by New York Penal Law

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10.00(9), which articulates “physical injury” as impairment of physical condition or substantial pain. Upon examination, ██████████ noted that after her altercation with the Subject, the Service Recipient’s eye was swollen and had slight purple discoloration. He concluded that it was a soft tissue disorder that was resolving. (Justice Center Exhibit 18) Although the effect of Subject’s striking of the Service Recipient’s face or head when the Service Recipient attacked her may not have been permanent or severe, the Subject’s actions nevertheless did cause physical injury to the Service Recipient as defined by New York Penal Law 10.00(9).

Even if there had been insufficient evidence to establish that the Service Recipient had sustained a physical injury as a result of the Subject’s conduct, a finding of serious physical abuse would still apply. It has already been determined, by the above review of New York Penal Law 15.05(3), that the Subject consciously disregarded a substantial and unjustifiable risk that physical injury to the Service Recipient would occur when the Subject engaged in a physical altercation with her.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject recklessly caused physical injury to the Service Recipient or that she consciously disregarded a substantial and unjustifiable risk that such physical injury would occur, both of which constitute serious physical abuse pursuant to SSL § 493(4)(a)(i).

As the Subject’s conduct meets the definition of serious physical abuse pursuant to SSL § 493(4)(a)(i), it also meets the definition of physical abuse found in SSL § 488(1)(a). It is clear that the Subject’s conduct recklessly caused, by physical contact, physical injury to the Service Recipient.

#### **Offense 1: Allegation of the Serious Conduct of Neglect**

Because the Justice Center substantiated this allegation of neglect as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(ii)

██████████ must be met. Although other scenarios are contemplated by the provisions of SSL § 493(4)(a)(ii), given the facts herein, the most applicable wording under the definition of the serious conduct of neglect is that the Subject's conduct constituted a reckless failure to perform a duty that was likely to result in serious impairment of health or loss or impairment of the function of any bodily organ or part of the Service Recipient.

In this case, the Subject's duty to the Service Recipient included complying with Safety Crisis Management (SCM) training and techniques. Socio-therapist ██████████ testified about various authorized techniques and testified that under SCM, it is never an authorized or approved technique to strike a service recipient. (Hearing testimony of Socio-therapist ██████████)

The Subject's training transcript reflects that she had completed an SCM training session on ██████████ which is proof that the Subject was aware of her duties under SCM. (Justice Center Exhibit 17)

The evidence in the record establishes that the Subject engaged in a physical altercation with the Service Recipient, rather than utilizing an authorized technique, and that the Subject hit the Service Recipient, both of which were failures to perform a duty.

Whether the Subject's failure to perform a duty was reckless is determined by returning to the definition of the term "reckless" under New York Penal Law 15.05(3). Again, New York Penal Law 15.05(3) states that "(a) person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation..."

In this case, the evidence in the record establishes that by failing to follow the SCM training and techniques, and by engaging in a physical altercation with the Service Recipient, the Subject

██████████ demonstrated a conscious disregard of the substantial and unjustifiable risk that the Service Recipient might be injured, which constituted a gross deviation from the standard of conduct that a reasonable person would have observed in that situation.

It is clear from all of the evidence, namely, the rapid escalation of violence, the Subject's apparent loss of self-control, and the fact that the Subject had injured the Service Recipient's eye, which is a very sensitive body part, both due to its function and location, that the Subject's conduct was extremely dangerous and was likely to result in serious impairment of health or loss or impairment of the function of a bodily organ or part of the Service Recipient.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject's conduct constituted the serious conduct of neglect pursuant to SSL § 493(4)(a)(ii).

As the Subject's conduct meets the definition of the serious conduct of neglect pursuant to SSL § 493(4)(a)(ii), it also meets the definition of neglect pursuant to SSL § 488(1)(h), which requires that a preponderance of the evidence shows that the Subject's conduct breached her duty to the Service Recipient and 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. It is clear that the breach by the Subject of her duty to the Service Recipient resulted in and was likely to result in physical injury to the Service Recipient.

### **Offense 2: Allegation of the Serious Conduct of Psychological Abuse**

Because the Justice Center substantiated this allegation of psychological abuse as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(iii) must be met. Although there are multiple scenarios contemplated by the provisions of SSL § 493(4)(a)(iii), they all require that the actual or likely result of a substantial and protracted diminution of the Service Recipient's psychological or intellectual functioning, be supported by a



██████████ clinical assessment performed by a physician, psychologist, psychiatric nurse practitioner, licensed clinical or master social worker or licensed mental health counselor.

Although the other elements of the serious conduct of psychological abuse are present in this case, absent any type of clinical assessment to support the finding, there can be no determination of the serious conduct of psychological abuse under SSL § 493(4)(a)(iii).

The definition of psychological abuse pursuant to SSL § 488(1)(c) relates to Category 2 and Category 3 findings, and is applicable in this case. Under SSL § 488(1)(c) a preponderance of the evidence must establish that the Subject intentionally or recklessly caused by verbal or non-verbal conduct, a substantial diminution of the Service Recipient's emotional, social or behavioral development or condition, supported by a clinical assessment, or that the Subject's conduct caused the likelihood of such diminution.

Again, because there is no clinical assessment, the question can only be whether the Subject's conduct caused the likelihood of a substantial diminution of the Service Recipient's emotional, social or behavioral development or condition.

The evidence shows that the Subject threatened to kill the Service Recipient while the Subject was reaching for and grabbed a kitchen knife. It is clear from the videos that the Subject rushed into the kitchen, picked up a knife that was on the counter and was immediately restrained by Socio-therapist ██████████, who did not release her until he was able to take the knife from her. Furthermore, the videos disclose that all of the service recipients were alert to and alarmed by the Subject's conduct. (Justice Center Exhibit 22)

While both Socio-therapist ██████████ and the Subject denied that the Subject uttered a threat to kill the Service Recipient, as alleged in the substantiated report, the videos reveal that the Subject was speaking as she rushed towards the knife and she clearly appears to have been acting impulsively and with anger. (Justice Center Exhibit 22)

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Furthermore, Socio-therapist ██████████ Incident Report states that “██████████ then seen (sic) the knife on the kitchen counter and began reaching for it. I immediately grabbed ██████████ and escorted her by the kitchen sink. I held her right hand down that held the knife and began to tell her to calm down. I got the knife from ██████████.” (Justice Center Exhibit 5)

There are two statements signed by the Service Recipient that both state that the Subject threatened to kill her immediately before she picked up the knife. (Justice Center Exhibits 7 and 10) There are two signed statements from each of the two other service recipients who were present. All four of those statements state that the Subject threatened to kill the Service Recipient immediately before she picked up the knife. (Justice Center Exhibits 8, 9 and 11)

The Subject’s testimony that she made no verbal threat to the Service Recipient was not credible evidence. The video evidence, together with Socio-therapist ██████████ Incident Report and the signed statements of the Service Recipient and the two other service recipients, are sufficient to establish that at the time that the Subject reached for and grabbed a knife from the kitchen, she threatened to kill the Service Recipient.

The utterance of a death threat by the Subject who was reaching for and holding a knife, especially after there had already been a serious physical altercation, most certainly would qualify as an act that caused the likelihood of a substantial diminution of the Service Recipient's emotional, social or behavioral development or 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 psychological abuse under SSL § 488(1)(c).

### **Offense 2: Allegation of the Serious Conduct of Neglect**

Because the Justice Center substantiated this allegation of neglect as a Category 1 act, which is the most serious category determination, the elements as set out in SSL § 493(4)(a)(ii) must be met. Although other scenarios are contemplated by the provisions of SSL § 493(4)(a)(ii),

given the facts herein, the most applicable wording under that definition of neglect is that the Subject's conduct constituted a reckless failure to perform a duty that was likely to result in a substantial and protracted diminution of the Service Recipient's psychological or intellectual functioning.

The Subject's duty included complying with SCM training and techniques. It was clear from the evidence in the record that under SCM, it is never an authorized or approved technique to threaten to kill a service recipient.

The record shows that immediately after she had been involved in a serious physical altercation with the Service Recipient, the Subject violated SCM training and techniques by reaching for and grabbing a knife from the kitchen, while verbally threatening to kill the Service Recipient, which was a failure to perform a duty.

Whether the Subject's failure to perform a duty was reckless is determined by returning to the definition of the term "reckless" under New York Penal Law 15.05(3). In this case, the evidence in the record establishes that by failing to follow the SCM training and techniques, the Subject demonstrated a conscious disregard of the substantial and unjustifiable risk that it was likely that her conduct would result in a substantial and protracted diminution of the Service Recipient's psychological or intellectual functioning, which constituted a gross deviation from the standard of conduct that a reasonable person would have observed in that situation.

Accordingly, it is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject recklessly failed to perform a duty that was likely to result in a substantial and protracted diminution of the Service Recipient's psychological or intellectual functioning, which constitutes the serious conduct of neglect pursuant to SSL § 493(4)(a)(ii).

As the Subject's conduct meets the definition of the serious conduct of neglect pursuant to

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SSL § 493(4)(a)(ii), it also meets the definition of neglect pursuant to SSL § 488(1)(h), which requires that a preponderance of the evidence shows that the Subject's conduct breached her duty to the Service Recipient and 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. It is clear that the breach by the Subject of her duty to the Service Recipient was likely to result in serious or protracted impairment of the mental or emotional condition of the Service Recipient.

### **CONCLUSION**

It is determined that the Justice Center has met its burden of proving by a preponderance of the evidence that the Subject committed the serious physical abuse alleged in Offense 1 and the serious conduct of neglect alleged in Offense 1 and Offense 2. While it was not established that the Subject committed the serious conduct of psychological abuse alleged in Offense 2, as defined in SSL § 493(4)(a)(iii), a preponderance of the evidence did show that the Subject committed an act of psychological abuse as defined in SSL § 488(1)(c). The substantiated report will not be amended or sealed.

Having established that the allegations contained in the report will remain substantiated, the next question to be decided is whether the substantiated allegations constitute the category of abuse and neglect set forth in the substantiated report.

Given the finding of serious physical abuse under SSL § 493(4)(a)(i) in Offense 1 and the findings of the serious conduct of neglect under SSL § 493(4)(a)(ii) in Offense 1 and Offense 2, it is determined that the category of the affirmed substantiated serious physical abuse and the two affirmed substantiated serious conducts of neglects were properly substantiated as a Category 1 acts.

A substantiated Category 1 finding of abuse and/or neglect will result in the Subject being 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. Substantiation of a Category 1 offense permanently places the Subject on the Staff Exclusion List.

With respect to the finding of psychological abuse under SSL § 488(1)(c) in Offense 2, it is determined that the category of the affirmed substantiated psychological abuse shall be amended to be a Category 2 act. The Subject's conduct seriously endangered the health, safety and welfare of the Service Recipient. Category 2 conduct under this paragraph shall be elevated to Category 1 conduct when such conduct occurs within three years of a previous finding that the Subject engaged in Category 2 conduct. Reports that result in a Category 2 finding not elevated to a Category 1 finding shall be sealed after five years.

**DECISION:**

The request of [REDACTED] that the "substantiated" report dated [REDACTED] [REDACTED] be amended and sealed is denied with respect to Offense 1. The Subject has been shown by a preponderance of the evidence to have committed serious physical abuse and serious conduct of neglect.

Offense 1 of the substantiated report is properly categorized as a Category 1 act.

The request of [REDACTED] that the "substantiated" report dated [REDACTED] [REDACTED] be amended and sealed is granted in part with respect to Offense 2. The Subject has been shown by a preponderance of the evidence to have committed psychological abuse and serious conduct of neglect.

The allegation of serious conduct of neglect in Offense 2 of substantiated report is properly categorized as a Category 1 act and the allegation of psychological abuse is amended to be a Category 2 act.

This decision is recommended by Sharon Golish Blum, Administrative Hearings Unit.

DATED: September 12, 2016  
Plainview, New York



Sharon Golish Blum, Esq.  
Administrative Law Judge